IN THE GRAND COURT OF THE CAYMAN ISLANDS

Neutral Citation Number: [2025] CIGC (Civ) 25

CAUSE NO: G154 of 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPEAL UNDER S.91 (11) OF THE UTILITY REGULATION AND COMPETITION ACT (2021 REVISION)

BETWEEN:

THE KING On the application of INFINITY BROADBAND LIMITED

(trading as C3 PURE FIBRE)

Applicant

-and-

THE UTILITY REGULATION AND COMPETITION OFFICE

Respondent

IN COURT

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:	30 June-1 July 2025
Draft Judgment circulated:	13 August 2025
Judgment delivered:	28 August 2025

Application for judicial rule-statutory appeal against enforcement notice-whether royalty fee charged by statutory authority an invalid form of coercive revenue-whether royalty and regulatory fees lawfully "prescribed" by regulations-Cayman Islands Constitution Order 1972-Cayman Islands Constitution Order 2009-Interpretation Act (1995 Revision)-Information and Communications Technology Act (2019 Revision)-Public Management and Finance Act (2020 Revision)-Public Authorities Act (2020 Revision)-Utility Regulation and Competition Act (2021 Revision)-Information and Communication Technology (Validation) Act 2024

JUDGMENT

Preliminary

1. This Judgment concerns whether the Applicant is legally obliged to pay to the Respondent:

   (a) 6% of its quarterly revenue as defined in the Applicant's license (the "Royalty Fee"); and

   (b) the Applicant's pro rata share of the Respondent's costs of regulating the Information Communications and Technology ("ICT") sector (the Regulatory Fee").

2. The Applicant stopped paying the Royalty Fee from the fourth quarter of 2019 and the Regulatory Fee from the third quarter of 2022. On 18 August 2023, the Respondent issued an Enforcement Notice in respect of the Royalty Fee. On 29 August 2023 the Applicant appealed against the Enforcement Notice and applied for leave to seek judicial review seeking a declaration that the Respondent is not entitled to collect either the Royalty Fee or the Regulatory Fee and restitution. The present hearing was limited to issues of 'liability'.

3. On 23 November 2023 following an *inter partes* hearing, I declined to grant leave to appeal holding (1) that the Royalty Fee was not unconstitutional and (2) the license fees as a whole were not invalid because they had not been published. The Applicant appealed against the first holding and by a Judgment dated 29 November 2024, the Court of Appeal set aside that decision and granted the Applicant leave to seek judicial review. The Notice of Originating Motion was filed on 23 December 2024.

4. It is important at the outset to express my surprise at the outcome of the appeal hearing. For the reasons set out in paragraphs 13-20 of my 23 November 2023 Judgment, I had purported

to decide the questions of law placed before me on their merits to avoid the need for a further *inter partes* hearing at the Grand Court level and a delay in determining the questions of law I considered had been fully argued before me almost 2 years ago now. I was concerned about delay because another Judge had declined to grant leave ex parte on the papers and adjourned the application to an *inter partes* hearing. Had I been seized of the matter from the start I would have granted leave on the papers and been dealing with the application on a full inter partes basis within the timeframe that the *inter partes* leave hearing was listed before me. I stated:

> "*20. … 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.*"

5. I had anticipated that any appeal against my refusal of leave would have been determined on the merits in a single appeal. However, for reasons which are unclear from the Court of Appeal's judgment, the appeal against my purported substantive refusal of the challenge to the Royalty Fee was argued on the narrower basis of an appeal against a traditional refusal of leave to seek judicial review, with the parties seemingly content by common accord to each have another day in Court at the first instance level, rearguing both (1) the limb of the application which was actually appealed (the Royalty Fee) and (2) the Regulatory Fee limb of the application even though the Applicant did not appeal against my refusal of leave in that regard.

6. The Royalty Fee challenge had two strands to it. First, the contention that no statutory authority to raise coercive revenue had been conferred on the Respondent. Secondly, it was contended that any such power could only be exercised through regulations and none had been validly made. As the Court of Appeal ultimately concluded, having considered only the second of two strands of the Applicant's case on the Royalty Fee issue:

> "*32. It is not necessary to rehearse Mr Grodzinski's submissions further because, as set out above, it is not our task to decide whether Mr Buttler's or Mr Grodzinski's arguments are correct. It is sufficient to say that, notwithstanding Mr Grodzinski's submissions, the court had no hesitation in concluding that the arguments put forward by Mr Buttler, as summarised above, are arguable grounds for judicial review having a realistic prospect of success.*

> 33. *It is for these reasons that the court allowed the appeal, granted leave to apply for judicial review and remitted the matter to the Grand Court for hearing. I would emphasise that the judge hearing the case will start with a clean slate. On the one hand, view that those arguments have a realistic prospect of success. On the other, this court has expressed no concluded view as to whether, at the end of the day, the Appellant's arguments will succeed.*"

7. In the event, the second incontestably substantive hearing before me was argued over two days (rather than one) and both points were argued in a sufficiently elaborated manner so as to prevent me succumbing to an overpowering sense of *deja vu*. I should also record that at the end of the hearing Mr Buttler KC made it clear that the only declarations sought at this stage related to present liability and that past liability would be addressed at the 'relief' stage.

The Originating Notice of Motion

Ground 1: "No regulations"

8. The essence of the Applicant's case on Ground 1 is captured in the following two paragraphs:

> "5. *Section 30(1) of the ICT Act requires licence fees to be 'prescribed'. Section 3(1) of the Interpretation Act defines 'prescribed' as 'prescribed by the Law in which the word occurs or by any regulations made thereunder', i.e. in primary or secondary legislation. Section 97 of the ICT Act provides for the making of regulations relating to licence fees.*
>
> 6. *The Respondent's position is that the licences issued to the Plaintiff on 14 December 2004 and 1 April 2021 were 'regulations' within the meaning of the ICT Act and the Interpretation Act. The Plaintiff submits that this is wrong in law.*"

Ground 2: "*No authority to charge coercive revenue*"

9. The essence of the Applicant's case on Ground 2 is captured in the following two paragraphs:

"*17. Coercive revenue or taxation cannot be collected except under the 'plain and direct' authority of a law made by Parliament which identifies both the 'particular charge' and the 'rates of coercive revenue'. This follows from sections 15 and 111(1) of the Constitution, section 6(1) of the Public Management and Finance Act (2020 Revision) and the principle in Attorney-General v Wilts United Dairies Ltd (1921) 37 TLR 884 (Court of Appeal), [1922] All ER Rep Ext 854 (House of Lords).*

18. The Respondent's power to make regulations prescribing 'licence fees' under section 97 of the ICT Act does not empower it to prescribe the Royalty Fee."

The Respondent's Statement of Case

10. The liberalisation of the ICT market was in summary described as follows. Between 1966 and 2003, Cable & Wireless paid the Government a revenue-based fee as a monopoly service provider. In 2001 a decision was taken to liberalise the market and the following year the Information and Communication Technology Law (now the Information and Communication Technology Act (2019 Revision) was enacted (the "ICT Act"). It is averred that the ICT License Fees Guidelines explaining this approach were published on 12 November 2003. In 2017 the Utility Regulation and Competition Act was enacted (the "URC Act") and the Respondent "Office" was created.

11. The license fee system for all ICT providers including the Applicant was described as comprising two elements:

(a) the "regulatory fee" representing each licensee's *pro rata* share of the Office's regulatory expenses; and

(b) the "royalty fee" of 6% of each licensee's quarterly revenue, a rate approved by the Cabinet on 5 August 2003 and ordered by the Governor.

12. It is then averred that the Applicant received its first license on standard terms in 2004 and a second license in 2021, raising no challenge to their legal basis. As far as the budgetary process in relation to the Royalty Fee is concerned, this was primarily explained as follows:

> "*20. The 6% royalty fees collected by the Office from ICT licensees formed part of the Government's annual budgeting process which would be approved each year by the Legislative Assembly under the relevant provisions of the Public Management and Finance Law and the annual Appropriations Bill.*"

13. The Applicant is said to have only started providing services to customers in 2015 and paid nearly CI$600,000 in respect of the Royalty Fee and the Regulatory Fee from 2015 to 2023 but ceased paying the Royalty Fee in the fourth quarter of 2019, and the Regulatory fee in the fourth quarter of 2022. Following service of an 'Initial Notice', an Enforcement Notice was issued on the Applicant in respect of outstanding fees on 18 August 2025.

14. As regards the various grounds of complaint in relation to the power to collect the Regulatory Fee, the Respondent's case can be summarised as follows:

(a) the license fees did not have to be prescribed in regulations;

(b) if regulations were required, the license itself, alternatively the Guidelines, constituted the requisite regulations;

(c) publication of the Guidelines met any publication requirements; and

(d) any non-compliance with applicable statutory requirements did not result in invalidity of the power to collect the relevant fees as this would be detrimental to the public purse.

15. As regards the various grounds of complaint in relation to the power to collect the Royalty Fee, the Respondent's case can be summarised as follows:

(a) the Respondent's power to charge fees is not limited in the manner contended for by the Applicant; and

(b) the Royalty Fee was authorised by the ICT Act and the Legislative Assembly and from the outset has been approved as part of the Government Budget process.

16. Finally, it is averred that relief should in any event be refused on the grounds of:

(a) delay; and

(b) estoppel.

Reply

17. The Applicant's Reply responded to the Respondent's pleading with various legal points which were rehearsed in argument and are considered more fully below. In summary:

(a) fees had to be prescribed in regulations, the licenses or Guidelines did not qualify in this regard and the requisite advertisement had not occurred;

(b) the Applicant was entitled to rely upon the Information and Communication Technology (Validation) Act 2024 (the "ICT Validation Act") as demonstrating that the requirements for regulations had not been met;

(c) the rules relating to procedural invalidity relied upon by the Respondent did not apply to the non-compliance complained of here which resulted in invalidity;

(d) legislative authority was required to raise coercive revenue as a result of the interaction of section 6 (1) of the Public Management and Finance Act (2020 Revision) (the "PMF Act") and sections 15 and 111 of the Constitution;

(e) delay is only relevant to relief and does not arise at this stage;

(f) the Applicant is not estopped from seeking relief.

The evidence

18. The First Affidavit of Sonji Myles was sworn on 19 February 2025 by the Respondent's Executive Director in response to the Applicant's application. This Affidavit most pertinently:

(a) supports the Respondent's pleaded case on the regulatory history of the present liberalized statutory framework;

(b) supports the Respondent's case as to how the Royalty Fee element of the license fees was collected for the Government with Legislative Assembly approval; and

(c) supports the Respondent's case about publication of the Guidelines, averring in addition that licenses were published on its website as well.

