IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE G154 OF 2023

THE KING

(On the application of INFINITY BROADBAND LIMITED)

(trading as C3 PURE FIBRE)

Applicant

-and-

THE UTILITY AND COMPETITION OFFICE

Respondent

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances:

Mr Chris Buttler KC of counsel and Ms Sally Bowler of McGrath Tonner for the Applicant

Mr Sam Grodzinski KC of counsel and Ms Anna Peccarino of Travers Thorp Alberga for the Respondent

Heard: 20 November 2023

Draft Judgment

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JUDGMENT ON APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW

Introductory

1. The Respondent issued a Notice of Possible Contraventions of Licence Conditions to the Applicant on 6 July 2022 (the "Initial Notice"). The main regulatory complaint being non-payment of license fees. The Applicant asked the Respondent to clarify how the Royalty Fee portion of the license fees had been defined, and the Responded replied on 16 February 2023. The Applicant, acting by its attorneys, invited the Respondent to revoke the Initial Notice, in a McGrath Tonner letter dated 17 March 2023. The main basis of the revocation request was the contention that the Respondent had no power to impose a Royalty Fee or Regulatory Fee, because under section 30 of the Information and Communications Technology Act (2019 Revision) ("ICTA"), such fees could only validly be imposed through regulations.

2. The Respondent issued an Enforcement Notice pursuant to section 91(9) of the Utility Regulation and Competition Act (2021 Revision) on 18 August 2023 against the Applicant (the "Enforcement Notice"), further to the Initial Notice. By an Application for Leave to Apply for Judicial Review filed on 29 August 2023, the Applicant:

   (a) sought leave to seek judicial review, an interim stay of the Enforcement Notice if leave is granted, a declaration that the Applicant was not liable to pay the "License Fee", an order of certiorari quashing the Enforcement Notice, a declaration that it is not liable to pay the License Fee and restitution of all License Fee payments it has made; and

   (b) appealed against the Enforcement Notice under section 91(11) of the Utility Regulation and Competition Act (2021 Revision) ("URCA") and applied for a stay of the Enforcement Notice pending the appeal, further or alternatively, pursuant to GCR Order 55, Rule 3(3).

3. Although the Applicant applied for leave on an ex parte basis to be considered on the papers, the Applicant gave notice of its application for leave to the Respondent in accordance with the Respondent's request that the Applicant do so made in pre action correspondence. On 14 September 2023, Justice Walters directed that the application should be initially listed for an *inter partes* hearing. How this influences, if at all, the way the basic leave filter should be applied is important to the disposition of the present application. Because I had little doubt from the outset that had the Applicant's carefully crafted application for leave to seek judicial review been dealt with on an ex parte basis, I would have been minded to grant leave. I have dealt with many applications for leave to seek judicial review, but had no recollection of ever dealing with an initial leave application on an *inter partes* basis.

The applicable legal test for granting leave to seek judicial review

4. Mr Buttler KC relied in oral argument primarily upon a classical statement of the principles governing leave to seek judicial review. In *Reg.-v- I.R.C., Ex p. National Federation of*

Self-Employed and Small Businesses Ltd. [1982] A.C. 617, Lord Diplock opined in his speech (at 642-643) as follows:

> "*The procedure under the new Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or 'threshold', stage is regulated by rule 3. The application for leave to apply for judicial review is made initially ex parte, but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether 'it considers that the applicant has a sufficient interest in the matter to which the application relates.' So this is a 'threshold' question in the sense that the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first stage. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.*
>
> *The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.*" [Emphasis added]

5. The Applicant's Skeleton Argument cited two additional authorities which suggested a light-touch leave test: *Knibbs-v-Revenue and Customs Commissioners* [2020 1 WLR 731 at paragraph 25 ("*no more than a filter to weed out groundless cases*") and *R v Secretary of State for Trade & Industry ex p Eastaway* [2000] 1 WLR 2222 at 2227H ("*primarily to protect public bodies against weak and vexatious claims*"). In the first case, leave had been granted *ex parte* on the papers and the applicable test does not appear to have been directly

in issue. In the second case, the House of Lords was only directly concerned with leave to appeal against the refusal of a renewed *inter partes* application for leave by both the high Court and the Court of Appeal, after the initial ex parte application had been refused on the papers. According to Lord Bingham (at page 2223G), the Court of Appeal refused to grant leave to seek judicial review on the grounds that the application was "*misconceived*".

6. Finally, reliance was placed by the Applicant on *Peerless Limited-v-Gambling Regulatory Authority* [2015] UKPC 29 where Sir Paul Girvan stated:

> "*24. A refusal to grant leave to apply for judicial review is a final and terminating decision which precludes a party from having the merits of his case considered at a substantive hearing. The power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way. In its armoury of powers the court has other less draconian ways of marking its disapproval of the conduct of a party and its legal advisers. It can, for example, make a wasted costs order against the legal advisers, it may disallow costs or it may award the costs of the proceedings for the leave application to the respondent even if leave is granted. As noted by Harrison J, it can have regard to the lack of candour when exercising its overall discretion in relation to the question of whether leave should be granted on the merits of the case…*" [Emphasis added]

7. Mr Grodzinski KC relied upon a test which was expressed in more rigorous terms. He referred the Court to *Sharma-v-Brown-Antoine* [2007] 1 WLR 780 where Lord Bingham and Lord Walker (at paragraph 14) summarized the governing principles as follows:

> "*(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the*

issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:

> *'... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733."

