

**THE HIGH COURT
COMMERCIAL**

[2006 No. 702P]

BETWEEN**SMART MOBILE LIMITED****PLAINTIFF**

**AND
COMMISSION FOR COMMUNICATIONS REGULATION**

FIRST DEFENDANT

**AND BY ORDER OF THE COURT
EIRCOM LIMITED**

SECOND DEFENDANT**Judgment of Mr. Justice Kelly delivered on the 31st day of October, 2006****The Challenge**

1. In these proceedings the plaintiff (Smart) challenges a decision of the first defendant (ComReg). That decision was communicated by a letter from ComReg's senior legal advisor to Smart's solicitors dated 13th February, 2006.
2. That letter made it clear that Smart would not be awarded a licence, which it had sought, to operate 3G mobile phones within the State. The reasons given for that decision were the failure on the part of Smart to meet the terms of the tender process in which it had engaged and, in particular, its failure to provide a performance bond in a form acceptable to ComReg within the extended time scale of that tender process.
3. In order to make sense of all of this it is necessary to set out in some detail the background against which the decision which is challenged came to be made.

Smart and Its Personnel

4. Smart is a limited company which carries on business at the Citywest Business Campus in Dublin. Its chief executive officer is Mr. Oisín Fanning. He did not give evidence in the trial although he was a participant in many of the discussions in respect of which testimony was forthcoming. Mr. Ciarán Casey is the chief operations manager of Smart. He was one of the two in-house witnesses who gave evidence for Smart. The other was Mr. Iarla Flynn who holds the post of head of regulatory affairs at Smart Telecom Plc. with which Smart is associated.

ComReg and Its Personnel

5. ComReg was established pursuant to the Communications Regulation Act, 2002. It is the statutory body with responsibility for the regulation of the telecommunications industry within the State. It consists of three commissioners who are assisted by technical, legal and administrative staff. Only one of the commissioners, Mr. John Doherty, gave evidence. Two members of the staff of ComReg also gave evidence. One was Mr. Mark Hughes, who is a solicitor. He joined ComReg in May, 2005. His work involves giving legal advice to ComReg in respect of inter alia telecommunications regulation. Prior to joining ComReg he developed particular expertise in corporate finance, commercial and regulation law.
6. The other in-house witness for ComReg was Mr. Jim Connolly. He is a radio spectrum engineer and was the senior manager responsible for spectrum management within ComReg.

Eircom Limited

7. The second defendant (Eircom) was joined as a defendant to these proceedings by an order made on 3rd April, 2006. It was joined to deal with any issues of public law affecting it which might fall for determination in the action. How this came about will be made clear later in this judgment. In the event, the only issues which fell for consideration were issues of public law since on the first day of trial Smart abandoned its private law claims. Eircom did not call any witnesses.

Huawei and B.T.

8. Although not parties to this litigation these two entities will feature throughout this judgment.
9. Huawei (Huawei) is a Chinese company. It supplies telecommunication network equipment including 3G networks. It has supplied Smart with equipment in the past.
10. B.T. Ireland (B.T.) is a company which is heavily involved in the telecommunications industry and the construction of 3G networks.
11. Smart selected both of these companies as its partners in the venture the subject of this action.

3G Mobile Phones

12. 3G refers to "third generation" mobile telephone technology. This technology permits the transfer of much more data than its predecessors which were known as first and second generation technology. First and second generation technology was capable of voice telephony and the transmission of small amounts of data such as short text messages. Because of improvements in technology, a 3G mobile telecommunications operator can provide many more services. A much broader range of content than heretofore is now possible. 3G technology allows an operator to provide facilities whereby mobile phones have direct access to the internet. These new services and content can include such things as the viewing of television programmes, video conferencing and the downloading of music from the internet.

3G Licensing

13. The office of the Director of Telecommunications Regulation (ODTR) was the predecessor of ComReg. In 2001 ODTR launched a competition for the award of four licences to provide 3G mobile services in Ireland.
14. It decided to divide these licences up into two categories. One was known as category A and the other, category B. It decided to offer one A licence and three B licences.
15. The party to whom the A licence was awarded undertook more onerous obligations with regard to the construction of

infrastructure and the achievement of demographic coverage than the holder of a B licence. However, the A licence involved the payment of a lower spectrum access fee.

16. The B licences carried less onerous roll-out and coverage requirements but had significantly higher spectrum access fees.

17. As a result of the 2001 competition the A licence was granted to Hutchison 3G Ireland, which was a new entrant to the Irish market.

18. Two B licences were awarded. One went to Vodafone Ireland (Vodafone) and the other to O2 (O2). The one remaining B licence is the subject of these proceedings.

19. At the conclusion of the 2001 competition ComReg decided not to award the remaining B 3G licence immediately. Rather it decided to wait and see how market conditions would develop.

Eircom's Approach

20. In June 2005 Eircom wrote to ComReg and applied for the issue of the third B licence to provide 3G mobile telephony services in the State.

21. ComReg responded swiftly. Just one week after this request from Eircom it issued a memorandum which had as its object the provision of information to all interested parties about the licensing process for the third 3G B mobile telecommunications licence which remained.

The Memorandum

22. ComReg's memorandum invited applications for the remaining B licence. It stipulated that if there was more than one applicant the selection of the successful one would be carried out by way of an open tender using the comparative evaluation or "beauty contest" method. This term "beauty contest" is well known in the telecommunications world and describes in effect a competition between contenders for the licence.

23. The duration of the licence was stipulated to be 20 years. The memorandum made it clear that if there was just a single applicant for it then, assuming all of the essential requirements were met, the licence would be issued within six weeks of the closing date for the applications. Should there be two or more applications then the comparative evaluation process would have to be carried out. Even in such case however, ComReg expected that the highest ranked applicant for the licence would be announced by 28th October, 2005.

24. The memorandum set out a great deal of information for interested parties. Some elements are of particular interest.

25. First, it stipulated that the overall objective of the competition was to generate the most competitive and robust mobile market structure possible so that Irish consumers could benefit from comparative tariffs and the availability of advanced services.

26. Secondly, the minimum requirements with regard to coverage, speed of roll out, and national roaming were stipulated as follows. 33% demographic coverage would have to be achieved by the end of October, 2009. 53% demographic coverage would have to be achieved by the end of October, 2011. Furthermore, minimum requirements with regard to the financial solidity and the coherence of the applicant's business plan would apply. Applicants would have to agree to pay a spectrum access fee. This was to comprise an upfront payment and deferred payments in certain years.

27. The information memorandum went on –

"All applicants will be encouraged to make voluntary offerings concerning coverage and roll out in excess of the minimum requirements concerning coverage and roll out and other offerings such as site sharing and quality of service. Performance guarantees underwriting these offerings will form part of the evaluation as well as the promotion of competition."

28. Details of the administrative fees and the spectrum access fees were set forth in the memorandum. The initial spectrum access fee had to be paid on the award of the licence.

29. It was made clear that, during the competition, applications would be subjected to a comparative evaluation on the basis of predetermined evaluation criteria. These were shown in diagrammatic form and were as follows.

30. 30% of the weighting was attributable to coverage, speed of roll out and site sharing. 20% was referable to quality of service. 20% was attributable to the promotion of competition. The remaining 30% was attributable to performance guarantees.

31. The information memorandum made it clear that the evaluation of the "beauty contest" would be in accordance with those weightings and dimensions.

32. Applications would be considered in descending order of merit and the highest ranked applicant would be offered the licence.

33. Finally, the memorandum made it clear that the closing date for receipt of the applications was 9th September, 2005, at 12.00 hours local time. The competition was formally launched on 22nd July, 2005. An analysis of the tenders was to be carried out between 12th September and 24th October, 2005 and the announcement of the result was originally scheduled for 28th October, 2005. In the event this latter date was altered to 16th November, 2005.

The Tender Document

34. On 22nd July, 2005, ComReg issued its tender document. It ran to some 79 pages and contained an enormous amount of information. Some parts of it have particular relevance to this litigation.

35. The first chapter of the tender document set forth the background and provided an introduction.

36. Chapter 2 gave a description of the licence and set out the minimum requirements of it. It made it clear that an applicant had to agree to meet the minimum coverage and roll out requirements which were the same as those which were set forth in the information memorandum, the relevant parts of which I have already reproduced. In order to qualify for the B licence an applicant had to commit to launch commercial services not later than 30th April, 2007.

37. The third chapter contained information on the application procedure. Chapter 3.4 dealt with the fees payable by an applicant. Some of these were described as once off and others as recurring charges.

38. The fees were as follows.

39. The first fee was an administrative one in the sum of €300,000. Every applicant was obliged to provide a valid bank draft for that sum. An unsuccessful applicant would have that sum refunded. The successful applicant was liable to pay that sum as the cost of the competition.

40. The second fee was an annual telecommunications levy. This was payable in order to meet the expenses incurred by ComReg in the discharge of its functions in relation to electronic communications.

41. The third fee payable was the spectrum access fee. That was a total sum of €114.3 million. The idea of this fee was to promote an applicant's efficient and effective use of the spectrum offered. It could be seen therefore as a further augmentation of a bidder's credible commitment to the efficient and effective use of the licence to be granted.

42. This total spectrum access fee covered an initial payment and deferred payments from year 4 to year 15 inclusive. The initial payment was €44.4 million and was due after the announcement of the ranking but prior to the award of the licence. The deferred payments were due in accordance with a schedule.

43. The €44.4 million initial spectrum access fee had to be paid not later than 15 days after receipt of the notification of award of the licence. The payment was to be made unconditionally. A failure to make this payment in accordance with these terms would result in the applicant not being awarded any licence.

44. Paragraph 3.4.3.2 provided for extension of time limits being granted by ComReg. If the €44.4 million was not paid within the stipulated time, ComReg might, at its discretion, grant an extension of the time in order to allow the applicant to correct the matter. In such event interest would be charged on the payment due. If, however, an applicant failed to meet the conditions within the extended time it would not be awarded the licence.

45. An applicant was also obliged, not later than 15 days after notification of ComReg's intention to award a licence to it, to make arrangements for a guarantee payable on demand to be provided at any time in favour of ComReg. That guarantee had to be issued by a bank or financial institution as stipulated which had to be registered in the European economic area and have a minimum long term debt A rating from Standard and Poors or A2 from Moody's Investors Service Limited. This guarantee was to be for an amount equivalent to the sum of the instalments payable on the spectrum access licence fee that fell due during the first five years of the licence and had to be valid for five years from the date of the award of the licence. ComReg was to lay down the terms of the guarantee.

46. Once the requirements for the payment of the €44.4 million and the making of the arrangements for the guarantee had been met, ComReg was obliged to issue a licence to the best ranked applicant in accordance with the rules set out in chapter 4 of this document.

47. ComReg was entitled to revoke the licence in circumstances where the licensee failed to meet payment obligations for the remainder of the spectrum access fee or those relating to the guarantee of such payment.

48. Chapter 3.11 provided as follows:-

"By participating in this tender, the applicant undertakes that it accepts the terms of this tender, will abide by the rules of the tender and that its application is an irrevocable and unconditional offer that will remain valid and binding on the applicant for the period of the competition or until such time as the applicant has been awarded or declined a licence, or ComReg has otherwise terminated the competition."

49. Some further parts of chapter 3 are also relevant. Clause 3.16 was headed suspension and revocation of this tender process. It provided:-

"The holding of this tender process does not warrant or imply that any licence will be awarded, or that the terms on which it may be granted may not be altered from those described."

50. Clause 3.18 was as follows:-

"ComReg may incorporate binding commitments made in the successful application into the terms and conditions of the licence. ComReg intends to incorporate any binding commitment made with regard to, inter alia, coverage and roll out, quality of service, site sharing and performance guarantees."

51. Clause 3.19, which was headed "Conclusion of licensing process" read:-

"It is the intention of ComReg to conclude the licensing process with the highest ranked eligible applicants as quickly as possible after the announcement of the results of the evaluation process."

52. The termination of the competition is stated to arise when the licence is awarded or at any time at the discretion of ComReg.

53. Finally, ComReg reserved the right to alter any of the deadlines or conditions during the tender process.

54. Chapter 4 of the tender set out in detail the evaluation process.

55. Table 8 of chapter 4 set out the evaluation criteria for the licence.

56. 20% of the points fell to be awarded to a new market entrant to the Irish mobile market. 30% were awarded in respect of coverage, speed of roll out and site sharing. 20% were attributable to quality of service.

57. The remaining 30% of the points fell to be awarded in respect of performance guarantees. 65% of that 30% were to be awarded for the performance guarantees tied to coverage, speed of roll out and site sharing. The remaining 35% were to be awarded in

respect of the performance guarantees tied to quality of service.

58. Chapter 5 set out in detail the structure of the application which would have to be made by a successful applicant. Part 7 of such an application dealt with performance guarantees.

59. Chapter 6 set out the calculatory assumptions and definitions. On the topic of performance guarantees it had this to say:-

"Each applicant is invited to commit to voluntary performance targets supported by financial guarantees, which will materially underpin the roll out and coverage obligations and any other offerings in its proposals.

Any financial guarantee offered must be secured by means of a cash deposit or by means of a performance bond provided by a reputable bank with a credit rating of at least A2 awarded by Moody's, or A from Standard and Poor.

The financial guarantees will become payable if a licensee fails to meet the performance target offered.

Each incidence (sic) of non-performance shall be considered separately."

60. The tender document contained a number of appendices. Part 7 of appendix B2 is relevant. It dealt with performance guarantees. It stated as follows:-

"Applicants should note that any binding commitments with regard to performance guarantees will earn points in the comparative evaluation (cf. Chapter 4 of the tender document).