19. The Second Affidavit of Randy Merren was sworn on 2 April 2025 by the Applicant's Managing Director in support of its application. He disputes the understanding of Mr Myles that fees were not initially paid by the Applicant for financial reasons. He avers, that fee payments ceased due to the Respondent's failure "*to regulate the sector effectively by resolving disputes expeditiously*", referring to several unprocessed determination requests made by the Applicant. Mr Merren does not directly challenge Mr Myles' evidence that licenses (including the Applicant's license) were currently made available on the Respondent's website. Instead he avers that the failure of the Respondent to publish historic Cable and Wireless licenses is relevant to the Respondent's "*decision not to publish copies of all licenses granted (or renewed) pursuant to the current and previous enactments of the ICT Act*".

20. The present application does not require the Court to resolve any factual disputes and turns wholly and/or substantially on questions of legal analysis against a non-contentious evidential background.

Legislative overview

21. Before considering the competing submissions, it is helpful to undertake a preliminary survey of the relevant public law landscape. The most relevant statutes are:

(a) the ICT Act;

(b) the PMF Act;

(c) the Public Authorities Act (2020 Revision) (the "PA Act");

(d) the Utility Regulation and Competition Act (2021 Revision) (the "URC Act");

(e) the ICT (Validation) Act;

(f) the Interpretation Act (1995 Revision) and the Official Gazette Act (1997 Revision);

(g) the Cayman Islands Constitution Order 1972 (the "1972 Constitution"); and

(h) the Cayman Islands Constitution Order 2009 (as amended) (the " Constitution").

The URC Act

22. The Respondent is established as a statutory body by section 4 of the URC Act. Section 6 (1) lists its principal functions which include:

> "*(a) to promote objectives set out in any Policy;*
>
> *(b) to promote appropriate effective and fair competition;*
>
> *(c) to protect the short and long term interests of consumers in relation to utility services…and*
>
> *(d) to promote innovation and facilitate economic and national development.*"

23. Section 6(2) confers powers for the fulfilment of the Respondent's principal functions, which pertinently include the power to "*(a) collect, retain and expend funds*" and "*(l) collect prescribed fees*". Although the Respondent is an independent body, it is subject to directions given by Cabinet which must be published (section 12). As far as financial matters are concerned, section 34 provides:

> "*(1) The revenue of the Office shall be classified under the following heads of receipt —*
>
> *(a) fees received under this Act, the regulations or any sectoral legislation…*"

24. The URC Act empowers the Respondent to "*collect prescribed fees*" and receive fees "*under this Act, the regulations or any sectoral legislation*", but does not empower the charging of fees, far less the raising of coercive revenue.

The ICT Act

25. Under section 9 (3) of the ICT Act, the principal functions of the Respondent include:

> "*(e) to license and regulate ICT services and ICT networks as specified in this Law and the Electronic Transactions Law (2003 Revision);*
>
> *(f) to collect all fees, including licence fees, and any other charges levied under this Law or the Electronic Transactions Law (2003 Revision) or regulations made thereunder…*"

26. Section 23 (1) empowers the Respondent to grant licenses in accordance with the Act. Section 26 provides:

> "*(1) A person who wishes to apply for a licence or the renewal of a licence shall, in accordance with a procedure determined by the Office submit an application for consideration by the Office, and the application shall be in the prescribed form and accompanied by such fees as may be determined by the Office.*"

27. The following section deals specifically with license fees:

> "***Licence fees***
> *30. (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. The Respondent is explicitly empowered to determine what the license fees should be (subsection (1)), but the fees must also be "*prescribed*" (subsections (1) and (2)). The following definition is set out in section 2 of the ICT Act:

> "*'licence fees' means the initial, annual or renewal fees for a licence payable to the Authority by an applicant or a licensee…*"

29. Section 97 provides:

> "*(3) The Office —*
>
> *(a) after consultation with the Minister, may make regulations relating to — (i) licence fees…*"

30. Under section 2, "*'regulations' mean regulations made under this Law*". Central to the legal controversy as to whether fees had been lawfully imposed was whether or not the ICT Act required the Respondent to fix fees through regulations and, if so, whether any regulations had been made. At first blush there is no express mandatory requirement for fees to be imposed through regulations. However, section 30 (1) of the ICT Act does appear to require that license fees should be "*prescribed*". That term is defined by the Interpretation Act.

31. Nor does the ICT Act contain any express requirement that fees should be advertised. However, licenses must be maintained in a publicly accessible register under the following provision:

> "***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.*"

The Interpretation Act and the Official Gazette Act

32. Section 3 (1) of the Interpretation Act defines various terms for the purposes of legislation generally, "*unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided*". For present purposes, the following definitions are relevant:

> "*'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…*
>
> *"'regulations' include rules, bye-laws, proclamations, orders, schemes, notifications, directions, notices and forms…*"

33. "*Prescribed*" is defined as meaning, in effect, a prescription that is set out in an act or in regulations made under an act. And what constitutes "*regulations*" is non-exhaustively defined in apparently broad terms. However, section 29 of the Interpretation Act provides:

> "*(1) All regulations made under any Law or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.*
>
> *(2) The production of a copy of the Gazette containing any regulations shall be prima facie evidence in all courts and for all purposes of the due making and tenor of such regulations.*"

34. The Official Gazette Act establishes the "*Cayman Gazette*" (section 3) and section 6 provides that it "*shall contain*", *inter alia*, "*(c) such official advertisements and notices as are required or authorised by any law to be published in the Gazette or as Government or Public Notices*".

The PMF Act

35. The PMF Act is relevant to the power to raise "*coercive revenue*", which is defined in section 2 as meaning "*revenue earned by the core government using the coercive power of the state and for which no direct exchange of service occurs*". This is to be contrasted with the following definitions in the same section:

> (a) "*'entity revenue', in relation to a ministry, portfolio, statutory authority, government company, the Office of the Ombudsman or the Audit Office, means revenue earned by the entity from the production of outputs*"; and

(b) "*'outputs' means the goods or services that are produced by an entity or other person*".

36. With these definitions in mind, the following provision of the PMF Act appears to apply to the Royalty Fee:

"***Law required for changes to coercive revenue***

6. (1) No coercive revenue may be collected and no changes to rates of coercive revenue may be made except by authority of a law."

37. At first blush, this unambiguously provides that express legislative authority is required to collect or change the rates of coercive revenue.

The PA Act

38. The PA Act is a statute which regulates the governance of public authorities in general terms. It potentially provides indirect support for the Applicant's proposition that the Respondent has the power to collect the Regulatory Fee but not the Royalty Fee. Under section 7 ("***Principal objectives of public authorities***"):

"(*1) The principal objectives of a public authority are to —

...

(c) *supply outputs to entities or individuals other than the Cabinet for payment on a break-even basis or preferably at a profit, and in accordance with agreements with those entities or individuals...*"

39. To the extent that the Respondent placed reliance upon Cabinet's approval of its budgets, it is noteworthy that Cabinet's role in relation to public authorities generally is to, *inter alia*, "*exercise, on the public's behalf, the duties and functions of the owner, or where relevant, shareholder of the public authority*" (section 49 (a)).

The 1972 Constitution

40. The 1972 Constitution was in force when the Applicant received its first license and when the governing legislation was initially enacted. The Applicant placed reliance on the fact that section 39 of the Constitution provided:

> "*(2) Except on the recommendation of the Governor the Assembly shall not—*
>
> *(a) proceed upon any Bill (including any amendment to a Bill) which, in the opinion of the person presiding in the Assembly, makes provision for imposing or increasing any tax, for imposing or increasing any charge on the revenues or other funds of the Islands or for altering any such charge otherwise than by reducing it or for compounding or remitting any debt due to the Islands…*"

41. This apparently provides that the Legislative Assembly did not under the 1972 Constitution have authority to consider or pass legislation raising coercive revenue without the Governor's prior approval. Without regard for the question of whether or not the relevant legislation in the present case received the requisite *imprimatur*, or is relevant at all, this constitutional provision indirectly suggests that the power to raise taxes, or coercive revenue, would be expected to be conferred in express legislative terms.

The Constitution

42. It is important to note at the outset that section 5 of the Order makes the following provision in relation to Cayman Islands' "*existing laws*" (which are defined in terms to exclude the 1972 Constitution):

> "*(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution…*"

43. Pre-2009 local legislation must accordingly be construed so as to ensure conformity with the 2009 Constitution, where any potential inconsistency arises. The most pertinent provision as regards the power to charge and collect the Royalty Fee is section 15 of the Constitution. Firstly, subsection (1):

"*(1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description, except in accordance with law…*"

44. Secondly, subsection 2:

"*(2) Nothing in any law or done under its authority shall be held to contravene subsection (1)—*

(a) to the extent that the law in question makes provision for the interference with, taking of possession or acquisition of any property, interest or right—

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

45. Section 124 of the Constitution, defining terms used in the Constitution itself, provides that "*'law' includes any instrument having the force of law made in exercise of a power conferred by law*". Reference was also made to the following provisions which confer full legislative competence on the Legislature to raise revenue:

"*111. — **Revenue and Expenditure***

(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."

46. Section 16 was also referred to by reference to the following provisions:

"*16. — **Non-discrimination***

> *(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*
>
> *(2) In this section, 'discriminatory' means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.*
>
> *(3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.*
>
> *(4) Subsection (1) shall not apply to any law so far as that law makes provision—*
>
> *(a) for the appropriation of revenues or other funds of the Cayman Islands or for the imposition of taxation (including the levying of fees for the grants of licences)…*"

47. Section 16 (4) is illustrative of one legal context in which an elision between licensing fees and taxation occurs. As a matter of preliminary analysis, the Constitution appears to vest sole tax-raising authority in the lap of the Legislature.

The ICT Validation Act

48. The ICT Validation Act appeared to me to be of peripheral relevance. It was passed by Parliament on 11 December 2024 and assented to by the Governor on 18 December 2024. Its key substantive provision is the following:

> "***Validation of licence fees***
>
> *3. (1) The licence fees charged by, paid to, and collected by, the Authority during the period commencing on 5th August, 2003 and ending on 15th January, 2017 are —*

(a) validated; and

(b) taken to have been lawfully charged by, paid to, and collected by, the Authority, as if the licence fees had been prescribed in Regulations which were —

(i) made under section 70(3)(a) of the Information and Communications Technology Authority Act, 2002; and

(ii) published in the Gazette.

(2) The licence fees charged by, paid to, and collected by, the Office during the period commencing on 16th January, 2017 and ending on the commencement of this Act are —

(a) validated; and

(b) taken to have been lawfully charged by, paid to, and collected by, the Office, as if the licence fees had been prescribed in Regulations which were —

(i) made under section 97(3)(a) of the Information and Communications Technology Authority Act (2016 Revision) as amended by the Information and Communications Technology Authority (Amendment) (No. 2) Act, 2016 and any later revisions of that Act; and

(ii) published in the Gazette."