8. The Respondent's counsel noted that Richards J approved the test in *Sharma* in *Cayman Islands Urgent Care Ltd-v- Director of Public Prosecutions*, G103 of 2022, Judgment dated 16 February 2023 (unreported). In the latter case, leave was granted on the papers. In *Sharma*, Jones J at first instance (in the High Court of Trinidad and Tobago) had granted leave ex parte and refused the respondents' *inter partes* application to set aside leave. She described the purpose of the leave filter as being, *inter alia*, "*to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error*"[1], in precisely the same way the Applicant contends the leave application should be approached. The Court of Appeal of Trinidad and Tobago set aside the grant of leave and the Privy Council upheld the decision of the Court of Appeal.

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[1] As quoted by Lord Bingham at paragraph 17.

9. Central to the Privy Council decision in *Sharma* was not a conceptual critique of the appropriate merits test, but rather a critical evaluation of the way in which the test had been applied in the context of the *inter partes* leave hearing. For instance, Lord Bingham noted (at paragraph 24) that as a result of the way the case had been argued before her, the Judge had "*approached the question of arguability without any recognition of the very ambitious case the Chief Justice was seeking to establish*". This clearly suggests the need to fully evaluate points which can be assessed at the leave stage in the context of an *inter partes* hearing. The need for scrutiny was clearly higher in *Sharma* than might ordinarily be the case because a review of the decision to prosecute is "*is an exceptional remedy of last resort, for all the reasons which Lord Bingham and Lord Walker identify in paragraph 14*" (Baroness Hale, Lord Carswell and Lord Mance at paragraph 30).

10. In my judgment Mr Grodzinski KC was nonetheless right to submit that there was a single test for the grant of leave to seek judicial review but that the Court in appropriate circumstances may determine that an application has no realistic prospect of success with the benefit of full argument at the leave stage. In effect he submitted that the Court could and should refuse leave in the present case because the application pivotally turned on a point of law which the Court could fairly determine had no realistic prospect of success at the leave stage. In my judgment the Court when invited to determine a point of law which does not depend on contentious evidence at the leave stage is taking the "draconian" step of denying an applicant a substantive hearing on the merits. It is in effect according the applicant an accelerated substantive hearing, an approach an applicant with merits on its side should welcome rather than scorn.

11. Further support for this view of the law based on the submissions of counsel can be found in a case not referred to in argument. *Cable & Wireless (Cayman Islands) Limited v. Information and Communications Technology Authority* [2007 CILR 273], Smellie CJ (as he then was) following an *inter partes* hearing set aside his earlier *ex parte* order granting

leave to seek judicial review. In a decision which was upheld by the Cayman Islands Court of Appeal[2], Smellie CJ held:

> "*77 This, in the end, is an argument which must also fail on the same basis that given the nature of the statutory scheme and regulatory policy, which vests a clear discretion in the Authority whether or not to intervene, there can be no arguable case that it has an obligation, at the mere behest of a service provider, to do so. That being so, the ordinary rule as stated by the Privy Council in Sharma v. Brown-Antoine must apply ([2007] 1 W.L.R. 780, at para. 14):*
>
> *'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospective of success and not subject to a discretionary bar such as delay . . .*'

12. In summary, I find that leave to seek judicial review should be granted where the application has arguable merits but refused when the application has no realistic prospect of success. While the test itself is not a fluid one, it will for obvious forensic reasons generally be easier to obtain leave at an ex parte hearing where the merits of the application are not tested by adversarial argument. Obtaining leave will generally be more difficult if leave is sought (or sought to be continued) at an *inter partes* hearing where it is possible for the merits to be fully and fairly evaluated.

13. It is accordingly necessary to consider whether the present application is one where the merits cannot fairly be determined without adjourning the application to a final hearing, either by granting leave or by having a further "rolled-up" hearing on leave and substantive relief as Mr Buttler KC suggested in reply.

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[2] [2008 CILR Note 6].

Are there grounds for not determining the merits of the application at this stage?