7.1 Performance Guarantees

Any performance guarantees offered should be described in relation to-

(a) Performance targets to be achieved, in relation to any coverage commitments (paras. 4.1, 4.2, 4.3), and the quality of service commitments (paras. 4.1, 4.2, 4.3, 4.5) and site sharing (para. 4.6).

(b) The method of measurement proposed for the identification and monitoring of the performance targets and any deviations thereto, and

(c) Any financial guarantees offered in case the performance targets are not achieved.

*Where financial guarantees are offered in respect of performance targets, such financial guarantees should be secured **by means of a cash deposit or by means of a performance bond** provided by a financial institution resident in the State. **The performance bond should be in a form acceptable to ComReg.** (See also s. 1, para. 6.2.8). (My emphasis)*

If the applicant wishes to make binding commitments with regard to performance guarantees, these should be inserted in the draft licence, (appendix B4, part 8). Any binding commitments made by the applicant with regard to performance guarantees are voluntary."

61. Appendix B4 provided a draft schedule which was to be incorporated in the final 3G licence. The roll-out and coverage requirements were specified with a launch of commercial services to begin no later than April 30th, 2007. On the topic of performance and financial guarantees dealing with quality of service and grade of service, it was made clear that an applicant was invited to detail any performance targets backed by financial guarantees to which it intended to commit. It was pointed out that any such guarantees would constitute binding commitments that might be evaluated in any comparative assessment procedure and that ComReg might incorporate any or all of those into the applicant's licence should they be successful. The schedule went on:-

*"In the event that the licensee fails to meet the performance targets on quality of service and grade of service specified in part 4, **the amounts guaranteed will be payable on demand to ComReg.***

***The licensee shall, before the licence commencement date, put in place a programme to measure and monitor compliance with the performance targets set out.** The programme shall include the reporting procedures to ComReg and shall be in such form as agreed with ComReg or as may be specified by ComReg from time to time."*

(My Emphasis)

62. Similar provisions applied in relation to performance and financial guarantees dealing with coverage, roll out and site sharing targets.

63. The final appendix which is of relevance is B5. That consisted of explanatory guidelines for the draft licence schedule. Only that part dealing with performance and financial guarantees is relevant.

64. It said:-

"In relation to any voluntary and binding commitments by way of performance targets backed by financial guarantees incorporated into the licence the following shall apply:

*1. In the event that the licensee fails to meet the performance targets, **the amounts guaranteed, will be payable on demand to ComReg,***

2. The licensee shall, before the commencement date of the provision of 3G mobile telephony services, put in place a programme to measure and monitor compliance with the performance targets set out. The programme shall include the reporting procedures to ComReg and shall be in such form as agreed with ComReg or as may be specified by ComReg from time to time,

3. The licensee shall, within 31 days of each relevant performance target notify ComReg that the licensee has

either,

(a) met the said performance target, or

(b) that the licensee has failed to meet the said performance target. Failure by the licensee to do so must be notified to ComReg in writing and shall be deemed to indicate non-compliance with the relevant performance target.

Applicants should note that any performance targets and financial guarantees supporting them constitute binding commitments, which may be evaluated in any comparative assessment procedure. ComReg may incorporate any or all of these binding commitments into the applicant's licence.

Applicants should further note **that performance targets offered that are not backed by financial guarantee will not be taken into account in any comparative selection stage** that may take place with respect to performance and financial guarantees." (My emphasis)

65. To summarise, the tender contained four sections dealing with financial guarantees and performance bonds. They were paras. 3.4.3.5, 6.2.8 and part 7 of appendix B2 and appendix B5.

The Questions and Answers Document

66. Each applicant, in addition to being provided with the tender document, was also furnished with a diskette which included questions and answers which arose during the initial 3G competition in 2001/2002. The diskette translated into a document of some 128 pages. Mercifully, only a small number of the questions and answers are relevant to this case. I will deal with each of them in turn.

67. Question 12.4 at pg. 49 asked if an applicant was part of a larger group could the performance guarantee be in the group's name if it adhered to the condition set out in s. 1. (6.2.7) of the tender. That section was to the effect that any financial guarantee offered must be secured by means of a cash deposit or a performance bond provided by the appropriate bank. The answer to the question made it clear that a financial guarantee i.e a cash deposit or performance bond, had to adhere to the conditions which were specified and went on:-

"It does not matter whether the cash deposit or performance bond are arranged by a person different to the applicant, as long as it is conditional only on a default by the applicant. This means that in case of a breach of a relevant obligation by the applicant, the Director can immediately forfeit the deposit or invoke the guarantee, as appropriate, without any further consent of decision by another party."

(My emphasis)

68. Qs. 9.1 asked for confirmation that performance guarantee bonds did not need to be in place until an applicant became a licensee. The answer was as follows:-

"During the comparative assessment, any financial guarantees (i.e. cash deposits and performance bonds) offered may be taken into account as described in para. 5.5 of appendix B5 to the 'B' licence tender and para. 5.6 of appendix A5 to the 'A' licence tender. We confirm that financial guarantees do not need to be in place until after the applicant has been offered a licence. However, any financial guarantees offered in the application must be in place when the licence is issued."

As a result, applicants should make appropriate arrangements in advance. Failure to adhere to guarantees, after the provision of a licence, could if the circumstances warrant, lead to various sanctions including the revocation of the licence." (My emphasis)

69. Qs. 12.4 on pg. 76 is in effect a repeat of that which I have already set out concerning the performance guarantee being in a group's name where an applicant is part of a larger group. The answer given concerning the performance bond being conditional only on a default by the applicant was repeated.

70. Qs. 16.4 on the same page asked for confirmation of the performance bond that would be acceptable to the Director. The answer to the question is as follows:-

"No specific form of performance bond is required."

71. The answer then continued to repeat the necessity to have the performance bond provided by a reputable bank with the relevant credit rating and that

"The financial guarantees (i.e a cash deposit or a performance bond) should be payable upon demand to the Director..."

72. Qs. 16.9 asked the following question:-

"Performance and Financial Guarantees define 'licence commencement date'? Surely a programme to measure and monitor compliance with the performance targets would only be necessary from the time of launching commercial services and not from licence award?"

73. The answer to that was as follows:-

"The term 'licence commencement date' shall in this context mean the date on which the licence is issued to the licensee. According to the tender document, s. II, appendix A2, part 8(1)(2) and (3) is it only the compliance programme (i.e. the procedures to measure and monitor compliance with the performance guarantees offered) that must be in place and agreed with the Director at the licence commencement date. However, the actual implementation and execution of the programme will take place from the time set out in the compliance programme agreed." (My emphasis)

74. The final question but one that is of relevance is Qs. 24.1. It asked the following:-

"With regard to performance guarantees in the licence will the ODTR relax the guarantees or renegotiate the guarantees if there are unforeseen environmental changes preventing the operator from meeting the performance target. Such changes would be changes in planning laws which would prevent roll-out in the specified time frame, business failure of a large global supplier of equipment, logistical difficulties due to foot and mouth disease restrictions or other such restrictions?"

75. The answer was as follows:-

"The applicants are free to make their performance guarantees and any related financial guarantees conditional by including in their guarantees exceptions to performance or payment under the guarantee, e.g. by way of an expression of reservations concerning future events such as a change in the planning law. Any such conditions and exceptions to performance or payment under the guarantees will be included in the evaluation of the performance guarantees and/or financial guarantees, respectively, under dimension D.

All reservations must accompany the application and any later reservations shall not be accepted by the Director, except for force majeure as described in the answer to Qs. 2.7."

76. Qs. 12.4 at pg. 96 is a repetition of the question already twice asked and answered concerning a performance guarantee being in a group's name. The answer is precisely the same as before and made it clear that the cash deposit or performance bond had to be conditional only on a default by the applicant so that in case of a breach the Director could immediately forfeit the deposit or invoke the guarantee without any further consent or decision by another party.

The Bids

77. Three bids were received by ComReg by the deadline of 12 noon on 9th September, 2005. One was from Smart, the others were from Eircom and Meteor.

78. On receipt of the bids an evaluation was carried out by ComReg in accordance with the criteria which I have already mentioned. Smart's bid was described as ambitious but its commitments with regard to issues such as speed of network roll out were supported by Smart's offer, on an entirely voluntary basis, of €100 million in financial guarantees.

79. It was awarded all of the available marks, namely 20% of the overall marks, for the fact that it was a new entrant to the Irish mobile market. It was awarded 89% of the marks available for performance guarantees for the commitment which it made to provide –

(a) financial guarantees of €100 million in respect of performance targets and

(b) a €100 million performance bond in a form acceptable to ComReg as security for such financial guarantees.

80. In a moment I will have to turn to the precise terms of the Smart bid document.

81. Smart won the competition. It achieved the highest ranking of the three applicants. As a result, on the 16th November, 2005, a letter was sent by ComReg to which I will turn in a moment. Before doing so however, it is necessary to look in a little detail at a part of Smart's bid.

Smart's Bid

82. The Smart bid was an enormous document occupying an entire lever arch folder. Fortunately, this judgment need only concern itself with that part of it which dealt with performance guarantees. Such guarantees were dealt with at part 7 of the document.

83. Part 7 began by pointing out that Smart had ambitious plans to roll out a leading-edge 3G network and provide a high quality service experience to its customers. It went on:-

*"In order to achieve the same, Smart needs to set a range of ambitious performance targets which it then needs to meet or exceed. Smart also recognises that, for the purposes of evaluating licence applications, **ComReg needs evidence as to the credibility of its plans and confirmation that the company intends to meet the performance targets that it has put forward.***

This section contains details of the performance targets put forward by Smart in this application and the financial guarantees that are being offered to underpin the targets. Performance targets are offered in relation to network quality of service, customer quality of service, date of service launch, network coverage and roll-out and site sharing. Financial guarantees totalling EUR 100 million have been offered to underpin the targets." (My emphasis)

84. There then followed a table (Table 7.1) setting out in one column the performance guarantees by reference to the appropriate provision of the tender and confirmation that these guarantees were included in the bid application.

85. In its comments contained at para. 7.1, Smart, *inter alia*, said as follows:-

"In the following sections, Smart sets out a number of performance targets that it is happy to commit to in relation to the provision of 3G mobile services in Ireland...Smart is committed to turning its plans into reality and, in doing so, to inject a strong competitive spur into the mobile market. Smart sees a significant commercial opportunity in acting as a disruptive force in the mobile market – in the same way as Smart Telecom has already done in the fixed and broadband market segments, and the commercial gains to be made from pursuing this opportunity will ensure that it achieves the targets that Smart has set itself in this application.

***Smart recognises, however, that ComReg requires confirmation as to the credibility of the performance targets that it has set out (both in part 4 of this application and in the following sections) and that ComReg needs to ensure that the promises that Smart makes are grounded in reality.** Smart knows that, in awarding it the licence, ComReg needs to have the utmost confidence that Smart's plans to become a strong, disruptive force in the mobile market will be achieved in the manner described in this application. Smart also recognises that ComReg needs to be confident that Smart can undertake the significant task of rolling out a new national mobile network.*

In this licence application, Smart is therefore making a commitment to put in place a performance bond of EUR 100 million to underpin the performance targets set out in this application. The performance bond will be provided

by a reputable bank with a credit rating of at least A2 awarded by Moody's or A from Standard and Poor and **will be put in place prior to the actual award of the licence to Smart. Once Smart has been informed that it is to be awarded the licence, Smart will consult with ComReg as to the form of the bond and it will ensure that this is acceptable to ComReg.**

The bond will underpin performance targets in the areas of:

- Network quality of service
- Customer quality of service
- Date of service launch, network coverage and speed of roll-out, and
- Access to radio transmission sites and site sharing.

In each of the above areas, Smart has provided for stringent financial penalties for non-performance in relation to the targets that Smart has set for itself. In addition, Smart is prepared to make binding commitments in relation to the performance guarantees and has included these commitments in the draft licence provided in part 11 of this application. These licence commitments reinforce Smart's commitment to successfully entering the mobile business in line with the plans detailed in this application.

Smart also recognises that ComReg will require information in order to measure and monitor compliance with the performance targets offered. It is noted that ComReg proposes to insert a specific obligation in the 3G licence requiring the licensee to put in place, prior to the licence commencement date, a programme to measure and monitor compliance with the performance targets offered by the successful applicant. Smart also notes that this programme will need to include reporting procedures to ComReg and must be in such form as agreed with ComReg.

*Smart acknowledges and accepts ComReg's requirements in this area; **once Smart has been notified that ComReg intends to award the licence to Smart, Smart will work constructively with ComReg to put in place the required reporting measures in advance of the licence commencement date.** For the purposes of this application, Smart has set out details of the ways in which it believes that the various performance targets may be monitored and Smart will be happy to confirm these with ComReg prior to licence award."* (My emphasis)

86. There then followed a summary of the financial guarantees offered, broken down under different headings such as those relating to coverage, speed of roll out and quality of service.

87. The bid concluded with the following statement:-

*"In the preceding sections, Smart has set out details of the performance targets that it is willing to offer in support of its plans to provide a high quality 3G service to Irish customers. **In order to confirm that Smart's plans are real and that they may be relied upon by ComReg, Smart is willing to underpin the target that it has voluntarily offered with substantial financial guarantees for non-performance. Once Smart has been informed that it is to be awarded the licence, Smart will put in place a performance bond in a form acceptable to ComReg and will do so prior to the actual award of the licence.***

In reality, Smart believe that commercial considerations will drive performance in all areas from network roll-out to service quality. However, Smart accepts that ComReg, as the licensing authority, needs to be convinced as to the credibility of the performance targets offered by applicants and it needs to have confidence that commitments made by applicants at this point would be carried out in practice over the coming months and years. Smart trusts that the way in which it has underpinned all of the targets that are offered with significant financial guarantees will satisfy ComReg that Smart's plans are tangible and credible."