49. However, these provisions have no direct impact on the present case because of the last two sections, which provide:

"***Orders or determinations by a court***

5. This Act does not affect any order or determination made by a court with respect to licence fees prior to the commencement of this Act.

Transitional provisions - pending and ongoing proceedings

6. Nothing in this Act affects any matter or proceeding in a court with respect to licence fees which is pending or in progress prior to the commencement of this Act."

50. It seems obvious that the purpose of this legislation was to prevent license holders who, unlike the Applicant, had not already commenced proceedings challenging the legality of the license fees from doing so in the event that the Applicant achieved full or partial success in the present cause. In light of the express terms of section 6, as I observed during the hearing, it is difficult to see how the enactment of the ICT Validation Act can be prayed in aid of the legal merits of the Applicant's present case. It is true that at the time of the hearing of the leave application before the Court of Appeal (10 September 2024) and by the date of Judgment (29 November 2024), the ICT Validation Act had not yet been passed by Parliament. Nonetheless Birt JA's view of the relevance of the Bill would seem to apply with equal force to the Act:

"*36. Mr Buttler sought to pray the existence of the Bill in aid as showing that the Minister considered that there was at least an arguable case that the licence fees were not lawful because regulations had not been made and/or had not been published in the Gazette. However, as Montgomery JA pointed out in argument and as Mr Buttler fully accepted the lawfulness of the licence fees is for the courts to determine. In the circumstances, the court has placed no weight on the existence of the Bill in reaching its conclusion that the Appellant has arguable grounds with a realistic prospect of success.*"

The legality of the Royalty Fee-no authority to charge/raise coercive revenue

51. Although the "no regulations" point was addressed first in oral argument, as it applied to both the Royalty Fee and the Regulatory Fee, I consider it more logical to consider the no authority point first, which was the approach adopted in the Applicant's Skeleton Argument and the Respondent's Skeleton Argument.

The Applicant's submissions

52. In the Applicant's Skeleton Argument, Mr Buttler KC advanced the following pivotal submissions:

> "*18. In the Cayman Islands, coercive revenue can only be imposed or increased through primary legislation. This is enshrined in the Constitution and in the PMF Act.*
>
> *19. As noted in the chronology above, the 2009 Constitution provides that only Parliament can impose or increase taxes, and only on the recommendation of the finance minister. Prior to that, the 1972 Constitution had provided that only Parliament could impose or increase taxes, and only on the recommendation of the Governor. The constitutional position in the Cayman Islands is unsurprising given that (a) the Cayman Islands are a British Overseas Territory and (b) it is a longstanding British constitutional principle that only Parliament can impose taxes (see paragraphs 13-15 above).*
>
> *20. This constitutional position is reflected in the PMF Act. Since 6 November 2002, the PMF Act has provided that '[n]o coercive revenue may be collected and no changes to rates of coercive revenue may be made except by authority of a law'. This provision was originally set out at section 7(1) of the PMF Act. The 2005 Revision of the PMF Act moved it to section 6(1). It remains there in the current, 2020 Revision.*"

53. This was said to reflect a longstanding common law principle recognised in *Attorney-General v Wilts United Dairies (*1921) 37 TLR 884 where Atkin LJ (as he then was, at 886) held:

> "*if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge.*"

54. In Mr Buttler KC's clear and cogent oral submissions, the following, potentially dispositive points were advanced on the foundation of the constitutional and other statutory provisions (notably section 6 of the PMF Act) and relevant principles of statutory interpretation:

(a) there was a fundamental distinction between a statutory power to raise fees for services and raising taxes in the form of coercive revenue;

(b) was no express power to raise coercive revenue conferred on the Respondent;

(c) there was no basis for inferring that such a power had been delegated to the Respondent by Parliament either from (1) the relevant terms of section 30 of the ICT Act or (2) its legislative history (e.g. the apparent absence of the requisite Governor's recommendation).

55. These points built upon the most important points advanced in the Applicant's Skeleton Argument, which were set out in the following two paragraphs:

> "*21. On its proper interpretation, section 6(1) of the PMF Act prohibits the collection of coercive revenue unless a law specifies both (a) the coercive revenue and (b) the rate of that coercive revenue. This follows from:*
>
> *(1) The language of section 6(1). The words "no coercive revenue may be collected …except by authority of a law" require that the collection of the coercive revenue must be authorized by a law. As a matter of necessary implication, the words "no changes to rates of coercive revenue may be made except by authority of a law" mean that the law must also specify the rate of the coercive revenue because otherwise there would be nothing against which to measure the express requirement that changes to the rate must be specified.*
>
> *(3) The purpose of section 6(1). The clear purpose is to ensure that new taxes or increases in the rates of existing taxes have the democratic imprimatur of Parliament.*
>
> *(3) The Constitution. The natural reading of section 6(1) of the PMF Act accords with section 77(3) of the Constitution and section 15 of the Bill of Rights, in that it underscores the constitutional requirement that any tax, rate or due must be provided for by a law.*
>
> *22. 'Law' is not defined by the PMF Act. However:*

(1) The broader context of the PMF Act indicates that it refers to primary legislation. Section 21 concerns the legislative review of the Government's budget and identifies the ways in which Parliament can enable the Government to raise funds to meet its spending plans. One way is through taxation. In respect of this, section 21(b)(i) provides that Parliament may give effect to the Government's spending plans by "authorising, by law, changes to types of coercive revenue or rates of coercive revenue". This indicates that the "law" referred to in section 6(1) is Parliament-made law.

(2) *This is consistent with the constitutional requirement that taxes can only be imposed or increased through an Act of Parliament, pursuant to a Bill that has been recommended by the finance minister….*

24. Section 30(1) of the ICT Act provides that: 'A licence granted under this Law shall be subject to the prescribed licence fees which shall be determined by the Office'

25. Section 2 of the ICT Act provides that: ' "licence fees"' means the initial, annual or renewal fees for a licence payable to the Authority by an applicant or a licensee'. This authorises OfReg to charge for its services. It does not authorise OfReg to collect coercive revenue on behalf of Government.."

The Respondent's submissions

56. Before dealing directly with the legalities of the Royalty Fee issue, Mr Grodzinski KC in the Respondent's Skeleton Argument helpfully set out the background to the way the Royalty Fee came to be included in license fees:

"*26. The revenue generated for the Cayman Islands Government from the C&W licence, before the liberalisation of the market, was reflected in the annual budget, plan and estimates and accounts laid before the Legislative Assembly every year.*

27. This continued to be the case following the liberalisation of the market, from which point the revenue from the royalty element of the licence fees was

reflected as a collective entry in relation to all ICT sector licensees. As the royalty element of the licence fees was collected on behalf of the Government, rather than to fund the activities of the Office, the figures were not recorded as income in the Office financial statements. This was explained, for example, under note 4 on page 8 of the Notes to the Financial Statements annexed to the ICT Authority's report entitled: 'The First Two Years: A Report on the ICT Authority's Performance and Finances for the Period from 8th May 2002 to 30th June 2004' …

28. The First Two Years Report and the Financial Statements were laid before the Legislative Assembly on 15 February 2005 [36/§12], under section 21 of the ICT Act. Subsequent annual Financial Statements were laid before the Assembly under section 43 of the URC Act, and referred expressly to the 6% Royalty Fee. See for example the 2021 Financial Statements: 'As part of the services provided to the Government, the Office collected, verified and remitted the 6% Royalty Fee from ICT Licensees as follows…' [606]."

57. Legalities aside, this material made it clear beyond sensible argument that the Respondent had *de facto* authority from the Legislature to collect the Royalty Fee on the Government's behalf through its licensing processes. As regards the legality of the Royalty Fee element of the license fees, seven points were made in the Respondent's Skeleton Argument:

*"42. **First**, the royalty fees charged by the Office, as well as being authorised under the ICT Act (as to which, see further below), were also authorised by the Cabinet and Governor in 2003 and subsequently the Legislative Assembly, in summary as follows:*

(j) In August 2003, the 6% royalty fee was recommended by the Cabinet (including the Finance Minister) and was approved by the Acting Governor, consistently with his powers to do so under the 1972 Constitution Order (see above).

(ii) The royalty fees were also approved under the PMF Act, under the annual Government budgeting provisions contained in section 17 to 27 of that Act. As noted above, those fees formed part of the Government's annual budgeting process and were approved each year

by the Legislative Assembly under the PMF Act: see for example the Plans and Estimates for 2018 and 2019, itemising various sources of coercive revenue - including from 'ICTA Licences' [425], approved by the Legislative Assembly under ss.21 and 24 of the PMF Act; and see likewise [489] for 2020 and 2021.

(iii) Contrary to C/Skel/§43, no further Bill was required under s.6 or ss.21 or 24 of the PMF Act, whether in 2003 of thereafter. In particular, there were no 'changes to types of coercive revenue or rates of coercive revenue' (see s.21(b)(i) and s. 24(5)(a) of the PMF Act), since the type and rate of coercive revenue had already been lawfully approved by the Governor in 2003.

(iv) In addition, as noted above, s.21(2) of the ICT Act provided that the Office's annual report and audited accounts had to be laid on the table of the Legislative Assembly by the Minister, no later than three months following their submission to the Cabinet. This provision was later replaced by section 43(3) of the URC Act. This statutory requirement was met from the outset and annually thereafter.

43. It is thus hopeless to suggest that there has not been lawful authorisation for the 6% royalty fee."

58. This submission is forcefully expressed, but on closer analysis elides the distinct processes of legislative and executive approval for the Royalty Fee. The case that executive approval was conferred is articulated with greater specificity than the case that legislative power was conferred. The next submissions were at first blush more persuasive:

"*44. **Second**, in any event, Infinity's argument that the types and rates of coercive revenue must be identified in primary legislation rather than intra vires subordinate legislation, is entirely inconsistent with the relevant provisions of the Cayman Islands Constitution Orders and the Interpretation Act:*

(i) Section 124(1) of the 2009 Constitution Order, headed 'Interpretation' states: '"law" includes any instrument having the force of law made in exercise of a power conferred by law'. The same definition was given in s.50(1) of the 1972 Constitution Order.

(ii) Section 2 of the Interpretation Act defines 'Law' as 'any Law and any regulations made thereunder….'.

(iii) Section 30 of the Interpretation Act provides: 'An act shall be deemed to be done under a Law by virtue of the powers conferred by a Law or in pursuance or execution of the powers of, or under the authority of, a Law if it is done under or by virtue of or in pursuance of any regulation made or issued under any power contained in such Law'.