14. The Applicant's own framing of its case acknowledged that the application was centrally grounded in questions of law. In its Skeleton Argument, the Applicant submitted:

> "*2. There are two substantive issues:*
>
> *2.1. First, the result of the English Civil War was that only Parliament can authorise the imposition of taxes. The Respondent advances the remarkable contention that it (an administrative body) can tax ICT providers on behalf of the Crown in whatever way and at whatever rate it sees fit. The question is whether Parliament has authorised such an extraordinary thing.*
>
> *2.2. Second, the Applicant's Licence states that a regulatory fee (charged to cover the Respondent's costs of regulating the ICT sector) is payable once it has been published. The question is whether published means 'published' or, as the Respondent contends 'communicated privately'. A further, related issue is whether the Respondent is unlawfully using the ICT regulatory fee and/ or Government funding to cross-subsidise the cost of regulating other sectors.*
>
> *3. These are clearly live, arguable issues of significant constitutional importance for the Cayman Islands. The Respondent's contention that the claim for judicial review should be hived off and summarily dismissed does not bear analysis.*"

15. Putting to one side the proposed additional new complaint of unlawful cross-subsidising, the Applicant's central case is that the license fees which the Respondent claims are due and payable cannot lawfully be recovered. This is said to be because as matter of legal principle and statutory interpretation, the applicable constitutional and statutory scheme does not permit such fees to be levied either at all or in the manner the Respondent has purported to levy them. There is no suggestion that these legal questions are fact sensitive ones which require full evidential analysis based on material not presently before the Court. It is fairly contended that the application ought not to be "*summarily dismissed*". However,

the Respondent in opposing the leave application was not inviting the Court to summarily dismiss the leave application. The hearing:

(a) was listed for 1 day;

(b) took place with both parties represented by Leading Counsel specialising in regulatory law;

(c) entailed the consideration of, in addition to written skeleton arguments running to 15 and 13 pages respectively, a Hearing Bundle running to over 475 pages, two Authorities Bundles from the Applicant and one Authorities Bundle from the Respondent.

16. If I was required to decide the application had no realistic prospect of success, it would certainly not be on a summary basis. The Applicant advanced another seemingly compelling argument against 'grasping the nettle' now. Its appeal raised the same core points and leave was not required to proceed with the appeal. However, the Respondent's straightforward answer was that the determination of the legal arguments in the Respondent's favour would mean that the Applicant's statutory appeal would also lack merit:

> "*47. Thus in the event that the Grand Court refuses Infinity's application for leave, Infinity will be invited to withdraw its statutory appeal and restitution claim. If Infinity fails to do so, the Office reserves its right to issue such summonses to protect its position as are necessary (including potentially for summary judgment and/or to prevent an abuse of the Court's processes and/or to establish that Infinity should be estopped from bringing its appeal and/or restitution claim).*"

17. In summary, I find no good or substantial reasons for adopting the standard *ex parte* 'light-touch' approach to the leave filter and not fully engaging with the arguability and/or merits of the legal points raised by the Applicant at the leave stage. It matters not that the Applicant's case would likely have been acceded to had an *ex parte* application been made. If leave had been granted without hearing from the Respondent, the Court would still have

been required to fully consider the Respondent's legal submissions in the context of an *inter partes* application to set aside leave.

18. The Respondent raised delay, seemingly as a freestanding ground for refusing relief. GCR Order 53 rule provides:

> "*An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made*".

19. The extent to which delay is a complete answer is not straightforward because I am not presently clear as to precisely what the Applicant's restitutionary claim actually is. On balance, I find that it is not a complete answer to the application to the extent that it seeks to invalidate the Enforcement Notice and does not necessarily look back to what happened years ago. However, delay is relevant in a general sense to the question of whether the Court should not make the essentially case management decision of deciding the contentious points of law sooner rather than later. The Preamble to the Grand Court Rules creates the judicial obligation of "*actively managing cases*" (paragraph 4.1), which includes "*identifying the issues at an early stage*" (paragraph 4.2 (a)), "*considering whether the likely benefits of taking a particular step will justify the cost of taking it*" (paragraph 4.2 (g)) and "*dealing with as many aspects of the proceeding as is practicable on the same occasion*" (paragraph 4.2 (h)).

20. In the public law context, moreover, there is a presumption of regularity in relation to official acts, and the Court should not be blind to the obvious fact that prolonging the present proceedings, if they truly lack merit, will only prejudice the public purse and extend the duration of the period when the Applicant can refuse to pay the impugned license fees. This is very much what the leave filter is designed to deter. In public law cases, perhaps more so than in private law cases, "kicking the can down the road" will rarely be good case management. I do not propose to do so in the present case. There is no discernibly material justification consistent with the Overriding Objective for not deciding now the merits of

legal questions which have been fully argued at the interlocutory stage. After all, if the legal points the Applicant relies on are meritorious, it will only benefit from an early determination of the central underpinning for its claims.

The constitutional point: are the license fees charged by the Respondent **unlawful unauthorised taxation?**

21. The Applicant submitted, as noted in paragraph 14 above, that the first question which arose was whether the Respondent was right that it could impose what amounted to a tax without Parliament's approval. Although the Skeleton Argument appeared to rely solely on the English law position under the 1688 Bill of Rights, at the hearing reliance was properly based on the Cayman Islands Constitution. The Respondent did not dispute that Parliamentary approval was required for the Respondent to impose a "coercive element". Instead, it was argued that it was clear that the requisite approval had in fact been conferred.