(My emphasis)

88. It is clear that Smart in unequivocal terms gave a voluntary binding commitment to provide ComReg with a performance bond in a form acceptable to ComReg to a value of €100 million. This was as security for financial guarantees to which it committed in its bid in respect of targets which it undertook to achieve. This approach clearly carried great weight with ComReg having regard to the 89% of the available marks which were awarded to Smart.

The Letter of Offer

89. Having won the "beauty competition" a letter of offer was written by the chairperson of ComReg to Mr. Fanning on 16th November, 2005. This letter stipulated the terms and conditions to which the award and grant of the licence were subject and also contained a summary report of the evaluation and the bid. The letter insofar as it is relevant said as follows:-

"Following completion of a comparative evaluation process and having considered the report of the internal ComReg and external evaluators, ComReg has decided that Smart Mobile Limited is the best applicant of the three applicants for the 3G mobile telecommunications B licence. Therefore, having regard to s. 5 of the Wireless Telegraphy Act, 1926 and the Wireless Telegraphy (Third Generation and GSM Licence) Regulations, 2002, as amended, I am delighted to inform you that it is our intention to grant Smart Mobile Limited the 3G mobile telecommunications B licence and hereby offer Smart Mobile Limited such a licence in accordance with the terms of Smart Mobile Limited's application and the terms and conditions set out below and in ComReg doc. No. 05/60 (the tender document)....."

In accordance with the tender document, not later than 15 calendar days from today's date, your company must forward to this office a cheque or bank draft for the sum of €44,400,000 as the first instalment of its spectrum access fee. Before the licence is issued, Smart Mobile Limited is also required to pay by cheque or bank draft its first annual spectrum fee of €1,111,023...I draw your attention to s. 3.4.3.5 of the tender document which provides -

'The applicant shall, not later than 15 days after notification of ComRegs intention to award a 3G licence to that applicant, make arrangements for a guarantee payable on demand to be provided at any time in favour of the Commission for Communications Regulation' –

This section sets out in detail the nature of the guarantees to be provided.

I also draw your attention to s. 6.2.8 of the tender document and pg. 7/2 of your company's application. In its application, your company undertook to put in place prior to the actual award of the licence the performance bond described on pg. 7/2 of your company's application.

The performance bond must be provided to ComReg no later than 30 calendar days from the date of this letter.

...

In summary, if Smart Mobile Limited accepts this offer of the 3G B licence you are required to provide ComReg with the following:-

(i) A cheque or bank draft for the sum of €44,400,000;

(ii) The first annual spectrum fee of €1,111,023 for the 3G spectrum;

(iii) A guarantee payable on demand to cover an amount (€7,600,000) equivalent to the sum of the instalments payable on the spectrum access licence fee that fall due during the first five years of the licence;

(iv) A guarantee in the sum of €100 million payable on demand to cover the total commitment of your performance guarantees;

(v) If you wish to take up the offer of the 900MHz spectrum, a cheque or bank draft for the sum of €12,350,000;

(vi) The first annual spectrum fee of €457,110 for the 900MHz spectrum.

For your consideration I also enclose a copy of the draft licence.

Please advise in writing of your acceptance of this offer within five working days from the date of this letter. Failure to so respond will be construed as a rejection of this offer.

Failure to comply with any of the requirements in this letter will result in withdrawal of this offer..."

The Acceptance

90. On 22nd November, 2005, Mr. Fanning wrote a letter of acceptance. It was simple and straightforward and said:-

"I am delighted to accept the Commissions offer on behalf of Smart Mobile Limited and I look forward to working with you and your colleagues to complete the licence grant process in the near future."

The Meeting of 22nd November, 2005

91. On the same date that the letter of acceptance was furnished a meeting took place between ComReg and Smart. All three commissioners from ComReg, together with Mr. Connolly and Mr. Hughes, were present. Messrs. Fanning, Flynn, Casey and Mr. Garfield Connolly represented Smart. This was the first of a series of meetings which took place.

92. Its principal object was to discuss issues arising from the letter of offer of 16th November, 2005.

93. At that meeting the Smart representatives stated that they intended to provide the spectrum access fee (€44.4 million and €12.35 million) and guarantee for the 3G fees by 1st December, 2005. They indicated that their target to provide the €100 million performance bond was 16th December. The ComReg representatives advised Smart to keep ComReg closely informed of progress in securing the bond.

94. The ComReg side requested feedback from Smart on the draft licence and indicated that correspondence in that regard should be addressed to Mr. Hughes. ComReg for its part confirmed that the 16th of December was the target date for the issue of the 3G licence.

95. At the meeting of 22nd November, Mr. Connolly gave a letter to Mr. Fanning which was in the following terms:-

"Further to the offer by ComReg to Smart of a 3G B licence arising from your successful application, I enclose for your information and guidance, a template for a typical guarantee to be provided by a bank or other financial institution to underwrite the financial guarantees in support of the performance commitments which Smart made in its licence application.

The actual guarantee to be provided by Smart does not have to mirror the template precisely but the template does cover the key elements which would be of interest to ComReg in accepting any such guarantee or bond. Please do not hesitate to contact me if you have any queries concerning this issue."

96. The template guarantee which accompanied this letter is set forth in [Appendix A](#) to this judgment.

The First Extension of Time

97. On 30th November, 2005, Smart wrote to Mr. Commissioner Doherty requesting an extension of the period by which it was to furnish ComReg with the €44.4 million initial spectrum access fee and the €7.7 million financial guarantee. An extension of time to 15th December, 2005, was sought. The reason given for this, it was said, was that that date was beyond the period by which a disappointed bidder could appeal the award of the licence to Smart. Smart agreed to pay interest on the late payment in accordance with the requirements of the tender document.

98. In the body of the letter, Smart requested ComReg to grant the extension of time by exercising its discretion as provided for in s. 3.4.3.2(4) of the tender document.

99. The letter also made it clear that by then Smart had engaged with two partners, one a significant shareholder and the other an overseas supplier to raise the funds for the initial licence payments. That process had, according to the letter, been completed.

100. This request was responded to by a letter of 1st December, written by Mr. Commissioner Doherty on behalf of ComReg. The extension of time was granted until and including 15th December, 2005. ComReg's letter drew attention to clause 3.4.3.2(7) of the tender document which provided that the applicant would not be awarded the licence where, on being granted an extension of the relevant time limit, the applicant still failed to meet the conditions set out in para. 3.4.3.1(1). The letter further stipulated that the extension granted did not affect, inter alia, Smart's requirement to provide ComReg with a guarantee in the sum of €100 million payable on demand to cover the total commitment on its performance guarantees no later than 16th December, 2005.

The Second Extension of Time

101. On the eve of the deadline of 16th December, a letter was received from Smart. It described itself as a formal request for an extension of the performance bond deadline due to "*a material change in the source of the bond*". It stated that Smart remained committed to the bond and the bond criteria but wished to meet to discuss the extension and the situation surrounding it. It suggested a meeting at 2.30 p.m. at the offices of ComReg on the following day, 16th December, 2005.

102. Such a meeting was arranged and took place on 16th December.

The Meeting of 16th December

103. All three commissioners, together with Messrs. Connolly and Hughes represented ComReg at this meeting. Messrs. Casey, Flynn and Connolly represented Smart. It is not necessary to deal in detail with what was said at this meeting save to recount that Mr. Casey gave an explanation of the problems which Smart had and sought an extension of time for as long as possible. When asked specifically what time he required in order to resolve his difficulties he indicated that he would like a date as long as possible and ideally to the end of February, 2006. The 25th January, 2006, was mentioned as a possible potential date by ComReg. Smart made it clear that that would be very ambitious given all that had to be achieved. At the end of the meeting the Smart team were under the impression that ComReg would seriously consider the application for the extension and they were very hopeful that it would be until the end of February.

104. ComReg considered the request for the extension and decided to grant it. On 16th December, 2005, it wrote to Mr. Fanning telling him of its decision.

105. The extension of the deadline was until 5.00 p.m. on Monday 30th January, 2006. The letter insofar as it is relevant read as follows:-

"Having given due consideration to your request to extend the period for you to provide the financial guarantees in respect of:

(i) The guarantee payable on demand to cover an amount (€7,600,000) equivalent to the sum of the instalments payable on the spectrum access licence fee that fall due during the first five years of the licence;

(ii) The guarantee in the sum of €100 million payable on demand to cover the total commitment on your performance guarantees,

I can confirm that ComReg is willing to grant an extension on the above financial guarantee and performance bonds which were due today, until 30th January, 2006.

Smart Mobile must therefore provide the requisite guarantees as outlined above and in accordance with the terms and conditions described in the tender document ComReg 05/60 no later than 17.00 on Monday 30th January, 2006.

ComReg believes the nature of Smart Mobile Limited's obligation in respect of the requisite guarantees as outlined above is clear. In this regard, I attach a note in respect of this obligation and would like to propose a meeting between ComReg and Smart Mobile Limited to ensure that there is no confusion in this regard. Jim Connolly of ComReg will shortly contact Iarla Flynn of Smart Mobile Limited to arrange a meeting.

ComReg has provided Smart Mobile Limited with a reasonable opportunity to comply with its obligation in respect of the requisite guarantees.

Should you fail to provide guarantees acceptable to ComReg by the above date, no further extension of the deadlines will be possible and Smart Mobile Limited will not be awarded the licence.

Finally, we welcome your proposal to keep us up to date on developments on a more regular basis."

(My emphasis)

106. Following this extension of time there were four meetings which took place between representatives of Smart and ComReg. These meetings took place on 20th December, 2005, 6th January, 2006, 13th January, 2006 and 20th January, 2006. There were of course meetings subsequent to this date but I will deal with them at a later part of the judgment.

The Four Meetings

107. At the meeting of 20th December, 2005, a schedule of subsequent meetings was agreed. The purpose of those meetings was to enable Smart to report on progress towards delivering the outstanding elements of its obligations by 30th January, 2006. ComReg

made it clear that, if necessary, additional meetings would be scheduled. At this meeting of 20th December, ComReg emphasised the importance of it being furnished with early sight of the draft guarantees that were going to be furnished. Furthermore, the requirement to provide a monitoring programme in advance of the licence being issued was also discussed and Smart agreed to liaise directly with a Mr. Tony Buckley to agree details of the programme.

108. At the second meeting which took place on 6th January, 2006, ComReg began by making it clear that it was essential that Smart understand that there was no possibility of a further extension to the deadline of 30th January, 2006. It also made it clear that it would be prepared to discuss and advise on any elements of the performance bond if it would assist Smart in that regard. It also pointed out that the full amount of the financial guarantees would have to be in place by 30th January, 2006. At that meeting Smart indicated that it expected to have the bonds in place by 27th January, 2006.

109. The next meeting took place on 13th January, 2006. Again it had the objective of discussing progress with Smart with a view to ensuring completion of the 3G licence award process by the fixed date. Smart was again reminded of that date. At that meeting Smart, *inter alia*, reported that it had signed heads of terms with Huawei, one of its suppliers, on 12th/13th January and that that entity would provide a bond in the sum of €50 million to cover the financial guarantees. Smart personnel also said that discussions were at an advanced stage with B.T. and they hoped to have heads of terms signed with it by 20th January, 2006. At this meeting ComReg urged Smart to provide drafts of the bonds for consideration as soon as possible, and at least during the week commencing 16th January, even if only one bond was available at that stage, in order to allow adequate time for ComReg and the banks to consider any changes.

110. The fourth meeting took place on 20th January, 2006. It began by ComReg again reminding Smart of the ultimate deadline of 30th January. Information was furnished to ComReg as to the progress that had been made by Smart with both Huawei and B.T. At that time it indicated that the proposal was that Huawei would provide a bond in the sum of €50 million to cover the financial guarantees and B.T. would provide €48 million of the remaining part of the bond with the final €2 million being provided by Smart. It said that its intention was that the bond would be provided by the Royal Bank of Scotland and that it had circulated the template bond provided by ComReg to all parties involved in the process.

111. At this meeting ComReg reiterated the requirement that Smart would provide drafts of the bonds for consideration as soon as possible in order to allow adequate time for it and the banks to consider any changes. It stated that the bonds must be in an acceptable state before 5.00 p.m. on 30th January, 2006. At that meeting Smart was also given a copy of a letter which the chairperson of ComReg had sent to Mr. Fanning earlier that day. That letter made it clear that ComReg proposed to issue the licence to Smart on Tuesday 31st January, 2006. That was, of course, subject to the provision by Smart of the performance bonds of €100 million and €7.6 million respectively no later than 5.00 p.m. on Monday 30th January, 2006. The letter also pointed out that ComReg expected Smart to be in a position to pay the wireless telegraphy fees of €1,568,133 on the day of issue of the licence. This had been indicated to Smart at the meeting on 6th January, 2006. The letter finally pointed out that for the avoidance of doubt, payment of those fees was a pre-requisite for the issue of the licence.

112. At the meeting on 20th January, 2006, ComReg acknowledged that it had received information from a firm called Mason's dealing with an outline of the compliance monitoring programme. That firm promised to provide more detail shortly.