(iv) In other words, an act done under intra vires subordinate legislation is deemed to be done under the primary legislation itself. (The requirement for regulations/subordinate legislation to be intra vires, is made explicit in section 27(d) of the Interpretation Act).

*45. **Third**, there is nothing in the Constitution Order 2009 which states that the type and rate of any coercive revenue measure must be set in primary legislation, and not in intra vires subordinate legislation…*

*46. **Fourth**, section 6(1) of the PMF Act is entirely inconsistent with Infinity's case. It provides: "No coercive revenue may be collected and no changes to rates of coercive revenue may be made except by authority of a law". Contrary to C/Skel/§22, the words "a law" can plainly include subordinate legislation, as made clear by the relevant provisions of the Interpretation Act.*"

59. However, on closer analysis, even if it is correct that coercive revenue can be set out in either primary or subsidiary legislation, this is not necessarily responsive to the complaint that there is no clear legislative power in any form conferred on the Respondent in this regard. The Respondent's next submission was also somewhat beside the point:

> "***Fifth**, Infinity's reliance on Attorney General v Wilts United Dairies (1927) 37 TLR 881 (C.A.) and [1922] All ER Reg Ext 24 (H.L.) is misplaced. On the facts of that case, as the Court of Appeal in England and House of Lords held, there was simply no statutory authority at all for the Minister (called the 'Food Controller') to levy money or impose any charges on the defendant dairy. Likewise, Vestey v IRC [1980] A.C. 1148 does not assist Infinity. Insofar as relevant, Vestey concerned the question of whether the Inland Revenue Commissioners had a discretion about which of a number of beneficiaries under a trust should have to pay income tax. The Respondent in this case*

is not asserting the existence of a discretion to choose between which licensees should be charged fees. On the contrary, the basis of all fees payable by all ICT licensees is the same: and it is only Infinity which is seeking to escape its obligation to pay those fees."

60. *Attorney General v Wilts United Dairies* (1927) 37 TLR 881 (C.A.) and [1922] All ER Reg Ext 24 (H.L.) and the common law position, which the Applicant in my view placed undue reliance upon in written submissions filed at the leave hearing in this Court, was not directly relied upon by the Applicant at the present hearing. It was only relied upon to demonstrate that legislative authority for raising coercive revenue theory was a principle which had roots predating the-2009 Constitution. The following submissions directly responded to the Applicant's central thesis:

> *"49.* ***Sixth****, in any event, the licence fees in this case were authorised by and under the ICT Act, pursuant to sections 30 and/or 97 (see further the next section of this Skeleton Argument, addressing the 'No regulations' part of Infinity's case). Contrary to C/Skel/§25, there is nothing in the ICT Act which limits the meaning of the 'licence fees' which may be charged to fees for the cost of providing services by the Office – i.e. costs of regulating the ICT sector.*
>
> *(i) Section 2 of the ICT Act defines 'licence fees' as 'the initial, annual or renewal fees for the licence payable by an applicant or a licensee'. There is nothing in this definition that prevents the fees, or an element of them, being prescribed by reference to a percentage of the licensee's turnover, nor anything which limits the fees to amounts necessary to recompense the Office for its costs of regulating the ICT sector, rather than the fees being paid to the Government.*
>
> *(ii) Infinity's restrictive interpretation is also contrary to section 7(2) of the Public Authorities Act: 'It is the duty of a public authority to conduct its affairs in a responsible financial manner and accordingly, a public authority shall operate as a profitable and efficient business and contribute to the revenue of core government or, at least, break even in its operations'. (emphasis added)*

(iii) *It is also relevant to note the background (set out above) that prior to the ICT Act, C&W had for many years been charged a licence fee based on a percentage of its revenue, which was paid direct to the Government. There was no ICT regulator at the time, and such fees were thus not charged in exchange for services or for meeting any regulator's costs: [34/§6]. There is no reason to consider that the Legislative Assembly would have taken a much narrower approach to the scope and meaning of 'fees' capable of being charged to licensees when it enacted the ICT Act. (See Bennion at sections 22.5 and 25.2: where an Act uses a concept that has an established legal or technical meaning, it will generally be interpreted as having that meaning.)*

(iv) *Infinity's references to Bennion section 3.11 and Jowitt's Dictionary do not assist it. Whatever the word 'fee' may sometimes connote in England, does not displace the points above relevant to the proper interpretation of the Cayman legislation in this case (see further below at (vii). If anything, Bennion section 3.11 assists the Respondent, as it makes clear that taxes/fees may be imposed by delegated legislation.*

(v) *Characterising the royalty element as a 'tax' does not assist Infinity. As explained in Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2004] 1 A.C. at [133] per Lord Scott: "Taxation is a levy imposed by a State, or perhaps by some core public authority authorized by the State to impose the levy, either on the public generally or on some identified section of the public. In Black's Law Dictionary, 6th ed. (1990), 'tax' is described as "a charge by the government ...", as a pecuniary burden laid upon individuals or property to support the government, and [being] a payment exacted by legislative authority" and whose "essential characteristics ... are that it is not a voluntary payment or donation but an enforced contribution, exacted pursuant to legislative authority".*

(vi) *As further explained below, the ICT Act clearly authorises a 'core public authority' (the Respondent) to impose a 'levy' or 'an enforced contribution' on an 'identified section of the public', namely those who hold ICT licences.*

> *(vii) Finally and importantly, and unlike direct taxes in England such as income tax or corporation tax (which confer no correlating benefit on the taxpayer), the ICT royalty fee in the Cayman Islands was payable as a condition of having a licence, and allowed the licence holder in return to have the significant financial benefits associated with the licence."*

61. Mr Grodzinski KC was here bowling a line which threatened to shatter his opponent's wicket. The central point being made was that section 30 as read with section 97 of the ICT Act and section 6 (1) of the PA Act, properly construed in their context, did in fact confer the requite statutory authority on the Respondent to raise coercive revenue through license fees and/or the Royalty Fee was not coercive revenue at all. The latter point was hopeless and did not appear to me to be seriously pursued at all. In oral argument he submitted:

(a) there was no justification for a construction limiting the Respondent's power to charge license fees to regulatory fees alone;

(b) such a construction was inconsistent with the background to the current legislative scheme in which a royalty fee had been included in the sole licensee's license and generally inconvenient;

(c) such a construction was inconsistent with the ICT Act, the language of section 16 (4) (a) of the Constitution and section 7 (2) of the PA Act;

(d) as far as approval of the Royalty Fee was concerned, the PMF Act requirements did not apply because when it entered into force (1 July 2004), the coercive revenue element of the relevant license had already been approved under the Public Finance and Audit Law;

(e) as regards section 111 (1) of the Constitution, Parliament's power to collect revenue could be delegated, although any such delegation was amenable to judicial review. Here the 6% charge was not irrational;

(f) the complaint that the Governor had not complied with section 37 the 1972 Constitution) was not pleaded and he had assented to the key legislation in any event;

(g) the suggestion that coercive revenue could only be authorised though primary legislation was misconceived having regard to the Constitution's definition of "*law*" (section 124) and "*primary legislation*" (section 28) and the usage of "*law*" in relation to "*the appropriation of revenues or other funds of the Cayman Islands or for the imposition of taxation (including the levying of fees for the grants of licences)*" (section 15 (4) (a)).

Legal findings: does the Respondent require and possess legislative authority to raise coercive revenue?

Preliminary

62. By the end of the hearing, it appeared to me that the most important point of controversy was whether there was sufficiently clear legislative authority for the Respondent to charge and collect the Royalty Fee. In my judgment this is a critical question of construction which properly falls to be analysed without regard to distinct considerations surrounding whether various constitutional actors (as members of the Executive or Legislative branches) subjectively approved what occurred. Answering this question requires the resolution of the following preliminary issue: do the provisions of the 1972 Constitution or the current Constitution govern the legality question, which arises in relation to a Royalty Fee which was only collected from 2015 although first levied in a license granted in 2004?

63. On reflection it seems counterintuitive to suggest that the 1972 Constitution should govern the practical application of statutory provisions in 2015, six years after the enactment of the current Constitution in 2009. The drafters of the 2009 Order-in-Council were not oblivious of the need to address how the new Constitution would interact with the statutory order which was enacted under the '*ancien regime'*. Mr Buttler KC aptly referred to section 5 of the Cayman Islands Constitution Order-in Council, through which the Constitution was enacted. That section makes it clear, certainly as regards the construction of "*existing laws*" in relation to events occurring in the post-2009 era, that the new Constitution is the lodestar:

"*5. — **Existing laws***

(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

(2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with the Constitution or otherwise for giving effect to the Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.

(3) *In this section 'existing laws' means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day.*" [Emphasis added]

64. The position under the 1972 Constitution is in my judgment of background interest only. Because after the 2009 Constitution came into effect, all pre-existing local laws took effect as if they had been enacted under the new Constitution and were liable to be construed so as to conform with it. The relevant temporal context in the present case begins in 2015 when fees were by common accord first collected and the 1972 Constitution could only potentially be relevant to matters occurring before the appointed day for the 2009 Constitution to take effect.

The Constitution and the power to raise coercive revenue

65. Section 15 of the Constitution is found within "*PART I BILL OF RIGHTS, FREEDOMS AND RESPONSIBILITIES*". The Bill of Rights primarily applies to natural persons, but certain provisions are well recognised as being applicable to artificial persons as well. Although the fair hearing rights protected by section 7 and the property rights protected by section 15 are not infrequently invoked by bodies corporate, it is difficult not to be subliminally affected by the instinctive notion that fundamental rights only really matter when human rights are engaged. Any such notion is legally misconceived and must be disregarded. The occasional allusions Mr

Buttler KC made in oral argument to how the provisions under consideration would impact on individuals were not entirely rhetorical (as I felt at the time). In fact they accord with principle.