22. Under section 15 of the Cayman Islands Constitution Order 2009, private property may only be acquired by law or under the authority of law if adequate compensation is provided. The exceptions to this general rule include, under subsection (2) (a), provisions of law providing for the acquisition of property:

> "*(i) in satisfaction of any tax, rate or due…*"

23. The Applicant's counsel also relied on the following provision in the same instrument:

> "***Revenue and Expenditure***
> *111.—(1) The Legislature shall have the authority to levy or change the rates of revenue unless otherwise provided by law.*
>
> *(2) All Government expenses, assets and the incurrence of liabilities shall require appropriation by the Legislature, unless otherwise provided by law.*

(3) A law enacted by the Legislature shall govern the operation of the Government's financial system and processes."

24. It is clear that taxes or any other charges raised for use by the Government may only lawfully be imposed "*by law*" as the Applicant contends. The only controversy ultimately was whether the relevant license fees are validly imposed by law. It was common ground that a 6% of gross turnover element of the license fees charged by the **Respondent** was designed to raise revenue for the Government. The Applicant in its Skeleton Argument relied on the following statutory provisions and raised the following legal questions:

"*15. Section 30(1) provides:*

'A licence granted under this Law shall be subject to the prescribed licence fees which shall be determined by the Office'.

16. There are two relevant definitions:

16.1. Licence fees 'means the initial, annual or renewal fees for a licence payable to the Authority by an applicant or a licensee' (s.2 ICT Act).

16.2. Prescribed means 'prescribed by the Law in which the word occurs or by any regulations made thereunder, and, in relation to any regulations, where no other authority is empowered in that behalf in the Law, prescribed by the Governor in Council' (s.3 Interpretation Act).

17. This raises the questions:

17.1. First, does a power to charge a 'fee for a licence' confer a power to set and levy a tax on turnover for use by the Crown?

17.2. Second, if so, is the Respondent authorised to prescribe taxes for use by the Crown at whatever rate and in whatever manner it sees fit?

17.3. Third, is the Respondent free to set taxes without even prescribing regulations?"

25. The Respondent firstly countered that the license fees themselves did not have to be prescribed but merely had to be determined. This was said to comply with the definition of "*prescribed*" in section 3(1) of the Interpretation Act. That seemed to me at first blush to be a doubtful argument. Public fees are normally promulgated in some formal way and published. The Respondent's alternative argument, as developed by Mr Grodzinski KC in oral argument, seemed to me to be potentially more powerful. The Respondent's Skeleton Argument submitted:

"*25. Further and alternatively, if (contrary to the above) there is a requirement for licence fees to have been prescribed in 'regulations' (whether under section 30 and/or section 97 of the ICT Act), then the Licences issued to Infinity in 2004 and 2021 satisfied the definition of that term.*

26. As noted in Infinity's SFG at §12, section 3(1) of the Interpretation Law states: ''regulations' incudes rules, bye-laws, proclamations, orders, schemes, notifications, directions, notices and forms'. These are wide words, and encompass documents of a formal character issued by a public authority, giving rise to legal rights and obligations, such as a licence issued under the ICT Law.

27. Consistently with this, 'regulations' under section 3(1) of the Interpretation Law are not limited to those which are subject to an affirmative or negative resolution of the Legislative Assembly, as set out in section 28(2) and (3) of the Interpretation Law.

28. Further, and as set out in paragraph 5 above, the fees were set in the Licence following consultation with the Minister and so satisfied (to the extent relevant) any requirement for Ministerial consultation in section 97(3) of the ICT Act."

26. In my judgment it is ultimately clear that section 30(1) did indeed require the fees to be prescribed either by primary legislation or by regulations and that 'regulations', contrary to my instinctive assumptions, may take different forms. The term "*regulations*" is defined in section 3(1) of the Interpretation Act in an open-ended way. The legislative purpose underpinning can only be to allow a wide array of public authorities operating in an infinite variety of legal and factual contexts to implement Parliamentary prescriptions in an appropriate manner. Some regulations are styled "regulations" and drafted in a manner which is similar to primary legislation. The Government Fees Act (Revision), for example, itself sets out an initial schedule of fees, in list form. The Act empowers Cabinet to revise the Schedule "*by order*". Such orders look nothing like the instruments which are formally styled as "regulations" but clearly fall within the statutory definition as such. Because the "order" amends the Schedule to an Act, the amendment is published as part of the laws of the land.

27. The ICT Act approach is simply one of many potential ways in which Parliament may authorize matters which primary legislation requires a public authority to prescribe to be both formulated and brought to the attention of persons affected. The general public are not, or not obviously, directly interested in the Act. Commercial entities applying for licenses are. Section 30 provides very simply:

> "*(1) A licence granted under this Law shall be subject to the prescribed licence fees which shall be determined by the Office'.*
>
> *(2) The licence fees referred to in subsection (1) shall be payable directly by the applicant to the Office at such time or times as may be prescribed by the Office.*"

28. There is no publication requirement in section 30 itself. However, section 34, to which the Respondent's counsel referred, provides:

> "***Register of applications and licences***

34. (1) The Office shall cause to be kept a register of all applications for licences received by it and all such licences and such register may be kept in electronic form.