113. After this meeting Mr. Hughes of ComReg wrote to Mr. Flynn of Smart by email. He reiterated that in respect of the performance bonds, if Smart had any queries or wished to discuss them with him they should not hesitate to contact him. He also pointed out that as the deadline for the provision of the performance bonds was on a Monday, namely 30th October, 2006, he would make himself available for discussion over the course of the preceding weekend if required.

114. On 26th January, 2006, Mr. Hughes received a call from Mr. Flynn of Smart. He was informed that the Royal Bank of Scotland slot for approval of any performance bond had been missed. Huawei was to speak to its bank the International Commerce Bank of China. That bank was, he was told, setting up a facility in Ireland or Europe and that latter bank would provide Huawei's performance bond to ComReg. B.T. Ireland was to speak with the Royal Bank of Scotland. Mr. Flynn believed that that bank would be able to provide B.T. with the requisite performance bond within the time frame. Mr. Flynn also told him that it was likely that Smart would be providing ComReg with a performance bond for 2.25 million. That would probably be issued by Ulster Bank and might be combined with B.T.'s performance bond as Ulster Bank is a subsidiary of the Royal Bank of Scotland. Smart's objective for that day and possibly the next was to settle both contracts and associated documents with Huawei and B.T. Mr. Flynn promised to update Mr. Hughes that evening but did not have, as of then, any definite time scale in respect of the production of the first draft performance bonds.

115. Mr. Hughes made it clear that he needed to see the first draft performance bonds soon, and he repeated his offer to make himself available for discussion over the course of the weekend. By noon on the following day, Mr. Hughes had been informed that Smart was proposing to provide ComReg with three performance bonds. Two were to come from the Royal Bank of Scotland and one from Ulster Bank. The first was in respect of the obligations of Huawei. The second was in respect of B.T.'s obligations and the third was a bond to be provided by Smart from Ulster Bank. As of then Smart was in negotiations with B.T. Mr. Flynn indicated that he wanted to take Mr. Hughes through the proposed first draft performance bond from Huawei and he was proposing to do that on Friday 27th January, 2006. Such meeting took place at about 1.00 p.m. on that date.

The Events of Friday Afternoon, 27th January, 2006

116. At about 1.00 p.m. Messrs. Casey and Flynn met with Mr. Mark Hughes. They produced for the first time three draft bonds which they gave to him. They are set forth at Appendices B, C and D to this judgment. They only have to be looked at to see how they differed materially from the template bond.

117. The first of these came to be called the Huawei bond and was in respect of a €50 million obligation. The second was called the B.T. bond and covered a sum of €47.75 million. The third was a draft in respect of €2.25 million being Smart's own obligations.

118. I do not propose to rehearse in detail all that took place at that meeting but I will mention the major points which were of concern and what was agreed at the conclusion of the meeting.

119. Insofar as the Huawei bond was concerned Mr. Hughes immediately identified a problem concerning clause 2. He was of the view that ComReg would have to demonstrate breach of contract by Huawei before they could call the bond. ComReg had no sight of any contract with Huawei and Mr. Casey made it clear that that would not be finalised until the end of February. He also made it clear that because of the Chinese New Year Huawei was not contactable in advance of the 5.00 p.m. deadline on 30th January, 2006.

120. Mr. Hughes also identified a problem in relation to clause 16. That provided that the performance bond would cease to be a continuing security in the event that Smart's licence was revoked. He indicated that he would have to discuss that internally with

ComReg. Mr. Hughes was also told that the tables contained in the first appendix to the bond were for information purposes only.

121. Insofar as the B.T. bond was concerned both Mr. Flynn and Mr. Casey made it clear that B.T.'s principal concern was the possible future insolvency of Smart. B.T. wished to have a clause inserted in its bond which provided that in the event of Smart becoming insolvent then the performance bond would cease to be a continuing security (clause 6.3). Mr. Hughes identified the problem at clause 2 of this bond similar to that which he raised concerning clause 2 of Huawei performance bond.

122. The meeting also dealt with the €7.6 million performance bond to be provided by Smart by 5.00 p.m. on Monday 30th January. Mr. Flynn stated that that would be a Bank of Ireland guarantee and he undertook to arrange for Smart's lawyers to provide Mr. Hughes with the proposed wording in respect thereof.

123. Mr. Hughes stated that, provided that he received an undertaking from a solicitor engaged by the relevant banks to forward to ComReg the original execution pages as soon as possible thereafter, ComReg would accept faxed execution pages of agreed bonds by the deadline of 5.00 p.m. on Monday 30th January.

124. At the conclusion of the meeting Mr. Hughes agreed to revert with comments on the three draft performance bonds given to him. He undertook to do so by 2.00 p.m. on the following day.

125. Six matters required to have action taken upon them at the conclusion of this meeting.

126. In respect of clause 2 of the Huawei bond and clause 2.2(a) of the B.T. bond, Mr. Hughes agreed to speak with his senior legal advisor, Mr. Farr. In respect of the concerns raised by B.T. with regard to the future solvency of Smart, Mr. Hughes agreed to speak with Mr. Commissioner Doherty and determine what ComReg's policy might be in such circumstances. He also agreed to confirm ComReg's position in respect of the furnishing of the faxed execution pages of the bonds. Mr. Flynn for his part agreed that Smart's lawyers would provide Mr. Hughes with soft copies of the draft performance bonds and also to arrange for Smart's lawyers to provide Mr. Hughes with a proposed wording in respect of the €7.6 million performance bond to be provided by Smart on Monday 30th January.

127. Rather than revert at 2.00 p.m. the following day, in fact, telephone contact was made with Mr. Casey later on the evening of 27th. Mr. Hughes thought this more appropriate because of concerns that ComReg had. The telephone conversation took place between Mr. Casey and Mr. Commissioner Doherty and Mr. Hughes.

128. Both Mr. Commissioner Doherty and Mr. Hughes expressed concern that the performance bonds proposed by Smart were not in accordance with the tender document. They made it clear that the tender document in their view envisaged a straightforward performance bond providing that in the event that Smart failed to perform its obligations under its licence the relevant bank would be liable under such a bond in respect of the relevant amounts. They were of the view that Smart was proposing conditional bonds. In order for ComReg to succeed in enforcing them, it would have to demonstrate either failure by Huawei or B.T. to perform obligations under their contracts as yet to be finalised or a failure by B.T. to perform obligations set out in a schedule to its bond. They also made their position clear in respect of what might occur in the event of Smart becoming insolvent. They were of the view that the purpose of the performance bond was to compensate for the resulting cost. They stated that the financial ability of the applicants for the licence had been an issue that was examined in the course of the award process. Licences could only be revoked in two circumstances, namely non-compliance with its terms or an emergency. They took the view that it would not be appropriate for the performance bond to cease to have effect in the event of non-compliance.

129. Mr. Casey did not agree with these interpretations and expressed himself as being comfortable with the legal advice that he had received in support of his view. He went on to say that clause 2 of the draft of the Huawei performance bond was a mis-draft and he did not believe that the draft B.T. performance bond was conditional.

130. Mr. Commissioner Doherty and Mr. Hughes offered to meet with Smart the following day to discuss their significant concerns as identified. Mr. Casey said that he would meet with his lawyer that evening and would revert to them. Mr. Doherty made it clear that ComReg had no objection in principle to Huawei and B.T. underwriting Smart's performance bonds.

131. Later that evening Mr. Casey spoke to Mr. Hughes by telephone. He said that he would respond to Mr. Hughes in respect of the earlier telephone conversation the following morning at 10.00 a.m. To complete this narrative I should record that in the afternoon of 27th, ComReg received an email from Smart's solicitors attaching electronic copies of the draft bonds. In a letter of that date from the solicitors enclosing the bond which was headed "Subject to Contract/Contract Denied" the final sentence read:-

"It should be noted that we reserve the right to review these documents prior to final acceptance of all these terms by the obligors under the bond which are still awaited."

132. Such final acceptance of these terms was never forthcoming.

Saturday 28th January, 2006

133. At 10.00 a.m. Mr. Casey telephoned Mr. Hughes requesting ComReg to provide its comments in respect of the draft bonds in writing later that day. Mr. Hughes did so at 4.18 p.m. He did so by means of an email addressed to Mr. Casey which was copied to Messrs. Flynn and Smart's solicitors. The email set out ComReg's preliminary view. He undertook that by 6.00 p.m. that evening he would forward ComReg's final view. If, in the course of his detailed review of the bonds he identified other potentially significant issues, he undertook to provide advance notice in respect thereof.

134. I do not propose to set out in detail the contents of this lengthy email. It is sufficient if I summarise the concerns expressed by Mr. Hughes on behalf of ComReg.

135. ComReg did not object to Huawei or B.T. underwriting the performance bonds to be provided by Smart but took the view that the draft bonds were not acceptable in accordance with part 7 of Appendix B2 of the tender document and part 7 of Smart's application for the licence.

136. The reasons given for this were as follows:-

"1. Clause 2 of the Huawei and clause 2.2(a) of the B.T. and Smart bonds make enforcement by ComReg of the bonds conditional."

2. Clause 2 of the Huawei makes enforcement by ComReg of that bond conditional upon failure by Huawei to perform a contract between Huawei and Smart which ComReg understands from Smart will not be finalised by close of business on Monday 30th January, 2006. The proposed contract between Huawei and Smart will not be finalised by close of business on Monday 30th January, 2006. ComReg is therefore not in a position to assess the risk in respect thereof. No contract may be entered into between Huawei and Smart. If this were the case, the performance bond could be frustrated, in which case the relevant bank could be discharged from its obligations thereunder and ComReg would not be in a position to enforce the performance bond. Even if the contract could have been finalised by close of business on Monday 30th January, 2006, demonstration of breach of contract is not always necessarily a straightforward matter.

3. Clause 2.2(a) of the B.T. and Smart bonds makes enforcement by ComReg of those bonds conditional upon failure by B.T. to perform a contract between B.T. and Smart which ComReg understands from Smart will not be finalised by close of business on Monday 30th January, 2006. For the same reasons set out at 2 above, this is unacceptable to ComReg.

The basis for the above interpretation of clause of 2.2(a) is:

(a) ComReg's knowledge that the obligations more particularly set out in a schedule to the relevant bonds will form the subject matter of the contract yet to be finalised between B.T. and Smart and;

(b) The words 'more particular' set out in the definition of 'performance obligations' contained in clause 1 of the B.T. and Smart bond.

4. Without prejudice to ComReg's interpretation of clause 2.2(a) of the B.T. and Smart bond set out above, if clause 2.2(a) of the B.T. and Smart bonds only makes enforcement by ComReg of those bonds conditional upon failure by B.T. to perform obligations to Smart as set out in a schedule to the relevant bonds, this is unacceptable to ComReg because in the absence of a relationship between ComReg and B.T. in respect of performance by B.T. of obligations set out in schedules to the relevant bonds, it is not clear to ComReg how it would obtain the necessary information from B.T. to demonstrate non-performance by B.T. of its obligations set out in schedules to the relevant bonds.

5. Clause 6.3(e) of the B.T. bond provides that in the event that Smart entered into liquidation (save for certain specified purposes) receivership, examination or similar insolvency process and Smart fails to appropriately substitute the bank under the bond within a specified period of time, the B.T. bond shall no longer be a continuing security of the bank. In such insolvency circumstances, the very purpose of the performance bond is to compensate ComReg on behalf of the State. In such circumstances, there is a resulting economic social welfare cost. The financial ability of applicants to provide 3G mobile services in Ireland was a critical aspect of the fourth 3G licence award process.

6. Clause 16(d) of the Huawei bond and clause 6.3(d) of the B.T. and Smart bonds provide that in the event that ComReg revokes Smart's licence, the bond shall no longer be a continuing security of the bank.

In the event that ComReg revokes Smart's licence for non-compliance, it would be inappropriate for the bond to cease to be a continuing security of the bank. In such circumstances:

1. There is a resulting economic social welfare cost;

2. The purpose of the performance bond is to compensate ComReg on behalf of the State.

In our telephone conversations referred to above you refer to a fundamental principle of performance bonds that the principal must have the opportunity to comply with its obligations. In circumstances of non-compliance, it is this very opportunity which has not been availed of.

In respect of the possible revocation by ComReg of Smart's licence in any other circumstances a clause to take account of such an event along the lines proposed in a performance bond would not automatically be included in a performance bond. Therefore, the inclusion of such a clause would not be acceptable to ComReg."

137. The remainder of the email sets out the relevant portions of the tender document and Smart's application which were relied upon in support of these objections.

138. At 6.48 p.m. and 7.38 p.m. Mr. Hughes sent emails to Messrs. Casey, Flynn and Smart's solicitors setting out ComReg's position concerning the draft Huawei, B.T. and Smart bonds respectively. The emails were issued with electronic copies of the draft bonds attached which had ComReg's comments marked upon them.

139. During the course of 28th January, 2006, there were a number of telephone conversations between Mr. Casey and Mr. Hughes. Mr. Casey said he was proposing to have a Smart meeting early that afternoon and a further meeting with its lawyers at about 7.00 p.m. He proposed a deadline of 6.00 p.m. for obtaining the comments of ComReg on the draft. Mr. Hughes attempted to meet that deadline but was unable to do so within that precise timeframe. However, having sent his observations, the latest of which was at 7.38 p.m. on 28th, he made it clear that he was contactable until 10.00 p.m. on that night and from 9.00 a.m. on the following Sunday morning. Mr. Commissioner Doherty was also available if required.