66. When construing section 15 of the Constitution, it is important to remember the distinctive approach to interpreting fundamental rights and freedoms provisions. In *Day-v-Governor of the Cayman Islands* [2022] UKPC 6, Lord Sales opined as follows:

> "*35. In Reyes v The Queen [2002] UKPC 11; [2002] 2 AC 235, concerning the constitution of Belize, in another important statement, Lord Bingham of Cornhill said this at para 26*:
>
> > *'When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many other cases,* Weems v United States *(1910) 217 US 349, 373,* Trop v Dulles *(1958) 356 US 86, 100-101,* Minister of Home Affairs v Fisher *[1980] AC 319, 328,* Union of Campement Site Owners and Lessees v Government of Mauritius *[1984] MR 100, 107,* Attorney General of The Gambia v Momodou Jobe *[1984] AC 689, 700-701,* R v Big M Drug Mart Ltd *[1985] 1 SCR 295, 331,* S v Zuma *1995 (2) SA 642,* S v Makwanyane *1995 (3) SA 391 and* Matadeen v Pointu *[1999] 1 AC 98, 108. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the*

> *Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see* Trop v Dulles *356 US 86, 101. ...*" [Emphasis added]

67. The fundamental right protected by section 15 is expressed in the following terms:

> "*(1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description, except in accordance with law…*"

68. Property rights are accorded a high value by the Constitution because section 1 declares that the purpose of the Bill of Rights is to, *inter alia*, enable people to "*freely pursue their economic…development and may, for their own ends, freely dispose of their natural wealth and resources*". Specific legally authorised derogations from the basic right to peacefully enjoy one's property are then set out and they include in subsection (2) (a):

> "*(a) to the extent that the law in question makes provision for the interference with, taking of possession or acquisition of any property, interest or right—*
>
> *(i) in satisfaction of any tax, rate or due…*
>
> *except so far as that provision of law or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society.*"

69. Taxes may be levied by the Government without the need for any specific justification, but even tax laws must be enforced in a way which falls within the ambit of international standards of

reasonableness. Section 15's relevance to the present case is indirect in character. Because levying taxes is a constitutionally permitted interference with fundamental property rights when authorised by "law", this falls to be taken into account when construing laws which levy (or are said to authorise the levying of) taxes. A reasonable starting assumption must be that any such laws should be sufficiently clear to demonstrate that the constitutional authority to derogate from fundamental property rights is being exercised. This would be the constitutional equivalent of the common law construction rule that penal or taxing statutes should be strictly construed and/or the presumption that express language is required to interfere with vested rights.

70. Section 15 (2) (a) (i) is not the only constitutional provision relevant to taxes. It is substantively supplemented by section 111 which directly authorises the raising of revenue:

> "*(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.*" [Emphasis added]

71. In my judgment Mr Grodzinski KC was correct to assert that appropriation is not a procedure which arises in the context of analysing whether the authority to levy revenue has been conferred by Parliament. Section 111 (1) clearly provides that the Legislature has the authority to raise revenue unless authority is conferred on some other person "*by law*". This reinforces the property right protections of section 15 of the Constitution. It similarly suggests that if the authority to raise revenue is delegated by Parliament, this is a constitutionally significant delegation of authority which one would expect to be effected in clear legislative terms.

72. What qualifies as a "law"? As Mr Grodzinski KC also rightly submitted, it is clear that "law" in the Constitution is a term which includes primary and subsidiary legislation. This flows inexorably from the considerations that:

(a) "*primary legislation*" is a defined term ("*a Law enacted by the Legislature*"-section 28); and

(b) "law" is a defined term ("*'law' includes any instrument having the force of law made in exercise of a power conferred by law*"-section 124 (1)).

73. These considerations fall to be taken into account below when evaluating the Applicant's contention that the PMF Act contemplated only primary legislation when using the term "law".

74. Section 16 (4) (a) of the Constitution is also relevant to construing the critical statutory provisions. It supports in a general way the Respondent's case that there is nothing inherently illogical about the notion of revenue being raised through licenses, because it refers to "*the imposition of taxation (including the levying of fees for the grants of licences)*".

75. To summarize my findings as to the main legal impact of the Constitution on the power to raise coercive revenue issue, sections 15 and 111 signify that legislative authority is required to raise revenue. Raising revenue is analogous to the Crown confiscating private assets. Collecting taxes under legislative authority is a permitted derogation from the basic right of all persons to peaceably enjoy their property. Collecting taxes without legislative authority would entail a breach of the property rights section 15 guarantees.

Was the power to raise coercive revenue prima facie conferred by law?

76. The PMF Act confirms the constitutional requirement that the raising of revenue should be authorised by law by providing:

> "*6. (1) No coercive revenue may be collected and no changes to rates of coercive revenue may be made except by authority of a law.*"

77. Had the term "Law" been used, that would signify primary legislation. However, in my judgment the debate over whether or not section 6 contemplates primary legislation or not is academic insofar as the "power" question turns on an analysis of primary legislation in any event. Whether the power, assuming it to exist, has been properly exercised through regulations is a separate question. It is also important to remember that section 2 of the PMF Act provides that "'*coercive revenue' means revenue earned by the core government using the coercive power of the state and for which no direct exchange of service occurs*".

78. What is the applicable statutory provision? Section 6 (1) is expressed in the same terms as section 7 (1) of the 2001 version of this Act and the definition of "*coercive revenue*" in section

3 of the 2001 Act is also unchanged. However, as Mr Grodzinski KC appeared to argue that section 7 of the 2001 Act did not come into force until 1 July 2024 (section 2 (1)), so this specific requirement of authority from "a law" did not exist under the law in force when the Applicant's license was granted (which according to his client's evidence was 13 December 2004). He submitted that the Public Finance and Audit Law (1997 Revision) (the "PFA" Act) was the governing financial statute when the Applicant's license was granted. That Act had a system of government estimates which were submitted to the Legislative Assembly for approval and so when the Applicant's license was subsequently granted, the new law did not operate so as to require any fresh legislative approval.

79. It is correct that while the PFA Act was still in force, on 12 August 2003, Cabinet prospectively approved ICT license holders collecting a coercive fee at the rate of 6% of gross revenue. It is also true that section 2 of the PMF Act 2001 provided:

> "*2 (1) Subject to subsections (2), (3) and (4), this Law will come into force on 1 January 2002.*
>
> *(2) Parts II, III, IV, V, VI and VII…do not apply to or require any action by the Legislative Assembly….or any other person in respect of any financial year commencing before 1 July 2004.*"

80. Section 7 of the PMF Act 2001 fell within Part II. The transitional provisions of the 2001 version of the PMA (section 81) also repealed the PFA save only as regards "*financial transactions*" occurring in the preceding financial year. Reading sections 2 and 81 together, it is possible to accept that section 7 did not in terms apply so as to require legislative authority for ICT licenses which were both (1) granted during the financial year which commenced before 1 July 2004 (and had presumably not ended when the Applicant's license was granted in December that year) and (2) in relation to which coercive revenue was "collected" during that carved out period. However, I would reject the Respondent's submission that no further approval was required in this case because:

(a) the coercive revenue in issue in this case was collected long after the transitional period; and/or

(b) even if the PFA Act did confer legal authority on the Respondent to collect coercive revenue without primary or secondary legislation, it would have to be construed in

conformity with sections 15 and 111 of the Constitution as incorporating such a requirement, by virtue of section 5 (1) of the 2009 Constitution Order.

81. Having disposed of these peripheral points, there is no legitimate way in which the Court can avoid grasping the nettle of analysing whether the ICT legislation conferred on the Respondent authority to collect coercive revenue. Once one does so, clearing the intellectual obstacles skilfully erected by Mr Grodzinski KC from the analytical path, the merit of the Applicant's central thesis become clearly apparent. In fact the nettle has a distinct sting to it, because I formed the contrary view when firmly rejecting the Applicant's case on this issue at the initial leave hearing. As already noted, section 30 of the ICT Act is the critical section and it states as follows:

> "*(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."*

82. This provision clearly confers a statutory power on the Respondent to prescribe license fees. This is consistent with the general provision in the Respondent's governing statute, the URC, which empowers it to "*collect prescribed fees*" (section 6 (2) (l)). There is nothing in the URC which plausibly empowers the Respondent to collect coercive revenue on behalf of the Government. Section 30 of the ICT Act does not by its terms authorise the Respondent to collect coercive revenue as part of the license fees it is clearly empowered to charge and collect. License fees are defined as "*the initial, annual or renewal fees for a licence payable to the Authority by an applicant or a licensee…*" (section 2). The Respondent has the power to prescribe license fees. Section 97 (3) provides that the Respondent:

> *"after consultation with the Minister, may make regulations relating to — ...(i) licence fees…*"

83. Bearing in mind that sections 15 and 111 of the Constitution read with section 6 (1) of the PMF Act explicitly require any coercive revenue collection to be authorised "*by law*", there is no justifiable basis for concluding that by necessary implication this extraordinary power was conferred as an incident of the power to fix and collect license fees. The fact that, in a different

constitutional and statutory era coercive revenue was collected by an ICT licensee may explain why the need to confer the relevant power through the ICT Act was overlooked. There is no recognised canon of statutory construction which justifies deploying that public administrative history in aid of construing the provisions of section 30 of the ICT Act in the post-2009 constitutional era. This conclusion is further buttressed by the following points advanced by Mr Buttler KC:

(a) there was nothing in the legislative history to suggest that the power to confer license fees was intended to include a coercive revenue element in addition to regulatory fees; and

(b) it was inconsistent with the rules of statutory interpretation to read the power to collect coercive revenue into the terms of the ICT Act.

84. As regards the ICT Act's legislative history, the Official Hansard (18 March 2002) revealed that section 30 was not discussed in Committee and the Bill was passed on the Third Reading without discussion. However, the Bill as a whole was extensively discussed on its Second Reading (8 March 2002). Mr Alden McLaughlin MP (now Sir Alden McLaughlin KC) made the following insightful observations about fees (at page 220):

> "*I note that while the Law provides for the licensing of ICT networks or ICT services that the Law itself does not deal with the question of fees, which is not unusual because the fees are usually included in the regulations. However, it would have been preferable if, at this stage, Honourable Members of this House could have been made aware of the proposed fee structure. I am inviting the Honourable Minister to deal with this if he possibly could in his reply in due course.*" [Emphasis added]

85. The request for clarification of the fee structure was insightful, because if the Legislative Assembly had expressly considered the fee structure issue, and approved clause 30 in the terms which were adopted on the explicit basis that it empowered the Respondent to collect both coercive revenue and regulatory fees, this might have justified the construction the Respondent now contends for. It might even have stimulated debate on the topic which resulted in the wording of section 30 being changed. Clearly, the Respondent could not use its power to set fees through regulations to authorise itself to collect coercive revenue. The legal vacuum identified by the Applicant is that coercive fees were charged without any documented

legislative approval. In the event no reply to Mr McLaughlin's request for clarification of the proposed fee structure was seemingly forthcoming on the floor of the Legislative Assembly, and so the authority gap was unwittingly left unfilled. Ironically, Sir Alden presided in Parliament as Speaker when the ICT Validation Bill was passed.