(2) The Office —

(a) shall make available for public inspection during its business hours, applications and licences; and

(b) *may permit any person to make copies of any entry in the register and may charge such fees as it considers reasonable for such copies*."

29. There is therefore mandated by the Act a form of publication of licenses because the license itself is required to be entered in a register open to public inspection. The License in this case merely sets out the methodology for calculating the License Fee, which includes 6% of the Licensee's quarterly revenue. This type of "regulation" is, upon analysis, in substance not fundamentally different to what one ordinarily conceives a 'regulation' to be at all. Section 97 also makes it clear that fees must be promulgated through regulations, and further imposes an additional requirement of Ministerial approval:

"*(3) The Office —*

(a) after consultation with the Minister, may make regulations relating to —

(i) licence fees…"

30. Mr Grodzinski KC in this regard referred to the Public Management and Finance Act (2020 Revision), which creates an elaborate framework for Government Budgeting including plans and estimates (section 24) which is ultimately subject to Parliamentary oversight. The Plans and Estimates for the years ending 31 December 2022 and 2023 respectively

include a line item for "*ICTA Licenses*". This demonstrates that the suggestion that the **Respondent** is fixing the coercive element of its license fees effectively on a frolic of its own is hopeless. The more fundamental point dispositive of Ground 1 is that it is clear as a matter of statutory interpretation that the relevant fees have been "*prescribed*" in accordance of law.

31. For these reasons, I reject the Applicant's case that the Respondent had no lawful constitutional or other lawful authority to impose the "tax" element of the license fees. The requisite authority was conferred by the ICT Act which itself contained a mechanism for the **Respondent** to be subject to Ministerial oversight. When the ICT Act is read together with the Public Management and Finance Act, it is clear that the Respondent in raising revenue was subject to Parliamentary oversight as well.

Was the imposition of license fees unlawful because of a failure to publish them?

32. The second limb of the Applicant's invalidity case alleged a breach by the Respondent of the following terms of the License itself:

"*The amount of the fee shall be established and published by the Office thirty (30) calendar days prior to each Quarter, and shall be based on data from the Quarter immediately preceding the Quarter in which the date of publication falls.*" [Emphasis added]

33. Why publication should be a precondition to liability to pay in circumstances where a license-holder is aware of what they are required to pay was not articulated in any coherent or convincing manner. The fact that there might arguably be some public interest in scrutiny by other providers of how various fees were being calculated, despite the fact that the calculation was based on confidential commercial data, is beside the point. The present regulatory regime has clearly been in operation for years with no general publication of this sensitive data taking place and no suggestions that it should be taking place. The Applicant submitted in its Skeleton Argument in answer to the Respondent's response to this point:

"*31. None of its arguments come close to showing that this issue should not be determined at a substantive hearing…*"

34. This was an evasive response to points to which the Applicant was clearly unable to formulate a coherent answer:

(a) there was no statutory obligation to publish the fees, so their legality could not depend on publication occurring;

(b) in the context of Annex 2 of the License, read in conjunction with the Office's Guidelines, publication meant communicated to the license holder because of the commercially sensitive character of the information upon which the computation of the fee is based. Any publication requirement had accordingly been met.

35. In the context of an *inter partes* application for judicial review, the onus on an applicant to make out a case with realistic prospects of success cannot be discharged by a bare plea that a full inquiry as the merits should be postponed until trial. In any event, I find that the Applicant's liability to pay is not invalidated by a failure to publish the "Regulatory Fee" for the reasons contended for by the Respondent. In summary:

(a) I accept that it flows from my finding that the License itself is a regulation that a failure to comply with certain provisions of the License by the Office might potentially invalidate the Office's determination of the amount of the License Fee;

(b) I accept that the primary legal meaning of "*publish*" is "*to bring it to the attention of the public*": '*Stroud's Dictionary of English Law*' 5th edition, upon which the Applicant's counsel fairly relied. That text refers to another text for discussion on "*other contexts*";

(c) my own researches confirm that at least one online legal dictionary identifies a secondary meaning of the word "publish" as "*to proclaim officially [an enactment]*"[3], which is consistent with my construction of the usage of the term in the License;

(d) I can discern no rational justification in any event for construing the License as making publication to the public at large a condition precedent for liability to pay the License Fee. Notification to the Licensee of the amount of the fee is clearly (as a matter of common sense) a precondition for liability to pay. The definition of "Regulatory Fee" in paragraph 1.1 of Annex 2 states: "…*The amount of the fee shall be established and published by the Office thirty (30) calendar days prior to each Quarter*…";

(e) "*Published*" in the present context can only sensibly mean published to the licensee so it knows what it is required to pay.

Proposed new ground 2b: should leave to amend be granted?

Is leave required?