140. In fact, the meeting which was to take place between Smart and its lawyers on the Saturday evening did not occur.

141. Mr. Commissioner Doherty also had communications with Smart personnel during the course of Saturday the 28th of January. The first was with Mr. Casey and followed his conversation with Mr. Hughes which took place at 10.00 a.m. Mr. Casey told Mr. Commissioner Doherty that he'd asked Mr. Hughes to provide a detailed list of ComReg's issues and concerns in writing and that he wanted them by early afternoon because of the meeting with Smart's lawyers that was to take place that evening. Mr. Casey said he was convinced that the issues could be resolved and that the Huawei bond clause 2 issue was a case of mis-drafting. However, he said he could not get this corrected before the 30th because the Chinese New Year made contacting China impossible. He suggested that with a side letter from Huawei Europe or Huawei Ireland he would be able to meet ComReg's requirements. He also referred to

clause 6.3 of the B.T. bond and said that was a condition that B.T. had required. Commissioner Doherty told Mr. Casey that both he and Mr. Hughes were available to meet to discuss these issues and any others that might arise. He also told Mr. Casey that he saw value in getting together at an early time.

142. Commissioner Doherty went into ComReg's office and remained there until about 4.00 p.m. He had a further conversation with Mr. Casey at that stage. He told him that if Smart wanted to meet to discuss any of the issues he would be available to do so. He also told Mr. Casey that he could telephone him at any time. He heard nothing further from Mr. Casey that day or night. He did however receive a text from Mr. Hughes to confirm that he (Mr. Hughes) was not aware of any meeting arranged that day.

Sunday 29th January, 2006

143. At 10.52 a.m. Mr. Hughes emailed Messrs. Casey, Flynn and Smart's solicitors. He said:-

"For the avoidance of doubt, in respect of the draft performance bonds provided by Smart Mobile Limited to ComReg on Friday 27th January, 2006, both my email to you yesterday at 16.18 and my emails to you yesterday at 18.48 and 19.38 represent ComReg's views in respect thereof.

As you will be aware, in respect of –

(i) the limitation clauses, duration clause and appendices of the draft Huawei bond, and

(ii) the schedules to the draft B.T. and Smart bonds, ComReg has reserved the right to revert with comments in respect thereof. The reason why ComReg has done this is that it was not possible to review these provisions within the time frame proposed by and agreed with Smart. ComReg understands from its meeting with Smart on Friday 27th January, 2006, that these provisions, appendices and schedules should not cause any significant problem."

144. At 11.11 a.m. Mr. Hughes sent a text message to Mr. Casey asking him to call him whenever he (Mr. Casey) wished to discuss matters.

145. At 11.59 a.m. Mr. Casey emailed Mr. Hughes as follows:-

"We had understood that you were providing us with your full comments on the three bonds. In the circumstances we think ComReg has had enough time to consider documents and reply in full. We have already passed on your first draft of comments to our partners.

We are very concerned that ComReg now seems to be holding out the prospect of further comments at some (undefined) point. We can't have this uncertainty so late in the process. We have conferences both with B.T. and Huawei later today and are meeting with our legal team at 6.00 p.m. this evening.

To try and make progress we need to have ComReg's full views as soon as possible."

146. Mr. Hughes responded saying that ComReg was currently reviewing the provisions, appendices and schedules and would revert with comments as soon as possible. At the latest it would revert with the comments by 5.00 p.m. on 29th January, 2006.

147. At 17.48 Mr. Hughes gave the final comments in the course of an email. He referred to the emails of the preceding day as representing ComReg's full views and went on as follows:-

"Unfortunately, as you will see from the attached the limitation provisions and appendices in the draft Huawei bond and schedule 3 to the draft B.T. bond give rise to significant concerns on our part.

In addition, it would appear from the draft B.T. bond that it is intended that B.T. and Huawei be jointly responsible for the network roll out and network quality. In respect of schedule 3 to the draft B.T. bond, this is a concern in respect of enforcement of the performance bond, namely proof of default by B.T. Obviously, in such circumstances such proof may be much more difficult."

148. That concluded any exchange of correspondence between ComReg and Smart on the Sunday.

149. Mr. Commissioner Doherty had a telephone conversation with Mr. Casey that evening. Mr. Casey again said that he did not believe that the problems could not be solved but that the Chinese New Year posed a challenge in making contact with Huawei. He also stated his belief that the issues with the B.T. bond were capable of resolution.

150. Commissioner Doherty told Mr. Casey of his view that the bonds presented were conditional. Mr. Casey said that they were working hard to meet the requirements but that the time allowed was too short. At that he was reminded by Commissioner Doherty that Smart's tender had indicated that it would be putting the bond arrangements in place quickly and that ComReg had originally allocated 30 days to do so. That had then been extended by an additional 45 days. He also reminded him that the tendering process clearly identified that the bonds had to be acceptable to ComReg and that the drafts were not. Mr. Casey spoke about bringing legal teams together. At that Mr. Doherty reminded him that he'd offered on numerous occasions to meet over the weekend but at no stage had Smart taken up ComReg's offer. He also told him that the Commissioners would be meeting early the following morning to discuss the issue.

Smart's Position

151. By Sunday it was apparent to Smart and its personnel that it was in considerable difficulty. By then, the evidence establishes, the draft performance bonds which had been furnished did not have the formal approval of any banks. They contained conditions to which ComReg objected. The bonds were not payable on demand. They contained a substantial number of errors. They provided for the bonds to cease to have effect in the event of Smart's insolvency or revocation of the 3G licence. All of these provisions were wholly unacceptable to ComReg.

152. Smart furthermore knew that from after lunch on 28th January, 2006, it was not going to be possible to have the Huawei performance bonds executed before 5.00 p.m. on 30th January, 2006. In any event it would not have been possible to execute the performance bonds in the form in which they were furnished to ComReg.

153. In the light of this knowledge Mr. Casey sent an email to his colleagues. In the course of his evidence he said that he was not proud of the way in which it was worded. I can quite understand why that should be so. However, he went on to point out that what was articulated in the first paragraph of the email is not what Smart went ahead and did. The email read as follows:-

"The fundamental issue is that we cannot be seen to ask for an extension. ComReg will not give it if we ask. What we have to do is get them to suggest a delay. This might derive from B.T./ComReg context, but we have to give the absolute impression that we are all ready and that we insist that ComReg tell us that they will accept the bonds in their current form – we cannot accept the risk that they reject our bonds. They have told us their deadline is absolute and we and our partners must accept that. We imply/threaten that we need certainty and that we will go legal if they don't accept our bonds. We wish it could be another way but we don't see any wriggle room. If they call our bluff and accept the bonds, then the Chinese end got mixed up and their bond got delayed because they thought ComReg wanted changes. On this basis, our position to ComReg is as follows:

Last night we received ComRegs marked up responses to the draft bonds. We have sent them to our partners. Based on discussions with them, we now believe there are significant (but not insurmountable) issues that would need to be resolved through the normal course of discussion, clarification and understanding. ComReg have accepted the principal (sic) that Smart will use its two suppliers to underwrite the bonds. It followed that ComReg accepts and understands that Smart will also have to discuss these issues in detail with both those parties. However, given the firm deadline that is in place, we do not believe that we have that time.

An analysis of the issues identified –

1. A critical area around clarity and understanding of a Dispute Resolution Process (D.R.P.). The development of such a D.R.P. agreement (to include testing for performance milestones) has been loosely discussed with ComReg however, this would now appear to be an issue that needs to be resolved so that issues relating to the bonds can be resolved. For example, the B.T. bond expects that only in the event of undisputed claims can they be held liable. ComReg have deleted this clause and described it as unacceptable. Overall there is confusion around performance milestone tests – how they are validated and disputed. The fact is, it is surprising that ComReg haven't insisted that such a process be in place or at least understood prior to issuing a 3G licence. It is questionable why this process wasn't put in place within the last number of weeks. However, at this stage, it has surfaced as an issue which must be resolved, not just before licence award. To address this issue Smart Telecom would have to interact directly with ComReg but also with its two supplier partners.

2. An issue in clause 2 of the Huawei bond where it refers to the works contract. We fully understand ComReg's position and are confident that this is a drafting issue and not a point of principal (sic). However, because of the Chinese New Year, it would take a week to get it redrafted. There may (be) an acceptable solution involving a supporting letter etc. but this also would take time to resolve.

3. Perhaps the most controversial issues are the 'insolvency' and the 'licence revocation'. Both of these would need time to be further explored both with ComReg and B.T.

In summary we strongly believe that it is not possible to have all of this resolved by 5.00 p.m. on Monday. These issues are surmountable but not in the time available – excessive haste at this stage is potentially dangerous to all parties and bordering on the irresponsible. We will not take that risk. In any event, the Chinese are not in a position to negotiate the type of changes ComReg wants, in time.

In the circumstances we must insist that ComReg accept our bonds in their current form and then grant the licence next week.

It should also be noted that notwithstanding the afore mentioned, there are no other significant issues of principal (sic). Everything else is ready to go. On Monday before 5.00 p.m., Smart Telecom can deliver bonds to the value of €100 million, €7.6 million and the cheque for the annual spectrum fees. The fundamental problem is that ComReg has raised issues which cannot be resolved in time."

154. The Smart personnel set their face against seeking a further extension of time from ComReg in order to resolve the difficulties concerning the bonds. It is true that ComReg had made it clear that having already granted two extensions of time the 30th January deadline was just that. As against that, ComReg had behaved entirely reasonably in relation to the previous applications. There was no reason to anticipate that ComReg would behave unreasonably if there were genuine difficulties which were capable of being resolved within a short period of time. The tactic of attempting to, in effect, force ComReg of its own motion to suggest an extension of time was in my view unlikely to succeed and in fact did not.

Monday 30th January, 2006

155. The commissioners of ComReg met on the morning of the 30th January. They were briefed by Commissioner Doherty and Mr. Hughes on what had taken place over the weekend. They also heard the legal advice of Mr. Hughes and Mr. Farr. They decided that the draft bonds were unacceptable for the reasons which had been outlined by Mr. Hughes to Smart personnel over the weekend. It is important to note that apart from the draft bonds that had been provided on the preceding Friday, no other drafts were forthcoming from Smart.

156. The position of Smart became even more uncomfortable as a result of a conversation between Mr. Flynn and Mr. Hughes which took place at 9.30 a.m. on this day. Mr. Flynn informed Mr. Hughes that the draft performance bonds which had been provided in electronic form by Smart's solicitors on Friday 27th January, 2006, were not the most up-to-date versions and differed from the hard copy versions provided to ComReg earlier on the same day. Needless to say this situation was regarded very reasonably by Mr. Hughes as being totally unsatisfactory. He had reviewed the draft performance bonds provided to him in soft copy and had provided comments in respect of them. Most of his weekend had been spent reviewing these documents. It had never been suggested that the bonds were not the most up-to-date version. He indicated that he now had no idea what changes existed between the two versions of the performance bonds. Mr. Hayes queried the course of action which Smart was now going to take. Mr. Flynn made it clear that Smart was now contending that it was ready to provide ComReg with the necessary performance bonds but that ComReg had identified significant concerns in respect of them. Smart did not believe that there was enough time before the 5.00 p.m. deadline that day to address these concerns. No application for an extension of time was made by Smart.

157. At 12.00 noon on 30th January, a telephone conversation took place between Mr. Connolly and Mr. Hughes of ComReg and Mr. Casey of Smart. There, ComReg reiterated its position that the draft performance bonds were not acceptable and that the deadline of 5.00 p.m. on that day remained the final deadline in respect thereof. Indeed it could not be otherwise as there was no application made for an extension of time by Smart.

158. ComReg personnel also requested a "compare write" document in order to assist it in comparing the performance bonds which had been sent in electronic form and the copies which had been given to Mr. Hughes on 27th January, on the preceding Friday. That request was not acceded to and no such document was provided. Despite its absence, Mr. Hughes carried out a physical comparison between the appendices in the hard and soft copy. There were no materially significant differences and the draft bonds in this form were equally unacceptable.

159. At 12.45 p.m. a telephone conversation took place between Mr. Hughes and Mr. Casey. Mr. Casey stated that Smart did not propose to execute the bonds if it remained likely that they would continue to be unacceptable to ComReg by the deadline. This was because of the financial cost to Smart of executing the bonds.

160. At 13.37 Mr. Casey sent Mr. Hughes a text message saying "Bonds are as handed to you last Friday".

161. There followed a phone conversation between these two men during which Mr. Casey reiterated the refusal to supply the compare-write document. He said his legal advisors had more significant issues to address.

162. The 5.00 p.m. deadline came and went. No executed performance bonds were presented to ComReg in any form, still less in a form acceptable to ComReg, by the deadline.

Events Post 5.00 p.m.

163. Smart did indeed "go legal". Shortly after 5.00 p.m. a letter was sent to ComReg by its solicitors.

164. That letter set out steps which Smart had taken with a view to fulfilling its obligations. The letter stated *inter alia*:-

"ComReg has raised issues with regard to certain parts of the performance guarantees and has claimed that the performance guarantees which have been furnished for their approval are not fit for their purpose. While our client does not accept this assertion on the basis that these performance guarantees have been approved by the requisite banks our client is willing to discuss these issues with ComReg with a view to finalising this one outstanding issue. With a view to having the outstanding issue resolved as quickly as possible, we suggest a meeting between the legal representatives of the parties as soon as possible.

Having regard to the foregoing the imposition of the deadline of 5.00 p.m. this evening is unrealistic and unreasonable.

In the event that ComReg refuses to enter discussions on this issue, the company with regret will be left with no alternative but to conclude that ComReg does not wish to be reasonable and to act reasonably in accordance with its statutory obligations in this matter. Accordingly if the matter cannot be resolved reasonably with ComReg the company must proceed to another forum."