86. Mr Grodzinski KC on this shaky legal ground was compelled to turn the correct interpretative approach on its head, contending that there was no justification for the Applicant's "restrictive approach" to the construction of section 30. Unless one minimizes the significance of sections 15 and 111 beyond vanishing point, clear words must be required to confer on a statutory body not charged under its governing statute with collecting coercive revenue to do so through the mechanism of licensing fees. Mr Buttler KC relied on additional academic authority to support the Applicant's case. *Jowitt's Dictionary of English Law* 6th Edition dealing with the legal meaning of "fee" states:

> "*Statutes frequently authorise the charging of a fee in respect of a service, sometimes including a "service" or process such as registration that a person is obliged to submit to as a condition precedent for carrying out a particular kind of undertaking. The word 'fee' in that context has connotations of recovery of costs, direct or indirect, incurred in the provision of the service or the administration of the process. There is therefore a presumption that the amount of a fee will relate in some recognisable way to those costs, and not be merely an excuse for levying a tax. If the intention is to set a rate of fee that will make a profit for use on some other activity, or to permit a significant degree of cross-subsidisation of the service offered to one person by the fee charged to another, express provision will generally be taken*..." [Emphasis added]

87. *Bennion, Bailey and Norbury on Statutory Interpretation,* section [3-11], before considering *Attorney-General v Wilts United Dairies, Ltd*, states:

> *"Where Parliament intends to confer a power to impose charges by delegated legislation, whether in the nature of taxation, fees for services or otherwise, the usual practice is to make express provision.*"

88. Not only is the power to raise coercive revenue so constitutionally significant that the power can only be delegated by Parliament in clear terms, the natural and ordinary meaning of the term "fees" does not, without more, connote anything other than fees in the usual *quid-pro-quo* sense.

Determination

89. For these reasons I find that the Applicant is entitled to a declaration to the effect that the Respondent has no legal power to collect the Royalty Fee element of the Applicant's ICT license fees.

Were fees validly prescribed in regulations?

90. The "no regulations" point only applies to the Regulatory Fee element of the license fees, unless I am wrong in finding that there was no authority to collect the Royalty Fee element. It is common ground that the basis for calculating the fees and the fees themselves were not set out in regulations published in the Official Gazette but were published on the Respondent's website and set out respectively in:

(a) the Guidelines; and

(b) the Applicant's license (and the licenses of other ICT licensees).

91. Three main issues were in controversy. First, whether regulations were required. Second, if regulations were required, whether non-compliance with the requisite formalities had occurred. Third, if non-compliance had occurred, was the consequence that the fees were not lawfully due. The Applicant's case on the first two issue seemed straightforward; but the third issue seemed to me to require more rigorous analysis as any non-compliance appeared at first blush to be highly technical.

The Applicant's submissions

92. Mr Buttler KC made the seemingly straightforward point that section 30 of the ICT Act, as read with section 97 (3), required license fees to be "*prescribed*" and this meant "*prescribed by the Law in which the word occurs or by any regulations made thereunder*" (Interpretation Act, section 3). Regulations had to published in the Gazette although a Government Notice stating that regulations had been made would suffice (Interpretation Act, sections 29 (1), 61). In short, the fees had not been published in regulations at all. If the individual licenses issued to ICT

licensees could, improbably, be described as regulations, they had not been published in the requisite manner in any event.

93. In the Applicant's Skeleton Argument, what was viewed as the main defence (delay and estoppel being fairly viewed as relevant to the restitutionary claim only) was addressed as follows:

> "*48. As to OfReg's first defence (Parliament's intention), the well-known principle in R v Soneji [2006] 1 AC 34032 is that, where legislation requires a procedural step to be taken and the step has not been taken, the Court must interpret the legislation to work out whether or not Parliament intended that the failure to take the procedural step would invalidate the administrative action in question. The principle was considered in In the matter of Real Estate and Finance Fund (dissolved) [2022] 2 CILR 27233 and Premier Assurance Group SPC Ltd v Providence Assurance Company [2023] 2 CILR 134.*
>
> *49. Here, OfReg would need to (a) characterise the making of regulations under section 97(3)(a) of the ICT Act and the publication of the regulations or a Government Notice in accordance with the Interpretation Act as "procedural steps" and (b) persuade the Court that Parliament's intention was that OfReg could validly charge licence fees notwithstanding a failure to comply with those "procedural steps". That is an impossible submission:*
>
> *(1) First, this is not a case in which there was an error in the procedure for the exercise of an existing power – it is a case in which the power did not exist. Under the ICT Act, as interpreted above, OfReg does not have the power to charge licence fees unless and until it has made and brought into force delegated legislation. Where, as here, a power to do something is conditional on it being prescribed by delegated legislation and no delegated legislation has been made, how could it be said that Parliament has conferred the power - where is it said to have come from? It cannot be conjured from thin air.*
>
> *(2) Second, this is underscored by the ICT Validation Act. Parliament there explained in terms that the validity of licence fees depends on the making of regulations.*

> *(3) Third, the requirement in section 29(1) of the Interpretation Act to gazette the regulations (or, alternatively, a Government Notice) is also a condition of the validity of the regulations because section 29(1) provides that regulations only come into effect on the date of publication unless otherwise provided (and no such alternative provision was made here).*"

94. In oral argument Mr Buttler KC replied to the Respondent's preliminary point (which I had accepted at the initial leave stage) that the licenses it issued fell within the broad definition of regulations. He submitted:

(a) the prefatory words in section 3(1) of the Interpretation Act do not shape the meaning of "regulations";

(b) the broad definition of "regulations" was intended to cover all forms of subsidiary legislation;

(c) section 27 of the Interpretation Act had to be taken into account; and

(d) regulations and licenses are different things.

95. The prefatory words in section 3 (1) provide as follows:

> "*(1) In this Law and in all Orders in Council, Laws, proclamations, regulations, rules, bye-laws, orders, directions, notices, forms and other instruments of a public character relating to the Islands, now in force or hereafter to be made, the following words and expressions shall have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided*:…"

96. Accepting that the prefatory words do not inform the construction of the substantive definition of "regulations" does not directly negate the Respondent's ability to rely on the broad, non-exhaustive definition which follows. However, Section 27 does arguably support the potentially "killer" conclusory point that regulations and licenses (and even more clearly the Guidelines) are different things:

"***Provisions as to making of regulations***

27. Where a Law confers power on any authority to make or issue regulations, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such regulations —

(a) a regulation may, at any time, be amended, varied, suspended, rescinded or revoked by the same authority and in the same manner by and in which it was made;

(b) the regulations may provide in respect of a breach of any of the provisions thereof that the offender shall, unless the Law otherwise provides, be liable to such fine not exceeding one thousand dollars, or to such term of imprisonment with hard labour not exceeding twelve months, or to both such fine and imprisonment, as may be therein prescribed;

(c) where any Law confers power on any authority to make regulations for any general purpose, and also for any special purposes incidental thereto, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;

(d) no regulation shall be inconsistent with the provisions of any Law;

(e) any breach of any regulation may, unless the Law otherwise provides, be prosecuted in a summary manner; and

(f) any reference in any regulation to "the Law" shall be read and construed as meaning the Law conferring the power to make or issue such regulations."

97. As regards non-compliance with the statutory publication requirements, (Interpretation Act, sections 29 and 61, the Official Gazettes Act, section 6 *et seq*), whether non-compliance resulted in invalidity was said to require an objective analysis. Even if, which was not conceded, the advertising requirement for regulations could be characterised as a procedural rule, in the

present context it should be viewed as a "*bright line*" rule. In *A1 Properties Ltd -v-Tudor Studios RTM Co Ltd* [2024] UKSC 27 [2024] 3 WLR 601, Lord Briggs and Lord Sales opined as follows:

> "*62. This does not mean that application of procedural rules in every statutory context turns on detailed examination of the consequences arising from the particular facts of the case, nor that a test of substantial compliance is properly to be applied in relation to every procedural rule. Examination of the purpose served by a particular statutory procedural rule may indicate that Parliament intended that it should operate strictly, as a bright line rule, so that any failure to comply with it invalidates the procedure which follows*…" [Emphasis added]

98. Reference was also made to *Premier Assurance Group SPC (in Official Liquidation)-v-Providence Insurance Company* 2023 (2) CILR 1. This was a case where an insurer's long-term business was transferred without the required permission of the Cayman Islands Monetary Authority and the Grand Court held that the purported transfer was invalid. Smellie CJ analysed the purpose of the statutory requirements before opining as follows:

> "*102. Those are critical safeguards…The plaintiff submits and I accept that they form a vital element of the statutory scheme of oversight and regulation of the insurance market in the interests of protection of the reputation of the jurisdiction itself, the market, and, equally important, consumers….Accordingly I find that these considerations clearly indicate that invalidity is a consequence of a purported transfer of business in breach of s.31.*"

99. Reference was also made to '*Bennion, Bailey and Norbury on Statutory Interpretation*' paragraph 9.5:

> "*Effect of failure to comply with statutory requirements:*
>
> *(1) Where an Act imposes a procedural or other requirement in connection with the doing of anything under the Act but does not spell out the consequences of breach, the question arises whether a failure to comply invalidates the thing done.*

(2) In ascertaining the effect of a failure to comply, it is necessary to determine whether the legislature can fairly be taken to have intended non-compliance to result in total invalidity.

(3) Precedents applying the former distinction between mandatory and directory requirements are not relevant unless they addressed the question of legislative intention as to the consequence of non-compliance."

100. It was by way of preliminary analysis easier to accept the accuracy of these guiding principles and to apply them to the requirement for regulations, which is clearly a fundamental requirement, than it is to apply them to the bare and seemingly merely formal advertising requirements.

The Respondent's submissions

101. In the Respondent's Skeleton Argument, the following submissions were set out on the need for regulations:

"*57. **First**, this is apparent from section 30 (emphasis added):*

'(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'.

58. Thus in section 30(1), the Legislative Assembly has made clear that the 'prescribed licence fees' are those which 'shall be determined by the Office'. There is no reference in section 30 for the fees having to be prescribed in regulations.

59. This interpretation is strongly supported by the use of the word 'prescribed' in subsection 30(2), concerning the timing of payment of the licence fees, which makes clear that 'prescribed' in section 30 means 'prescribed by the Office' itself, not in any separate regulations.