36. By a Summons dated 14 November 2023, the Applicant sought leave to amend its Application for Leave to Apply for Judicial Review to add the following new (or reformulated) ground:

"*GROUND 2b-the Respondent has charged a Regulatory Fee to the Applicant that includes an unlawful cross-subsidy for the Respondent's costs of regulating other sectors and/or fails to represent the Applicant's pro-rated share of sectoral revenue. The Respondent has frustrated the Applicant's ability to investigate this point by (a) not publishing the information required by the License (ground 2a), (b)*

[3] https://dictionary.findlaw.com/definition/publish.html.

refusing to provide this information under its duty of candour and cooperation within these proceedings, and/or (c) failing to produce or publish a detailed report of the performance of each of the sectors for which it has responsibility for 2002, in breach of s. 41 (3) of the Utility Regulation and Competition Act."

37. The "unlawful cross-subsidy" ground was not included in the original grounds. Those were described in the Application as follows:

"*3. In summary, the grounds for judicial review and appeal are:*

3.1 First, the Respondent has no power to charge the Applicant the Royalty or Regulatory Fee unless and until it makes regulations prescribing a Licence Fee under the ICT Act. Having failed to do so, the Respondent's demands for payment of the Royalty or Regulatory Fee are of no legal effect.

3.2. Second, the Respondent has no power to charge the Applicant the Regulatory Fee unless and until it publishes the amount of the fee in accordance with the terms of the Licence. Having failed to do so, the Respondent's demands for payment of the Regulatory Fee are of no legal effect.

38. In paragraph 5, three reasons were set out for granting leave on the papers. The last stated:

"*5.3 Third, the claim is of wide public importance. If the claim is well-founded, the Respondent has unlawfully extracted millions of dollars of Royalty and Regulatory Fees from the Applicant and other ICT service providers. It also appears that the Respondent may have used the Regulatory Fee to subsidise its costs of regulating other sectors.*"

39. The Grounds of the Application and Appeal were formally set out in section F:

"***F.1 GROUND 1-NO POWER TO CHARGE ROYALTY OR REGULATORY FEE***

47. For the reasons set out at sections B-D above, the Respondent is not empowered to charge ICT licence fees unless and until such fees are prescribed by regulations. ICT licence fees have not yet been prescribed by regulations. Accordingly, the Respondent has no power to require the Applicant to pay Royalty or Regulatory Fees under the 2021 Licence, and had no such power under the 2004 Licence.

F.2 GROUND 2-FAILURE TO SATISFY THE CONDITIONS FOR PAYMENT OF THE REGULATORY FEE

48. The Regulatory Fee is not payable for the reasons set out under ground 1 above. Alternatively, the Regulatory Fee is not payable unless and until the Respondent triggers the obligation to pay under paragraphs 1.1 and 1.2 of Schedule 2 to the Licence and, to date, it has not done so…"

40. Section F.2 concludes its elaboration of Ground 2 with the following averment:

"*53. In the absence of transparency, the Applicant is concerned that the Respondent is attempting to charge a Regulatory Fee to the Applicant that includes an unlawful cross-subsidy for the Respondent's costs of regulating other sectors and/or unlawfully fails to represent the Applicant's pro-rated share of sectoral revenue. In these proceedings, the Respondent should disclose its method for determining how much of its overall costs are attributable to regulating the ICT sector, its costs of regulating the ICT sector, and the distribution of those costs between ICT providers.*"

41. The cross-subsidy point is not advanced as a freestanding ground for invalidating the impugned payment obligations. Rather the need to ensure that cross-subsidisation is not occurring is one of several arguments supporting the proposition that publication is an essential condition precedent for the Applicant's liability to pay. The Applicant does evince an intention to investigate whether or not such cross-subsidisation, which it is said (without any particularisation) would be unlawful, has occurred. Indeed in pre-action

correspondence it sought without success information which would enable it to investigate these matters and, properly in my judgment, elected not to advance (through positive evidence) a ground of complaint it knew it could not substantiate. There lies the Achilles heel of (1) the half-hearted assertion that the point is already, perhaps imperfectly, already pleaded and (2) for the reasons set out below, the amendment application itself.

42. In these circumstances I am bound to find that although the cross-subsidisation issue was mentioned in the Application as a factor supporting of the Applicant's case on Ground 2, it was not raised as a freestanding ground. Leave to amend to advance a new ground 2b is accordingly required. In reaching this conclusion, and approaching the amendment Summons below, I have been guided by judicial observations about the need for procedural rigour in public law cases upon which Mr Grodzinski KC relied. In *Talpada (R, on the application of)-v-Secretary of State for the Home Department* [2018] EWCA Civ 841, Heather Hallett LJ opined as follows:

> "*69…Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation.*"

Should leave be granted?