165. The letter then sought a number of assurances to be given by ComReg by close of business on the following Friday. They included an assurance that ComReg would proceed to engage in the completion of the licence process including the agreement of the programme to measure and monitor the compliance with the applicable performance targets. Furthermore an assurance was sought that, on completion and delivery and the payment of the relevant sums together with the delivery of the bonds, the licence would issue. Included amongst the bonds mentioned here was a performance bond from Royal Bank of Scotland in respect of the Huawei performance part of the contract in the amount of €50 million.

166. The letter went on to threaten that High Court proceedings would be instituted seeking as their primary relief specific performance of the contract which had already allegedly been part performed by the company.

Events from 31st January, 2006 Onwards

167. On the morning of the 31st January, 2006, the commissioners of ComReg met. They were briefed by Messrs. Farr, Hughes and Connolly. No application for an extension of the deadline had been made to them and it had now expired. They did not extend the deadline.

168. The commissioners did however decide to give Smart the opportunity of meeting them so that Smart could outline its position and provide information as to whether it could produce bonds acceptable to ComReg and if so when.

169. Commissioner Doherty contacted Mr. Fanning and that meeting was arranged.

170. That meeting took place on 2nd February, 2006. All three commissioners, together with other personnel from ComReg were present. Messrs. Fanning, Casey and Flynn represented Smart. At that meeting Smart was asked whether it could produce performance bonds in a form acceptable to ComReg and if so within what time period. That question was never answered. I accept Commissioner Doherty's evidence in this regard. Instead Smart claimed that it was confident and had strong legal advice to the effect that the provisions in the performance bonds regarding insolvency and revocation ought to be acceptable. Whether the term "show stopper" was used or not (and I believe it was), it is clear from Mr. Casey's evidence that Smart "held our position with regard to our justification for including insolvency and revocation of licence". At the meeting Smart provided ComReg with a document in respect of the €7.6 million financial guarantee.

171. No extension of time was sought by Smart during the course of this meeting. No indication was given as to whether it would provide bonds in an unconditional form acceptable to ComReg. Smart maintained its position concerning both insolvency and revocation.

172. Subsequent to the meeting the commissioners met with their in-house advisors. The commissioners took the view that nothing said by the Smart personnel gave them any confidence that it would be able to come up with bonds acceptable to ComReg.

173. The commissioners decided to obtain outside counsels' advice on the draft bonds proffered. They then sought from Smart an unconditional extension of time in respect of the threat of proceedings. A week (until 10th February) was sought and granted.

174. The terms upon which that weeks extension was granted were set out in a letter from Smart's solicitors the relevant part of which reads as follows:-

"We are instructed that subject to ComReg entering into interaction with the company and its legal advisors and being available to engage to resolve the outstanding differences in good faith, in the interests of cooperation, our clients are agreeable to extend the deadline to the close of business on Friday 10th February, 2006, for the resolution of the issues or the grant of the assurances sought."

175. Those terms were not acceptable to ComReg and were the subject of conversations between Mr. Commissioner Doherty and Messrs. Casey and Fanning. Having spoken to them they agreed the extension of time sought but clearly accepted that they had no expectation of an engagement with ComReg in the intervening period. Neither did they have any express or implied commitment to any change in ComReg's position. It was made crystal clear to Smart that there was no express or implied commitment of any change in ComReg's position as a result of the extension of time being granted. Mr. Casey indicated that Smart was working on its proposed monitoring plan which would be completed shortly and that it might send it to ComReg but he accepted that it in turn had no obligation to respond at that time.

176. The new extension of time ran out on 10th February, 2006. On the preceding day, after further discussions between the commissioners, Mr. Fanning was contacted and an extension of the deadline to the 13th February was sought. The necessity for this was in part due to Commissioner Doherty's absence from the country on business during the intervening days. The extension was agreed to by Mr. Fanning but he expressed concern about the lack of engagement that had taken place.

177. On 9th February, 2006, Mr. Flynn sent to Mr. Connolly an email setting out what he described as a "first cut" at a document which described how the performance management process might work. Such a document was attached to the email. It was on that date Smart agreed to forbear from issuing any proceedings until Monday 13th February, 2006.

178. There was also an email sent from Mr. Connolly of Smart to Mr. Hughes of ComReg on 9th February, 2006. This was forwarded by Mr. Hughes to the commissioners.

179. On the 9th February, the ComReg commissioners decided that Mr. Fanning should be contacted again on whether the issue of insolvency of Smart as dealt with in the bonds was a deal breaker or not. Mr. Fanning's response was to confirm that that was so. He rehearsed the issues in relation to inclusion of the insolvency clause which had been dealt with at the meeting on 2nd February. He added that he believed that, while difficult, the issue was not insoluble or a deal breaker provided that ComReg was willing to work with Smart and allow them sufficient time to amend the bonds. Commissioner Doherty said he would communicate those comments to his fellow commissioners.

180. Within half an hour he had a phone call from Mr. Casey who stated his belief that Smart could meet ComReg's needs on the issue. Mr. Casey expressed unhappiness with the degree of dialogue that had taken place and suggested that ComReg and Smart should get together and move to process forward.

181. On 10th February, 2006, Smart's solicitors wrote to ComReg recording Smart's disappointment with the level of interaction between ComReg and Smart in seeking to resolve the outstanding difficulties with regard to the performance guarantees. The letter also invited ComReg to have the issues surrounding the performance bonds determined by an independent expert whose decision would be final and binding. This was not a course which was acceptable to ComReg.

182. The 13th February was the date upon which the extension granted to ComReg by Smart expired. The commissioners met that day to consider the position. They had been briefed by Mr. Commissioner Doherty on the conversations which he had had with Messrs. Fanning and Casey on the 9th February. They were also in receipt of counsel's advice on the terms of the draft performance bonds which had been proffered. They considered that, together with the explanations which had been given, and the matters communicated by Smart personnel at the meeting on the 2nd February and subsequent thereto.

183. The commissioners decided that the draft bonds which had been proposed were correctly regarded as unacceptable. No acceptable bond had been provided prior to the 30th January deadline. No extension of time had been sought for that deadline.

184. As far as matters subsequent to the deadline were concerned they were not satisfied that Smart could or would provide bonds acceptable within a reasonable timeframe.

185. I accept the evidence which was given to the court that in reaching their conclusion, the commissioners took into account the necessity that the tender process should be conducted in a transparent, non discriminatory and open fashion. They were also mindful of the necessity of maintaining the integrity of that process. They considered whether they ought to extend the deadline further to see if Smart could come up with bonds acceptable to them. However, they concluded that adequate time had been allowed to Smart to deliver its commitments in relation to these bonds. Therefore, as it had not provided performance bonds by the extended deadline of 5.00 p.m. on 30th January, 2006, it had failed to meet the terms of the tender process and would not be awarded the licence. The letter mentioned in the first paragraph of this judgment was accordingly sent to Smart.

Events Subsequent to 13th February, 2006

186. Smart was as good as its word in instituting proceedings. On 14th February, 2006, proceedings were instituted and an application for an interim injunction was made to Laffoy J. That injunction was granted. The proceedings were taken only against ComReg. The reliefs sought were as follows:-

"1. A declaration that there exists a concluded contract between the plaintiff and the defendant for the award and subsequent grant to the plaintiff of a 3G mobile telecommunications B licence (the 3G licence) pursuant to s. 5 of the Wireless Telegraphy Act, 1926 and the Wireless Telegraphy (3rd Generation and GSM) Regulations, 2002, as amended.

2. Alternatively,

(a) A declaration that having selected the plaintiff as the successful tenderer for the 3G licence the defendant was and is obliged to give the plaintiff a reasonable period of time to comply with the terms and conditions (additional to those set out in the defendant's tender document) which the defendant has sought to impose on the plaintiff as the successful tenderer for the 3G licence;

(b) A declaration that the defendants deadline of 30th January, 2006, for the plaintiff to comply and satisfy the said additional requirements specified by the defendant for the performance guarantees to be provided by the plaintiff to the defendant is unreasonable;

(c) A declaration that the said additional requirements specified by the defendant for the performance guarantees requested from the plaintiff are unreasonable;

(d) A declaration that the defendant is not entitled to treat its negotiations with the plaintiff for the award and subsequent grant to the plaintiff of the said licence as being at end until such time as the plaintiff has been afforded a reasonable period within which to satisfy the defendants additional requirements in relation to the said performance guarantee or to proffer appropriate alternative proposals;

3. An order restraining the defendant, its servants or agents from:-

(a) Awarding the licence, the subject matter of these proceedings to any other party;

(b) Treating its negotiations with the plaintiff for the award of the said licence as being at an end, and/or

(c) Entering into negotiations with any other party for the award of the said licence pending further order of this honourable court;

4. If necessary an order of specific performance of the contract concluded between the plaintiff and the defendant in respect of the 3G licence;

5. Such further and other declaratory and injunctive (including interim and interlocutory) injunctive relief as this honourable court may deem fit,

6. Damages for breach of contract,

7. Damages for unlawful interference with the plaintiffs economic relations,

8. Damages for negligence and breach of duty including breach of statutory duty,

9. Interest pursuant to the Courts Act, 1981, as amended,

10. Costs."

187. A statement of claim was delivered on 6th March, 2006, which prayed for the same reliefs.

188. ComReg delivered its defence on 13th March, 2006. On the same day I heard an application brought by it which sought an order directing that those parts of Smart's case which arose under public as distinct from private law should be brought by way of an application for judicial review. I delivered an *ex tempore* ruling on that date refusing that application. It was accepted that Smart's case fell to be considered both by reference to private law and public law considerations.

189. Eircom was given the opportunity to apply to be joined in the proceedings if it wished. It did so and was permitted to defend the public law issues which arose for consideration.

190. In the meantime the injunction granted by Laffoy J. was continued and remains in place.

191. The action, which was originally scheduled to last for four days but in fact lasted for four weeks, came to trial in July, 2006.

Changes in Smart's Case

192. Right up to the opening of the trial, Smart continued to assert its entitlements to have the contract allegedly made between it and ComReg specifically performed. That was the primary relief sought. It was asserted in pleadings, at the hearing on the 13th March and in the pre-trial written submissions. It was abandoned during counsel's opening of the case.

193. It is difficult to see how at any stage it could have been successfully asserted that there was an enforceable, binding, contractual obligation capable of being specifically performed in existence between Smart and ComReg. The action proceeded only in respect of any public law entitlements which Smart might have.

194. The abandonment of the specific performance claim was not the only shift in Smart's stance during the trial. Much of the public law declaratory reliefs were also abandoned or not pursued. In effect the only part of the relief sought which is now pursued is that set out at para. 2(d) of the prayer of the Statement of Claim. That is a declaration that ComReg is not entitled to treat its negotiations with Smart for the award and subsequent grant to it of the licence as being at an end until such time as Smart has been afforded a reasonable period within which to satisfy ComRegs additional requirements in relation to the performance guarantee or to proffer appropriate alternative proposals.

195. In the light of this limited relief which is now sought it is not necessary for me to consider all of the legal submissions and authorities which were contained in the original written submissions of the parties. It is a pity that the decision to abandon the specific performance claim was not notified prior to the opening day of the trial as much time and effort might have been avoided. That is not however the only troubling matter concerning the conduct of Smart in relation to this litigation. Affidavit evidence was put before the court in order to obtain the interim injunction. Mr. Casey, in the course of that affidavit, swore that Smart had furnished to ComReg in draft form three separate performance guarantees in the aggregate sum of €100,000,000. He said:-

"These draft performance guarantees/bonds were furnished to the defendant and were secured by the plaintiff from reputable banks which had a rating of at least A2 awarded by Moody's or A from Standard and Poor."

196 That statement was not true. Although apologies were proffered in respect of this at trial it is difficult to see how such an averment could have come to be made by the deponent.

197. I will consider this aspect of the matter later in this judgment.

Smart's Case in Law

198. The entire of Smart's case is now focused on the relief claimed at para.2(d) of the prayer to the statement of claim.

199. That in effect amounts to an assertion by Smart that it has some entitlement at law to compel ComReg to continue to negotiate with it beyond the expiry of the extended deadline of 30th January, 2006.

200. It is accepted that such legal rights as Smart may have in this regard do not derive from private law. If they exist, they have their roots in public law concepts.

201. Smart's case is that in behaving as it did, ComReg was unreasonable and disproportionate and was in breach of obligations which it owed to Smart. All of that will have to be considered having regard to my findings on the facts of the case which I will deal with in the next part of this judgment. But before commencing that voyage it is necessary to identify the legal landmarks which will guide the journey.

202. First, ComReg is a statutory body which must keep faith with the obligations imposed upon it.

203. Section 12 of the Communications Regulation Act, 2002, provides that in relation to the provision of electronic communications networks it ought to promote competition and contribute to the development of the internal market. In respect of those objectives it is obliged to take all reasonable measures which are aimed at achieving them. It is furthermore enjoined in carrying out its functions to seek to ensure that measures taken by it are proportionate having regard to the objectives set out in s. 12.

204. ComReg is also governed by a series of regulations, namely The European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2003; The European (Electronic Communications Networks and Services) (Framework) Regulations, 2003 and the Wireless, Telegraphy (Third Generation and GSM Mobile Telephony Licence) Regulations, 2002 and 2003.

205. In deciding upon the grant of a licence ComReg is required, pursuant to Regulation 9(4) of the Authorisation Regulations to –

"Establish open, transparent and non-discriminatory procedures for the grant of licences and shall cause any such procedures to be made publicly available."