60. ***Second***, *this interpretation of s.30 is also supported by s.26 of the ICT Act, concerning the initial grant and renewal of a licence. Section 26(1) states (emphasis added): 'A person who wishes to apply for a licence or the renewal of a licence shall, in accordance with a procedure determined by the Office submit an application for consideration by the Office, and the application shall be in the prescribed form and accompanied by such fees as may be determined by the Office'.*

61. *Two points follow from section 26(1):*

(i) *The fees payable on application for a licence or its renewal are simply those as may be 'determined by the Office'. There is no reason, supported by the terms of the ICT Act, why the Office would have the power to determine the fees payable upon the initial application for a licence, or on its renewal (without the need for such fees to be prescribed by regulations), but would not have the power to determine annual fees in the licence itself. As noted above, licence fees are defined collectively in section 2 of the Act.*

(ii) *The word 'prescribed' cannot require the making of separate regulations of the kind contended for by Infinity. Indeed if it did, its original application for a licence (not being in a form 'prescribed' in separate regulations of the kind contended for by Infinity) would have been void ab initio and all its activities thereafter, and the revenues generated thereby, would have been obtained without lawful authority.*

62. ***Third***, *Infinity's reliance on the definition of "prescribed" in section 3(1) of the Interpretation Act is also misplaced:*

(i) *The definition of 'prescribed' in section 3(1) of that Act is 'prescribed by the Law in which the word occurs or by any regulations made thereunder…'. For the reasons set out above, the Law in which the word 'prescribed' occurs in this case (i.e. the ICT Act) states that the licence fees are those which 'shall be determined by the Office'. Thus the Respondent's determination of the fees under section 30, without the need for separate regulations, is consistent with such fees being*

'prescribed' within the meaning of that word in section 3(1) of the Interpretation Act.

(ii) *Further, as the opening words of section 3(1) of the Interpretation Act state, the meanings assigned to various words in that section will not apply where 'there is something in the subject or context inconsistent with such construction or unless it is therein expressly provided'. For the reasons set out above, it is apparent from section 30(1), 30(2) and 26(1) of the ICT Act that the word 'prescribed' does not have a meaning requiring fees to be set out in 'regulations' separate from the licence.*

63. ***Fourth**, s.97(3)(a)(i) of the ICT Act provides that the Office, after consultation with the Minister: 'may make regulations relating to:(i) licence fees; (ii) critical ICT infrastructure; and (iii) radio and television content obligations'. The fact that the Office may make such regulations does not mean either that it must do so, or that the Office itself has no power (as set out in section 30) to determine the relevant fees for a licensee and when they shall be paid.*

64. *Given that section 30(1) of the ICT Act provides that the prescribed licence fees 'shall' be determined by the Office - i.e. the determination of the prescribed fees under section 30 is a mandatory duty, whereas by contrast, the power to make regulations in section 97(3) is permissive, the ICT Act clearly contemplates prescribed fees being determined by the Office, whether or not regulations are made under section 97.*

65. ***Fifth**, and relatedly, given that nothing in the ICT Act would prevent different fees being charged to different licence holders (or categories of licence holders), it would be consistent with the scheme of the Act for the Office to prescribe/determine licence fees for each licensee in its respective licence (which might be different from each other); but also to have the power (but not a duty) under section 97 to make regulations covering matters of general application, if it considered it appropriate to do so. 66. In short, the existence of the Office's permissive power to make general regulations under section 97 does not exclude the mandatory duty on the Office to determine licence fees for each licensee in section 30."*

102. On careful analysis, there is a strong echo of Humpty Dumpty's "*when I use a word …it means just what I want it to mean*" in the first four of these submissions. The helpful statutory words are emphasised and the inconvenient words are ignored. The key provision on the need for fees to be prescribed is section 30 (1) which must, for a fair reading, be given the following emphasis:

> "*(1) A licence granted under this Law shall be subject to the prescribed licence fees which shall be determined by the Office.*"

103. There is an express mandatory requirement that license fees be "prescribed", and the obligatory character of that requirement is not diminished by the unremarkable fact that the general power to make regulations is expressed in permissive terms in section 97 (3), as invariably occurs in an infinite variety of similar statutory provisions. The fifth point in my judgment has far greater relevance to an evaluation of the questions of (1) does the license qualify as a regulation and (2) if it does, how significant is any non-compliance with the publication requirements? After all, I resolved essentially these same two questions in favour of the Respondent at the leave stage.

104. Mr Grodzinski KC was not able to materially strengthen these submissions in oral argument. Building on the language of section 26 of the ICT Act ("*Procedure for the grant of a license*") he contended that "prescribed" in the current version cannot possibly require regulations in the traditional gazetted sense, because this would mean that the original license issued to the Applicant was void *ab initio*. Section 26 (1) so far as is material as follows:

> "*…the application shall be in the prescribed form and accompanied by such fees as may be determined by the Authority*." [Emphasis added]

105. There was a requirement for license forms to be "prescribed", they were not "prescribed" in the way the Applicant contends should have occurred and so if regulations were required the forms, the unprescribed license itself would be of no legal effect. This seems a somewhat desperate point, which can only be rejected for the following main reasons:

(a) it cannot be a legitimate approach to statutory interpretation to construe one statutory provision inconsistently with its express terms merely because a public authority has not complied with another clearly expressed statutory provision;

(b) there is no legal challenge to the validity of the license itself. It is far from obvious (and in my judgment seems improbable) that the failure to prescribe a form which is actually completed by a license applicant and issued by a public authority would result in its invalidity for all purposes; and

(c) it is doubtful that a public authority in the position of the Respondent could seek to impugn the validity of a license it has issued on the basis of its own default.

106. It is true that the definition of "*prescribed*" in section 3(1) of the Interpretation Act contemplates that prescribing may occur through primary legislation, as counsel contended. But that does not erase the later part of the definition which refers to "*or by any regulations made thereunder*". The ICT Act does not on any view prescribe the fees section 30 (1) provides must be prescribed. The suggestion that "prescribed" merely means "determined by the Respondent" is simply untenable.

107. As for the question of whether the license itself qualified as regulations, it was submitted in the Respondent's Skeleton:

> "*67. Further and alternatively, if (contrary to the above) the ICT Act requires licence fees to have been prescribed in 'regulations' under section 97, then the licences issued to all licensees (including to Infinity in 2004 and 2021) satisfied the definition of that term, for the reasons set out below.*
>
> *68. (This was the primary basis on which Kawaley J refused leave in his judgment in December 2023, see in particular paras 26 et seq. Although the Court of Appeal subsequently granted the appeal and leave to apply for judicial review in relation to Infinity's challenge to the royalty fee, it made clear that was not that Court's task 'to determine whether [Infinity's] arguments are correct': see [§30 and 34].)*
>
> *69.* ***First****, s.3(1) of the Interpretation Act states: ' "regulations" includes rules, bye-laws, proclamations, orders, schemes, notifications, directions, notices and forms' (emphasis added). This is a very wide and non-exhaustive definition of 'regulations'.*

70. *As the opening words of section 3(1) of the Interpretation Act make clear, the key requirement for an instrument to constitute 'regulations' (as well as for 'rules, bye-laws, orders, directions, notices and forms') is that they are 'instruments of a public character relating to the Islands'. As Kawaley J stated at [§26], the legislative purpose of section 3(1) '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'.*

72. ***Second**, the wide variety of instruments that can fall within the definition of 'regulations' under section 3(1) of the Interpretation Act are not limited to regulations which are subject to an affirmative resolution or negative resolution of the Legislative Assembly, as set out in section 28(2) and (3) of the Interpretation Act. Regulations made under s.97 of the ICT Act are not required to be subject to affirmative or negative resolution.*

73. *Infinity contends for a contrary conclusion (Skel/§37) because: 'licences' and 'regulations' are defined separately in the ICT Act; licences do not need to be prescribed by regulations; and (so Infinity asserts) because an individual licence does not have the 'character' of regulations. However:*

    (i) *As submitted above, the relevant character of regulations for these purposes is that they are 'instruments of a public character'. ICT licences have such a character, since they are made by a public authority and must be published by the Office under section 34 of the ICT Act.*

    (ii) *The fact that 'licences' and 'regulations' are each defined in section 2 of the ICT Act does not mean that a single document cannot fulfil both statutory functions.*

    (iii) *Given the wide (and non-exhaustive) definition of 'regulations' in section 3(1) of the Interpretation Act, including but not being limited to e.g. 'notifications', 'directions', 'notices' and 'forms' (provided that they are instruments of a public character) the licences granted under the Act fall within that wide definition, as Kawaley J held at §§26-29.*

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

108. In oral argument, Mr Grodzinski KC argued that the licenses themselves or the Guidelines met the need for regulations if regulations were required for two main reasons. Firstly, in addition to the open-ended definition of "regulations" in section 3(1) of the Interpretation Act, the licenses were also an "*instrument of a public character*" in the sense referred to in section 61 of the same Act. A point that I was heavily influenced by at the leave stage was the further submission that traditional regulations made no sense in this statutory context because different fees might be prescribed for different service providers. Viewed practically, in the pre-liberalisation era bespoke license had been issued to one service provider. In the post-liberalisation era, a series of bespoke license fees based on commercially sensitive material could only be calculated after the fact, as it were. Prospective publication of fixed fees was not possible in this regulatory context. With the benefit of fuller argument and further consideration, the contention that the requirement for regulations was satisfied by the license and its publication in the statutory register of licenses is less easy to accept for two principal reasons:

(a) if the Respondent had intended to treat the regulatory fee calculation formula set out in the license as a form of regulation, a notice to that effect could simply have been published in the Official Gazette; and

(b) the statutory obligation to advertise prescribed fees (not identified at the leave stage) and the statutory obligation to maintain a register of licenses (ICT Act, section 34 (1)) strongly supports the Applicant's straightforward assertion that licenses and regulations are distinct legal things.

109. Nonetheless, in the Respondent's Skeleton Argument, the following submissions on publication were set out:

"*76. Infinity argues that to be valid, any regulations would have had to be published in the Legislation Gazette under section 29 of the Interpretation Act or a Government Notice under section 61 of the Interpretation Act.*

77. Section 61 of the Interpretation Act provides:

> *'Where any regulation or other instrument of a public character is required either expressly or by implication to be published or notified in the Gazette, a Government Notice that such regulation or other instrument has been made and of the place where copies thereof can be purchased or perused shall be sufficient compliance with such requirement'*

> *78. There is no definition of Government Notice in the Interpretation Act. The clear purpose of section 61 is to ensure that the public are notified that 'regulations and other instruments of a public character' have been made, and where they can be perused.*

> *79. Given that the Office is a public authority under the Public Authorities Act; and that ICT Licences (including those granted to Infinity) are published by the Office under section 34 of the ICT Act; and that the Guidelines have also been published by the Office (see above), the publication requirement of section 61 has plainly been satisfied.*"

110. This is a somewhat beguiling submission. Section 61 seems most straightforwardly to mean that it not necessary for the full content of regulations to be published in the Gazette; instead, a Notice identifying where the regulations can be obtained can be published in the Gazette. Mr Buttler KC plausibly suggested this section reflected the legacy of the pre-internet era when publication only took place in hard copy form. The idea that a Notice published in any form anywhere a public authority chooses would be section 61 compliant is an eyebrow-raising proposition. However, the more plausible alternative proposition is that (assuming the fees were in substance validly prescribed) substantial compliance with the publication requirements had occurred so that the failure to publish in the Gazette is a mere technicality. This question is closely connected with the Respondent's "no invalidity in any event" argument.