43. The Affidavit of Rees Jones of McGrath Tonner dated 15 November 2023 was sworn in support of the amendment Summons. He avers:

> "*6. Initially, the respondent refused to disclose the information requested on the premise that such disclosure was not required for the Court to determine the claims set out in the Application for Leave (page), and then latterly (at pages 6 and 7) on the premise that the disclosure was not relevant to the Applicant's pleaded claims.*

> *7. In the circumstances, the Applicant is unable to confirm whether, and if so to what extent, the Respondent has charged a Regulatory Fee to the Applicant that includes an unlawful cross-subsidy for the Respondent's costs of regulating other sectors and/or unlawfully fails to represent the Applicant's pro-rated share of sectoral revenue.*"

44. It is therefore frankly acknowledged that the Applicant does not presently have a basis for advancing the essentially factual allegation that the Office is in fact assessing payments in a way which overcharges the Applicant and other members of the Applicant's sector to cover the costs of regulating other sectors. Paragraph 9(b) of the Jones Affidavit cites figures from the Respondent's 2020 Annual Report which confirmed that the revenue generated from regulatory fees charged to the Applicant's sector are indeed larger than those derived from other sectors:

> "*iv. the balance of the Respondent's revenue for 2020 was generated by regulatory fees of Cl$ 2,940,419, license fees of Cl$ 393,380 (payable by the ICT sector) and permit fees of Cl$ 137,716 (payable by the fuel sector).*
>
> *v. The water sector cost the Respondent Cl$ 489,274 and generated revenue of Cl$ 293,507; vi. the ICT sector cost the Respondent Cl$ 2,018,929 and generated revenue of Cl$ 2,255,441;*
>
> *vii. the Fuel sector cost the Respondent Cl$ 1,274,794 and (including the output revenue paid by the Government) generated revenue of Cl$ 1,532,173 (with the balance paid by the fuel sector providers by way of permit fees).*
>
> *viii. Regulatory fees of Cl$ 2,940,420 were paid by each sector as follows: 1. Electricity - Cl$ 1,215,000; 2. Water - Cl$ 280,261; 3. ICT - Cl$ 1,445,159; and 4. Fuel - Cl$ 0.*"

45. The Applicant boldly submitted in its Skeleton Argument that this evidence was "*prima facie evidence of unlawful cross-subsidy*". It is impossible to infer from the relevant evidence that the Office, with the connivance (or negligent oversight) of the members of Government and Parliament charged with raising revenue under the Public Management and Finance Law has:

(a) fixed a regulatory fee for the ICT sector at a level intended to generate excess revenue; and

(b) applied the 'excess' to support the costs of regulating other sectors.

46. Mr Grodzinski KC submitted that all this evidence showed was that the Government was having to subsidize the costs of regulating those sectors whose revenues fell short and was not having to subsidise the ICT sector. Mr Buttler KC did not have the temerity to pursue in oral argument the suggestion that the presently available evidence supported a prima facie case of unlawful cross-subsidisation. Instead, he focussed his attack on the Respondent's duty of candour as a basis for requiring the Respondent to disclose information which would enable the Applicant to verify whether or not an arguable new ground could be formally pursued.

47. It is clear that there are circumstances in which the respondent to a judicial review application will be expected to disclose material, with or without a formal discovery order, which might fortify the Applicant's case. Here, however, the Applicant was really contending that the Respondent had a duty to disclose material which might enable an entirely new case to be advanced. The Applicant's counsel referred to one well-known authority which elucidates the governing principles. In *R-v- Lancashire CC* [1986] 2 All ER 941, Sir John Donaldson MR observed (at pages 946g-947a:

"…*Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But* <u>*it is a process which falls to be conducted with all the cards face*</u>

upwards on the table and the vast majority of the cards will start in the authority's hands…

The legal, as contrasted with the evidential, burden being on the applicant to establish his entitlement to relief, [judges] are entitled and are very willing to assume that the authority has acted in accordance with law, until the contrary is proved. But authorities assist neither themselves nor the courts if their response is a blanket assertion of having acted in accordance with law or one which begs the question. If the issue is whether the authority took a particular factor into account, it will be sufficient response to say that it did. But if the allegation is that a decision is prima facie irrational and that there are grounds for inquiring whether something immaterial may have been considered, it really does not help to assert baldly that all relevant matters and no irrelevant matters were taken into consideration without condescending to mention some at least of the principal factors on which the decision was based." [Emphasis added]

48. The present case is far removed from the context of a decision being alleged to be irrational or indeed any other context where the merits of the applicant's grounds can only be fairly evaluated through the disclosure of information the Respondent alone holds. The Respondent is not being asked to assist the Court to understand the presently pleaded grounds at all, nor even to identify other similar forms of legal or procedural errors. The request here is for disclosure of material which would potentially enable the Applicant to advance a new case of serious wrongdoing by, *inter alia*, the Respondent which there is presently no plausible basis for believing has occurred. This Court has previously determined that a public authority's duty of candour must be carefully circumscribed. In *Maples Corporate Services Limited-v-Cayman Islands Monetary Authority*, G/2001, Judgment dated (unreported), I held:

"*24. I accept that the duty of candour is generally as broad as the Plaintiffs contended, but also accept that there must be some connection between what must be disclosed in any particular case and the matters which fall for determination as the Authority argued. There is a duty to disclose material which is potentially*

relevant to unpleaded grounds, but the Court can control the discovery process to prevent a disproportionate amount of time and costs being expended by public authorities on giving discovery in relation to documents which are of peripheral concern. I accordingly accept the Authority's counsel's submission this Court should also adopt considerable restraint when deciding to make specific discovery orders; and that general discovery ought not generally to be ordered in public law cases (general discovery was not ordered in this case). As Sir John Laws observed in Graham-v-Police Service Commission and Attorney General of Trinidad and Tobago [2011] UKPC 46, in a passage upon which Mr Robinson QC relied:

> *'18. It is well established that a public authority, impleaded as a respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision.* '" [Emphasis added]

49. It might be said that there is a sufficient contextual connection between the Grounds 1 and 2 as presently pleaded and the proposed new ground in that they all support the same broad complaint that the fees have been unlawfully levied. In my judgment this does not answer what I consider to be the main objection to the suggestion that the duty of candour requires the Respondent to supply information relating to the cross-subsidisation issue. As Travers Thorp Alberga pointed out in a 6 November 2023 letter to McGrath Tonner, the concern about cross-subsidisation is based on "*speculation*" in circumstances where the Applicant has "*no evidence to support the serious allegation of allegedly unlawful cross subsidy*". The Applicant's request for information in this regard therefore "*amounts to an impermissible fishing expedition*".

50. Second, reliance was placed on *Sky Blue Sports & Leisure Limited-v-Coventry City Council* [2013] EWHC 3366 where Silber J held it was inappropriate to grant a disclosure order at the permission stage. This case merely establishes that when deciding whether or not to grant leave, the Court can take into account the fact that the applicant's existing case might be fortified by material disclosed in the proceedings. Silber J stated:

> "*25. Lord Diplock said famously that permission would be granted where 'on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case' (R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC617, 644 A (emphasis added)). On a permission hearing, the Court will, and does, consider not only 'the material then available' but also what further relevant material might become available before the substantive hearing in order to decide if the application reaches the threshold for obtaining permission. I do not know enough about this case to give any definite view; the existence of such potentially critical material might conceivably be a good reason for granting permission.*
>
> *25. Indeed, if the Claimants are unsuccessful in the present disclosure application, there is no reason why they cannot point to the fact that they have not had this disclosure so as to fortify their contention that they should be granted permission. In other words, the Claimants would be contending that this is a case which in the words of Civil Practice which I have just quoted 'merits full investigation at a full oral hearing with all the parties and all the relevant evidence'. Indeed, in my experience and the experience of my colleagues, such submissions are treated very seriously and they are very often successful. This could well be a persuasive or a decisive argument on the permission hearing and this fact of life undermines the Claimant's case that the disclosure sought is 'necessary' at this stage."* [Emphasis added]

51. This authority in no way supports the proposition that the Court should permit a judicial review applicant to pursue a complaint that entails allegations of serious misconduct which the applicant is unable to positively assert are even arguably valid. There may be many circumstances where a public authority can reasonably be expected to proffer information which might assist the formulation of a new public law claim. When the true gravamen of ground 2.b and its inherent implausibility are properly understood, it is clear that the present case does not properly engage the duty of candour at all.

52. Nor does *Sky Blue Sports & Leisure Limited* assist the Applicant's case on leave in relation to Grounds 1 and 2. These grounds raise points of law which, as I have already held above, appear to me to be fairly capable of resolution based on an analysis of the legal and factual material presently before the Court.

53. For these reasons the Applicant's amendment Summons must be dismissed.

Conclusion

54. In summary, I resolve the application for leave to seek judicial review on the presently pleaded grounds as follows:

(a) I decline to postpone determining the points of law raised by the Applicant to a further hearing in circumstances where the Court has received the benefit of full *inter partes* argument on two discrete points of law;

(b) leave is refused in relation to Ground 1 because the Respondent has validly made regulations prescribing the License Fee;

(c) leave is refused in relation to Ground 2 because (1) publication of the Regulatory Fee to the world at large was not a condition precedent to liability to pay it, and/or (2) by notifying the Applicant of the amount of the Regulatory Fee the Respondent has complied with the requisite publication requirements in any event.

55. As regards the Applicant's amendment Summons and its application for a stay of the Enforcement Notice pending appeal:

(a) the amendment Summons is dismissed because it is unsupported by any evidence advancing a positive (let alone an arguable) case of unlawful cross-subsidisation. The Respondent's duty of candour does not impose an obligation

to disclose material responsive to unpleaded claims and/or purely speculative concerns;

(b) the application for a stay of the Enforcement Notice pending appeal is granted. This is consistent with basic principles of fairness notwithstanding the refusal of the judicial review leave application since the appeal is still before the Court. The parties shall have liberty to apply for such further directions as may be required[4].

56. I will hear counsel if required as to costs and the terms of the Order but can see no reason why costs should not, in the usual way, follow the event.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

[4] I have dealt with this issue summarily based on comments received on the draft version of this Judgment which was circulated for editorial comments.