206. It is also obliged to ensure that licences which it grants are on the basis of selection criteria which are objective, transparent, non-discriminatory and proportionate and which give due weight to the achievement of the objectives set out in s. 12 of the 2002 Act.

207. There are many other obligations imposed upon it pursuant to these regulations dealing with *inter alia* procedures, extensions of time, payment of fees and the competitive tender. It is not necessary to set them out here in any detail because there is now no complaint made concerning the procedure which was followed, the times fixed, or the conduct of the competition up to and including the 30th January, 2006.

208. Smart relies on a relatively small number of decisions of the courts of this jurisdiction in asserting its legal entitlements. The first is the decision of the Supreme Court in *TV3 v. Independent Radio and Television Commission* [1994] 2 I.R. 439. There Egan J., speaking for the Supreme Court said as follows:-

"I agree with the learned trial judge that it is not easy to categorise the relationship which existed between the Commission and the applicants in the period between the determination by the commission that a particular applicant should be offered the franchise and the actual finalising of a contract. One thing is clear, however, and it is my conclusion that the commission were obliged to negotiate with the applicants with a view to entering into a satisfactory contract. Negotiation would be a necessary preliminary to the fulfilment of the obligation imposed by s. 4(2)(b) of the Act. Negotiation of a satisfactory contract was not realistically an immediate possibility and there were two principal reasons why this was so... .."

Section 4(2)(b) of the Act of 1998, imposed an obligation on the Commission to enter into a contract with the person or persons who would have 'the right and duty to provide a television programme service'. In accordance with the provisions of s. 6 of the Act, as extended by s. 18 of the Act of 1990, the Commission had determined that the consortium was the most suitable applicant to be awarded the contract.

I am satisfied that the applicants received a benefit of some description from their selection or acceptance in pursuance of a statutory authorisation. However one might describe it, it was some kind of legal right which no other person or body could claim. It might not ultimately lead to completion of a final contract containing specific and suitable terms but, quite clearly, there was a right to negotiation with the Commission with such an end in view.

The decision taken by the Commission on 29th October, 1999, was a unilateral decision to deprive the applicants of the right to continue all negotiations. The decision was an administrative one made by a commission which was created by statute and it was not seriously contended that it could be made without complying with the requirements of natural and constitutional justice."

209. Smart readily accepted that there is an obvious distinction between the facts of the TV3 case and this case. It accepts that ComReg warned Smart that if it did not provide satisfactory performance bonds by 30th January, 2006, it would not be awarded the licence. Nonetheless it is submitted that the conduct of ComReg was unilateral and that it failed to take account of the entitlements of Smart having been selected as the best applicant. It contends that Smart had a right to negotiate with ComReg with a view to concluding the terms of the licence which it had been envisaged would be granted to it. It concedes that there is doubt as to whether that right can be properly regarded as a property right but it says that it is one which cannot be interfered with without complying with the requirements of natural and constitutional justice. Whilst it concedes that ComReg enjoys a power to impose time limits and the additional power to enforce them, such rights must, it says, be exercised fairly and judicially, for a purpose contemplated by the statutory scheme proportionately and with reasons for the exercise of the power.

210. Smart also relies on *Radio Limerick 1 Limited v. Independent Radio and Television Commission* [1997] 2 I.L.R.M. 1 where Keane J. said:-

"In some cases, at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege could be so gross as to render the revocation unreasonable within the Wednesbury or Keegan formulation. Thus, in the present case, if the amount of the advertising and the applicant's programmes had on two widely separated occasions exceeded the permitted statutory limit by a few seconds, the permanent revocation of the licence, with all that was entailed for the livelihood of those involved, would clearly be a reaction so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness."

211. Once again Smart accepts that that case is different from the present because there the applicant had the benefit of a licence whereas here it is contended Smart had the benefit only of the right to negotiate the conclusion of a licence.

212. Smart also relies upon *Dunnes Stores Ireland v. Ryan* [2002] 2 I.R. and in particular the dictum of Murray J. where he said:-

"In the light of the foregoing considerations, it seems to me that in exercising a power under s. 19, the second respondent, without intending to be exhaustive as to all the elements which may be taken into account, must do so, so that:

- 1. It is exercised for a purpose contemplated by the Act within the terms of the section,*
- 2. Reasons are given for a decision,*
- 3. The decision to do so is rational and neither arbitrary or disproportionate."*

213. They also rely upon the observations of Hardiman J. in *Meenan v. Commission to Enquire into Child Abuse* [2003] 3 I.R. 283 where he approved the agreement between the parties to the effect that statutory powers require to be exercised proportionately and quoted the well known dictum of Costello J. in *Heaney v. Ireland* where that judge stated that the means chosen to restrict the exercise of a right must –

- (a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,*
- (b) Impair the right as little as possible, and*
- (c) Be such as their effects on rights are proportional to the objective.*

214. Smart also relies upon the decision in *International Fishing Vessels Limited v. Minister for the Marine (2)* [1991] 2 I.R. 93. Smart accepts that that case was to the effect that there was no breach of natural or constitutional justice in refusing to grant a fishing licence on a ground which had been put to putative licensee and upon which that licensee had had an opportunity to make submissions, even if the decision to refuse was also based on other grounds never put to the licensee.

215. It contends that that is not the position here. It says that it did not know that insolvency and revocation clauses in the bonds would be objectionable and was never in a position by virtue of this fact to provide a bond acceptable to ComReg.

216. ComReg and Eircom accept that ComReg operates on foot of a statutory regime which is prescribed both by the Acts setting it up and the regulations made thereunder. They contend that much of the case law which is relied upon by Smart has little or no application having regard to the facts of this case. They contend that there was nothing irrational, unreasonable or disproportionate in the way in which ComReg behaved. In fact they argue that everything that it did was in compliance with any legal obligations imposed upon it and that, in some respects at least, it went beyond what might reasonably be required of it.

217. They also point out that the court is here being called upon to review a decision of a public body on public law principles. Both the standard and the scope of review in such circumstances is clearly limited. They point out the oft repeated dictum of Lord Brightman in *R. v. Chief Constable of North Wales Police, ex parte, Evans* [1982] 1 W.L.R. 1155 that:-

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

218. It is not an alternative form of appeal against administrative decisions.

219. They also point out the high threshold that has to be surmounted by Smart in asking the court to interfere with the decision of ComReg. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. said:-

"The court cannot interfere with the decision of an administrative decision making authority merely on the grounds that

- (a) It is satisfied that on the facts as found it would have raised different inferences and conclusions, or*
- (b) It is satisfied that the case against the decision made by the authority was much stronger than the case for it."*

220. On this line of argument they also called my attention to a decision of Clarke J. of 21st June, 2006, in *Ashford Castle v. SIPTU* where he said:-

"A very high degree of deference indeed needs to be applied to decisions which involve the exercise by a statutory body... of an expertise which this court does not have."

221. ComReg also relied upon the decision of the Supreme Court in *S.I.A.C. Construction Limited v. Mayo County Council* [2002] 1 I.L.R.M. 401 and its citation of the *Walloon Buses case (Commission v. Belgium* [1996] E.C.R. 1). The effect of these decisions is that tenderers must be in a position of equality both when they formulate their tenders and when the tenders are being assessed by the adjudicating authority. A public body, submits ComReg, conducting a tender process, cannot negotiate and accept criteria different from those which were contained in the tender documents. To do otherwise would be a violation of ComReg's duties. It could not therefore accept conditional performance bonds having allocated marks in the comparative evaluation on the basis of unconditional performance bonds. Such would be a variation of the terms of the tender process.

222. I am satisfied that as a statutory body ComReg must conduct its business in accordance with its statutory mandate. It must not purport to exercise powers which it does not have. In the exercise of such powers as it does have, it must act fairly, proportionately and in a manner which conforms to its statutory purposes. I also accept that having been chosen as the winner of the competition Smart was to use the words of Egan J. in the *TV3 Case* the beneficiary “of some kind of legal right which no other person or body could claim”. ComReg’s behaviour towards Smart has to be examined with a view to ensuring that it has complied with its obligations in these regards.

223. In asking this court to intervene Smart relies only on public law entitlements. That being so, the standards which must be achieved by a successful applicant in judicial review proceedings must be attained by Smart. The court must also be astute to ensure that it does not exceed its function by acting as an appeal court from the regulator’s decision and still less seek to sit in the regulator’s chair and so trespass into an area in which the court has neither competence nor expertise.

224. I also accept that the observations of the Supreme Court in *S.I.A.C. Construction Limited v. Mayo County Council* are relevant to my consideration.

Expert Evidence

225. In accordance with the normal practice of the commercial court each side was notified of the witnesses intended to be called by the other. They were also furnished with a statement of the evidence which it was intended to adduce from such witnesses.

226. Smart tendered a witness statement from a Mr. Andrew Brown. He is a chartered accountant and director of the Dublin office of K.P.M.G, an international firm of accountants and business advisors. He heads that firm’s forensic accounting department. In the course of his witness statement he advanced a number of propositions. They included contentions that the purpose of the financial guarantees underpinned by performance bonds was punitive in nature and not compensatory; that ComReg’s requirements were unclear; that the draft performance bonds met the requirements of the tender; that the bonds offered to ComReg were entirely consistent with the requirements set out by ComReg in its tender. He also proposed to give evidence that Smart was not given clear guidance at a sufficiently early stage of the post tender award process to enable it to ensure that the performance bonds met with ComReg’s requirements.

227. Smart also furnished a witness statement from a Mr. Andrew Wright, an expert on the role of performance guarantees in the licensing process. He also, *inter alia*, expressed the view that the draft guarantees were adequate and in the absence of a detailed specification ought to have been accepted by ComReg.

228. Neither of these witnesses were called to give evidence. That decision was made in the full knowledge of the fact that ComReg intended to call its own expert, Mr. Tom Murray. In addition Smart did not call any witness from Huawei, Huawei’s bankers, B.T., B.T.’s bankers, or its own bankers, Ulster Bank, concerning the issue of the bonds.

229. I am asked to infer from Smart’s failure to call any of these witnesses that they had no evidence which might help Smart’s case and indeed that Smart was not in a position to support the assertions, both made in the pleadings and the draft statements of evidence.

230. In *Fyffes v. D.C.C. and Others* [2005] 1 I.E.H.C. 477, Laffoy J. had to consider such a proposition. In that case, Fyffes argued that the court should draw inferences from the failure of the defendants to call witnesses on key issues in the case. She considered that the principles outlined in the *Wisniewski v. Central Manchester Health Authority* [1998] Lloyd’s Reports Med. 223 provide helpful guidelines for the court. The principles in question were set forth by Brooke L.J. as follows:-

- “1. In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
- 2. If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call witnesses.*
- 3. There must, however, have been some evidence, however weak, by the former on the matter in question before the court is entitled to draw the desired inference: in other words there must be a case to answer on that issue.*
- 4. If the reason for the witnesses absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or modified.”*

231. I likewise find these guidelines helpful and, insofar as it is necessary to do so in this case, I propose to apply them. They have a particular relevance in the case of witnesses who provide statements of proposed evidence but are not (without explanation) called to testify.

232. Smart offered no explanation for the decision not to call Messrs. Brown or Wright.

233. The expert called by ComReg was Mr. Tom Murray. He has 42 years experience in banking in Ireland and the United Kingdom. That includes more than 25 years experience in corporate banking. He is a retired managing director of corporate banking with Bank of Ireland. His evidence was uncontroverted. He was an impressive witness and I accept his testimony in its totality.

234. I now set forth my findings and the conclusions which I have reached having regard to the evidence, both oral and documentary.

Findings and Conclusions

Introduction

235. Smart’s bid for the 3G mobile phone licence was an ambitious one. Smart so described it. It was no mis-description.

236. Smart was aware from the outset of how important it was to offer attractive voluntary performance targets as part of its bid. Those targets had little meaning unless they were backed by a financial guarantee which in turn had to be secured by either a cash deposit or a performance bond or bonds.

237. Smart never opted to make a cash deposit in support of its bid. That would have required the lodgement of €100 million. Instead, such efforts as were made, involved the procuring of bonds.

238. In its tender document ComReg made clear the importance of such performance bonds from the point of view of achieving marks in the competition. But the real importance of the bonds was to provide a recourse for ComReg in the event of Smart failing to perform its obligations.

Bond Requirements

239. In its tender document, and indeed in other documents to which I have already referred, ComReg made it clear that the bonds had to be in a form acceptable to it and be payable on demand.

240. That is, in my view, clear from the documentary evidence which I have already reproduced in this judgment and is supported by the evidence of Mr. Murray. He regarded the tender document as being clear and unambiguous both as to the requirements of ComReg and its intent in seeking such bonds. I accept his evidence. Even without that evidence, however, it seems to me that a fair reading of the relevant documents makes ComReg's requirements clear.

241. Indeed I believe that their requirements were so understood by Smart. For example, Mr. Casey, on the third day of the hearing said:-

"We understood that the bonds are on demand, unconditional, subject to there being a performance failure."

242. Later on the same day the following exchange took place –

Question 221: "The tender documents had referred to the bond being cash or bond in terms of the performance bonds, isn't that correct?"

Answer: *"That is correct."*

Question 222: "The reference to cash or bond, I take it, would have alerted you to the fact that the bonds had to be virtually the equivalent of cash?"

Answer: *"Yes. Well, the bond again on performance failure would pay ComReg on demand unconditionally."*

Question 223: "Unconditionally?"

Answer: *"Conditional on performance failure."*

Question 224: "Unconditionally vis-a-vis the bank?"

Answer: *"Yes."*

Question 225: "The bond that was provided required nothing of ComReg other than to serve the demand in accordance with the form required in the bond. Thereafter, if there was a dispute, it was between Smart and ComReg as licensee and regulator?"

Answer: *"Yes, but in order for ComReg to claim the bond, there had to be a performance miss, but yes."*

243. I find that Smart's commitment to ComReg was to provide it with unconditional performance bonds payable on demand in a form acceptable to ComReg.

Time

244. It was clear from the tender that ComReg intended to issue the licence within a short time after it decided on the successful tenderer. It was obvious to the contestants that they would be required to have their performance bond or bonds in place within a relatively short time.

245. When Smart was offered the licence, ComReg stipulated a period of 30 days (to 16th December, 2005) for Smart to furnish the performance bonds in the amount of €100 million in a form acceptable to ComReg. I am satisfied that that period of 30 days was reasonable. I am fortified in that view by –

(a) The fact that Smart accepted that time without any objection or qualification, and

(b) The evidence of Mr. Murray that normal banking practice for the provision of such bonds would usually operate in a timeframe of 14 to 21 days.

246. On the day before that 30 day period expired an application was made for an extension of time and was granted. A further period of 45 days was allowed. That was 150% in excess of the original allowance. If the original period of 30 days was reasonable then a *fortiori* a further period of 45 days must also be reasonable. Lest it might be thought otherwise because of the intervention of Christmas and the New Year holiday, I am satisfied that such is not the case. In that regard I again accept the evidence of Mr. Murray that even allowing for such holiday periods the 45 days was reasonable and well within the expected response periods of the banking industry.

247. Whilst Smart hoped for a longer extension of time it accepted the one granted and made it clear that it would work to whatever deadline was fixed by ComReg. It never contended prior to this action that such an extension was unreasonable.

248. At each of the weekly meetings which took place, up to and including 20th January, 2006, Smart was reminded of the deadline of 30th January. It was aware that failure to meet that deadline would result in the termination of the offer of the licence. That is abundantly clear from the evidence of Mr. Casey.

The Template Bond

249. On 22nd November, 2005, Smart was given the template bond. It was in the form of an unconditional demand bond. It did not provide for its termination in the event of a revocation of Smart's licence or its insolvency.

250. It is of course true that Smart was informed that the bond to be provided by it did not have to mirror the template precisely. However, it was told that the template covered the key elements which would be of interest to ComReg in accepting any such guarantee or bond.

251. I am satisfied that it must have been apparent to Smart that any deviation of substance from the form of that template would amount to a major departure from what ComReg had stipulated would be acceptable to it. The template bond was in Smart's possession from as far back as the 22nd November, 2005.

252. Not merely did ComReg provide the template bond but at meeting after meeting it consistently asked Smart to provide draft performance bonds to it as soon as possible so that any problems with them could be identified and rectified in advance of 30th January, 2006, deadline. I am satisfied that ComReg did all that it could to assist Smart in meeting its obligations in this regard.

253. Smart's undertaking to provide the performance bonds was a big factor in it winning the "beauty competition". One might have thought that Smart would make very sure that it would comply with its obligations concerning these bonds in a timeous fashion. Whilst I heard a good deal about the difficulties that were encountered by Smart, the plain fact which emerges from the evidence concerning its obligations regarding these bonds up to the 27th January, 2006, can be summarised as follows.

1. Smart did not furnish any performance bond of any sort in draft until the afternoon of the 27th January, 2006. That was the Friday which preceded Monday 30th January or to put it another way the 72nd of the 75 days allowed with the two following days being a Saturday and Sunday.
2. Notwithstanding Smart's undertaking to consult with ComReg as to the form of the bonds as soon as the licence was announced, it failed to do so. No engagement was possible concerning this topic before 27th January because of Smart's failure. Smart was solely responsible for this.
3. The drafts furnished on the 27th January were the first drafts.
4. ComReg held regular meetings prior to the 27th January, 2006, to discuss any issues concerning the licence but Smart made no enquiry as to whether provisions in the bonds regarding insolvency, revocation or conditions as to the performance of third party contractors would be acceptable to ComReg.
5. Smart did not honour its obligation to consult with ComReg as to the form of the bonds as soon as the licence was announced.

The Draft Bonds

254. The draft bonds which were presented to ComReg on the 27th January, 2006, differed substantially from the template which ComReg had provided. The bonds were conditional and did not in my view meet the requirements of the tender document. My views in this regard are supported by the evidence of Mr. Murray.

255. Apart from the fact that they contained clear errors they were not, in my view, payable on demand and contained conditions to which ComReg was justly entitled to object.

256. They also contained conditions which would render them useless in the event of Smart's insolvency or the 3G licence being revoked. ComReg was correct to refuse to accept these limitations.

257. In a word the draft bonds were not unconditional demand bonds, i.e. the equivalent of cash, and were not acceptable to ComReg. In making it clear that they were not acceptable ComReg was within its rights.

Events Over the Weekend the 28th and 29th January, 2006

258. Commissioner Doherty and Mr. Hughes made themselves available throughout the weekend to meet with Smart personnel. Smart did not avail itself of such an opportunity.

259. Smart did not enquire from either B.T. or Huawei as to whether they were prepared to drop the insolvency condition.

260. No alternative draft of the performance bonds was furnished to ComReg.

261. The evidence is also clear to the effect that the draft performance bonds when presented to ComReg did not have the formal approval of any bank.

Monday 30th January, 2006

262. Smart did not furnish any executed performance bond, still less one acceptable to ComReg in advance of the deadline. The consequence of its failure to do so was well known to Smart and its personnel. It had been spelled out to them on many occasions.

263. Smart was not in a position to furnish executed bonds in a form acceptable to ComReg by the deadline. In my view, Smart was entirely responsible for that state of affairs. No blame can be attributed to ComReg in that regard.

Smart's Tactics

264. A deliberate decision was made by Smart not to request a further extension of time from ComReg. It is difficult to understand why that was so. Whilst ComReg made its position concerning the deadline very clear it had nonetheless already behaved reasonably in granting previous extensions of time. If matters were as far advanced as Smart sought to assert there was nothing to suggest that ComReg would behave unreasonably in relation to such a request.

265. Instead a different tactic was adopted. It was the "go legal" one. That expression was used in the email sent by Mr. Casey to his colleagues on Sunday 28th January, 2006. Despite his evidence to the contrary I am satisfied that, in part at least, the strategy and tactics set forth in the first paragraph of that memorandum were in fact put into operation by Smart. Smart did indeed attempt to give the impression that it was in a position to execute the bonds and it made threat of legal proceedings in support of that.

266. The evidence satisfies me that Smart was indeed attempting to “engineer” a situation where ComReg would, of its own motion, feel forced to offer an extension of the time period without any request in that regard from Smart.

267. In order to produce such a result ComReg had to assert that the bonds that they had produced were fit for purpose and should be acceptable to ComReg. That is what they did and threatened legal proceedings if ComReg did not agree.

268. Smart’s solicitors letter of 30th January, 2006, was incorrect when it asserted that the performance guarantees had been approved by the requisite banks. No formal approval of the performance bonds had been given by any bank.

269. In short, Smart attempted to engineer an extension of time in circumstances where it knew that the bonds which it proffered were unacceptable to ComReg and in any event were not in a position to be executed because they had not even been approved by the relevant banks.

Events Post 30th January, 2006

270. Faced with Smart’s failure to meet the deadline and the threat of litigation ComReg decided to consider if its approach in respect of the deadline and the unacceptable nature of the performance bonds was reasonable. It sought outside legal advice.

271. ComReg also decided to give Smart an opportunity to explain its position and to make representations to it. That took the form of a meeting which was held on 2nd February, 2006. I am satisfied that at that meeting ComReg specifically asked Smart whether and when it could furnish performance bonds acceptable to ComReg. It never received a satisfactory answer. Indeed it is quite clear from the testimony of Mr. Casey that Smart “*held our position with regard to our justification for including insolvency and revocation of licence*”.

272. Smart did not furnish any bonds, either in draft or executed form, to ComReg in the period following this meeting of 2nd February. Neither did it confirm to ComReg that it could, and would, provide bonds that were acceptable to ComReg.

273. On 9th February, 2006, Smart indicated that it might be prepared to move on insolvency and revocation. That response however, has to be seen in the context of Mr. Fanning standing firm on those issues only to be followed by a phone call from Mr. Casey within half an hour stating his belief that Smart could meet ComReg’s needs on this issue. That suggestion however was made without consultation with either B.T. or Huawei.

274. It also has to be seen in the light of the suggestion made on the following day that the matter be dealt with by binding arbitration. That suggestion was also made without any agreement being obtained from either B.T. or Huawei or their banks.

ComReg’s Position

275. Having regard to the principles applicable and to the case law to which I have already referred I am unable to identify any right or entitlement on the part of Smart that was breached by the way in which ComReg dealt with it. On the contrary it appears to me that ComReg at all times behaved in a perfectly reasonable way and gave ample opportunity for Smart to put its house in order. I cannot detect any breach of principles of non-discrimination, transparency or proportionality in the approach of ComReg. In my view it acted lawfully.

276. Smart’s misfortunes are of its own doing. It cannot, in my opinion, point the finger at ComReg. It did not satisfy the conditions for the award of the licence within the times provided, or indeed at all.

277. The provision of appropriate bonds was a matter of major importance. The failure by Smart to meet its obligations in their regard had to be viewed very seriously by ComReg. It did so in a reasonable and lawful fashion.

278. Overall I get the impression that Smart is a company whose ambitions outstripped its abilities. It set about making up for that deficit by a policy of bluff, bluster and threat. It did not work.

279. Not merely did it fail to produce executed bonds by the deadline but it also failed to put the monitoring and measuring programme in place. Indeed, even in respect of the guarantee which Smart was obliged to provide for its instalments of the spectrum access licence fee, I note that it was not until late in the evening of Friday 27th January, 2006, that Anglo Irish Bank was contacted by Smart in that regard. The facility letter was not signed until 31st January, 2006, although the evidence is that its terms were agreed and accepted by the bank on 30th January. This last minute attention to even this arrangement is indicative of the general unsatisfactory approach of Smart.

280. In my view, ComReg did all that it could to assist Smart in attempting to meet its obligations. In particular Mr. Hughes and Commissioner Doherty went to great lengths to facilitate it.

281. I have already rejected the suggestion that there was any ambiguity or lack of clarity in what was required of Smart having regard to all of the information provided to it by ComReg. I likewise reject the late-in-the-day suggestion made that because ComReg adopted a different approach to bonds in respect of Hutchinson and O2 that there was either ambiguity as to its requirements here or that it was obliged to adopt a similar approach in this case.

282. In these circumstances I decline to grant any declaration to the effect that ComReg was not entitled to treat its negotiations with the plaintiff for the award of the licence as at an end or that Smart is entitled to any further period within which to satisfy ComReg’s requirements.

Judicial Discretion

283. The relief which is sought by Smart is declaratory. The grant of declaratory relief is a matter for the discretion of the court. I have already refused it. Lest however I am wrong in so doing, I propose to express my views as to whether, even if Smart had made out a case, the court ought as a matter of discretion to grant the declaratory relief sought.

284. If I had found in favour of Smart on the substantive claim I would have been disinclined to grant the declaration sought. This is because of the behaviour of Smart, both in its dealings with ComReg and with this court. I do not find its methods of trying to solve its problems in the least bit attractive. Part of the tactics set out in the email of Mr. Casey, of 29th January 2006, were, in my view, carried into effect.

285. The deliberate attempt to try and “engineer” a situation where ComReg would feel pressured to grant a further extension of time was not an honourable way to behave towards it. Assertions were made in support of this approach which were not correct. That in

particular arose in the material which I have already identified from Smart's solicitors of 30th January, 2006.

286. Whatever about the approach adopted by Smart towards its regulator, it is an entirely different matter when it comes to dealing with the court.

287. From the outset Smart asserted its entitlement to a decree of specific performance. It was never in a position to provide bonds fit for purpose and had not obtained, either from its banks or its partners, the necessary approval in respect of them. It could never have obtained a decree of specific performance and such should not have been claimed.

288. I deprecate the obtaining of an *ex parte* interim injunction on the basis of sworn material which, in one important respect, was simply untrue. I have already identified that averment earlier in this judgment. I cannot see how such an averment could have come to be made by the deponent. There might be some explanation if the affidavit had to be sworn in great haste. Such was not the case. The application to Laffoy J. came at the end of a moratorium of in excess of ten days which gave ample time to ensure that all of the facts deposed to were correct. Whilst an apology was tendered for this during the trial that does not remedy the position.

289. Apart from the specific performance claim other claims were maintained right up to the trial. Many of them were abandoned or not pursued amidst a number of shifts in position which occurred during the course of the hearing.

290. I do not believe that Smart dealt with ComReg in an appropriate fashion. Neither did it do so with the court.

291. In such circumstances, even if I had found that there had been some breach of Smart's entitlements I would have required a lot of persuasion before I would have been prepared to grant declaratory relief.

A Final Matter

292. It is suggested that by refusing the relief sought, Eircom will be the beneficiary of the licence. It is not now a new entrant to the market. Thus an enhancement in competition in the 3G market will be frustrated. Such a result does not assist in achieving the purpose of the relevant legislation, it is said.

293. This court cannot usurp the function of ComReg, nor should it. Having dismissed Smart's claim it is now a matter for ComReg, and it alone, as to what should occur in relation to the competition.

Result

294. The action is dismissed.

Appendices