111. The Respondent's last stand was to contend that there was no invalidity in any event. It was submitted:

> "*84. Finally, even if (contrary to the above) the Licences and/or Guidelines did not fall within the relevant definition of "regulations"; and/or even if their publication did not satisfy the requirements of section 61 of the Interpretation Act, these matters would not invalidate the fees charged to Infinity, in particular in circumstances where neither Infinity nor any other relevant person has suggested that they were unaware of the terms of their obligation*

to pay fees, and where no other prejudice has been identified by Infinity; and where significant detriment to the public purse would follow from granting the quashing and other relief sought by Infinity: see R v Soneji [2006] 1 AC 340 per Lord Steyn at [23]; and A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd [2024] UKSC 27; [2024] 3 WLR 601 at [57] to [68] per Lord Briggs and Lord Sales (with whom the other members of the Supreme Court agreed)."

112. This argument is a potentially dispositive one and I consider it to be the most difficult point to resolve. It requires the application of general principles of statutory construction to a context which does not appear to be elucidated by any contextually comparable cases. Mr Grodzinski KC rightly submitted in oral argument that the *Soneji* principle did not only apply to procedural non-compliance. He also rightly submitted that even if the second defence could not be advanced if the Royalty Fee was unconstitutional, both delay and estoppel could be relied upon as grounds for refusing discretionary relief in relation to the Regulatory Fee. He contended that no statutory purpose would be undermined by declining relief based merely on a failure to publish in the Gazette.

Was the Respondent unable to lawfully collect the Regulatory Fee because the relevant fees were not prescribed through valid regulations?

113. The following main issues fall for determination:

(a) whether section 30 (1) of the ICT Act imposes a mandatory requirement that license fees be prescribed by regulations;

(b) if there is any such requirement, was it substantially met though the license placed on the Respondent's public register and/or through the publication on the Respondent's website of Guidelines describing how the Regulatory Fee would be calculated;

(c) did any non-compliance with the requirements relating to promulgating and publishing regulations relating to license fees which occurred result in the inability of the Respondent to lawfully collect the relevant fees?

114. I have no hesitation in finding that section 30 (1) of the ICT Act imposes a mandatory obligation on the Respondent to prescribe license fees through regulations. Section 30 (1) states: "*A licence*

granted under this Law shall be subject to the prescribed licence fees…" The URC Act, the Respondent's governing statute, empowers the Respondent to "*collect prescribed fees*". The word "prescribed" is not given a special meaning by way of express definition or statutory context by the ICT Act itself. Accordingly the standard definitions in section 3 (1) of the Interpretation Act apply:

> "*'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…*
>
> *'regulations' include rules, bye-laws, proclamations, orders, schemes, notifications, directions, notices and forms…*"

115. Clearly, the only form of prescription which arises for consideration here is prescription by regulations made by the Respondent, which is generally empowered to make regulations under section 97 (3) (a) (i) and to determine fees by section 30(1) of the ICT Act. The Interpretation Act section 29 provides:

> "***Commencement and proof of regulations***
>
> *29. (1) All regulations made under any Law or other lawful authority and having legislative effect shall be published in the Gazette and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.*
>
> *(2) The production of a copy of the Gazette containing any regulations shall be prima facie evidence in all courts and for all purposes of the due making and tenor of such regulations*."

116. Publication in the Gazette is a requirement both for proof of the existence of regulations and, unless otherwise stated, the date of their commencement. These substantive elements of the publication requirements must not be overlooked. Regulations are a form of delegated or subsidiary legislation, albeit that they may take a variety of forms. This is why section 61 provides that if the regulations are not fully set out in the Gazette, a notice of the existence of the regulations can be published in the same publication instead. Publication in the Gazette, with some form of words signifying that regulations by whatever name (regulations, proclamations, bye-laws, order or form), is clearly fundamental to the process of both (1) legally

signifying and (2) declaring to the public at large, that a form of subsidiary legislation has been made. The exercise of delegated legislative authority to create subsidiary legislation is not a constitutionally insignificant matter which delegees can exercise in the manner of their own choosing. The Respondent's contention that either the license or the Guidelines qualified as regulations implicitly invites the Court to find that where Parliament empowers a public body or public officer to make subsidiary legislation, the law-making process is not limited to what Parliament has laid down. Instead, the delegee can, at its own election, determine that because of its unique administrative context, some other law-making procedure can be deployed instead.

117. The potentially dangerous implications of the Respondent's position on this ought not to be obscured by the fact that fees under the ICT Act happen to affect a small number of licensees as opposed to the public at large. Had the Legislature considered it was inappropriate in this particular public law context for fees to be prescribed in the usual manner, it could theoretically have mandated some other statutory mechanism. Justifying a departure from what is surely the standard practice of providing that all statutory fees collected by public authorities should receive the imprimatur of primary or subsidiary legislation would not have been a straightforward proposition. I accordingly am bound to find that neither the license issued to the Applicant nor the Guidelines constituted legally valid regulations for the purposes of section 30 (1) of the ICT Act.

118. It follows that because the publication requirements are an essential part of the law-making process, not a merely incidental feature of it, the suggestion that these requirements were met by giving general notice of the content of the fee guidelines can summarily be rejected. It remains to consider the closely connected question of whether the failure to lawfully prescribe the fees results in the invalidity of the fee levying which occurred in the Applicant's case. It is closely connected because what is at issue is what Parliament would have intended to be the consequences which would flow from a failure to collect license fees in the manner mandated by Parliament; namely, through subsidiary legislation.

119. In *R-v-Soneji* [2005] UKHL 49, [2006] 1 AC 340 (upon which the Respondent's counsel primarily relied), Lord Steyn opined that in determining the consequences of statutory non-compliance "*the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction*" (paragraph 23). That case concerned whether a failure to comply with statutory time-limits deprived the court of the jurisdiction to make confiscation orders, and the House of Lords considered it obvious that

Parliament would not have wanted a loss of jurisdiction to occur. Here, the relevant question is: what would Parliament have wished to occur in the event that fees were levied under a power mandated to be exercised through subsidiary legislation without the subsidiary legislation being enacted? Lord Steyn (at paragraph 22) cited with approval the following passage from the judgment of Evans JA in the Canadian Federal Court of Appeal decision in *Society Promoting Environmental Conservation v Canada (Attorney-General)* (2003) 228 DLR (4th) 693 (at paragraph 35):

> "*(iv) . . . the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.*"

120. Although there must be "*an objective appraisal of the intent, which must be imputed to Parliament*" (*Soneji*, paragraph 25), I find that the Court is required to have regard to both (1) the objective purpose of the statutory requirement which has not been met and also (where this is relevant) (2) an objective appraisal of the implications of the particular instance of non-compliance before the Court in the circumstances of each case. The correctness of this approach is most clearly demonstrated by the following observations of Lord Rodger (at paragraph 35): "*…In that situation, where the breach of the requirements of section 71(1) caused no prejudice of any kind to the respondents in respect of their sentences, I am satisfied that Parliament would not have intended that the sentences passed by the judge should be invalid.*" Each strand of the analysis requires regard to be had to the purpose of the relevant statutory provision, however in some cases analysis of the statutory provision itself may be dispositive (e.g. *Premier Assurance*).

121. The purpose of the statutory provision (section 30 (1) and the requirement for fees to be made by regulations) does not fall to be understood within the narrow confines of the ICT Act itself. The provision is undoubtedly based on the usual practice according to which public authorities may only collect fees by authority of law. Properly understood, the requirement is not an inconsequential procedural requirement. Rather it fulfils higher level constitutional policy imperatives. It would be inconsistent with the rule of law for public authorities, who have the statutory right to regulate public access to economic opportunities, to fix access fees without any legislative accountability. This is the fundamental reason why section 30(1) requires fees to be "*prescribed*". This is also why section 16 (4) (a) of the Constitution, in carving out certain

areas of legislation from being exposed to constitutional discrimination claims, includes laws for imposing taxes including the "*levying of fees for the grants of licences*". This provision indeed demonstrates, broadly in line with Mr Grodzinski KC's submission on the Royalty Fee point, that a coercive tax element could validly be incorporated into a license fee. For present purposes this constitutional provision also reflects an assumption that license fees, like taxes, will be imposed not arbitrarily but under legislative authority. For similar reasons, a license fee also arguably falls within the ambit of "*rate or due*" for the purposes of section 15 (2) (a) (i) of the Constitution.

122. For all of these public policy reasons, in my judgment collecting fees in breach of a statutory requirement to do so through subsidiary legislation should *prima facie* be deemed to be intended to result in invalidity, depending on the circumstances of the case. It ought ordinarily to be a "bright line" requirement where the starting assumption is invalidity. It ought not to be possible for non-compliant fee collecting public authorities to believe that when legally challenged they can simply respond by saying, in effect, "take a chill pill!" My initial assessment of this issue at the leave stage unwittingly endorsed precisely this unsatisfactory public law outcome. One must avoid being distracted by the mitigating historical circumstances which explain why the need for regulations was overlooked and the idiosyncrasy that fees in this statutory context are calculated on a bespoke basis for a narrow segment of the public. A clear-headed analysis of the statutory purpose of the regulations requirement demonstrates that it is very far removed from a merely technical procedural requirement.

123. Carrying out an objective appraisal of the circumstances of this case of non-compliance and their implications for the policy of the regulations requirement, I find that Parliament should be deemed to have intended that the Applicant should be entitled to a declaration of invalidity. This is because:

(a) although the non-compliance was clearly accidental, there is no reasonable justification for it. This was a complete oversight as opposed to a minor administrative slip (e.g. collecting fees before valid regulations came into force);

(b) there will be no great public inconvenience if the fees collected and/or claimed from the Applicant are found not to be due, because the Respondent has protection against an avalanche of further claims through the Validation Act;

(c) the inherent prejudice to the Applicant from being denied the declaration sought (assuming at this stage that there is no entitlement to restitution) would outweigh any countervailing public interest; and

(d) the public interest in the rule of law being upheld, the central purpose of the 'fees prescribed by regulations' requirement in section 30 (1) of the ICT Act, would be undermined rather than upheld by upholding the validity of the levying of fees without lawful authority.

Adjudication

124. In summary, the Applicant is for the above reasons entitled to a declaration that the Regulatory Fee cannot lawfully be collected because it was not levied through regulations as section 30(1) of the ICT Act requires. If my primary findings on the Royalty Fee were not properly open to me, I would in the alternative find that it was not liable to be paid by the Applicant because of the absence of regulations.

Summary

125. The Applicant's application for judicial review and declarations that it is not liable to pay the Royalty Fee and Regulatory Fee respectively succeeds because:

(a) coercive revenue can only lawfully be collected by statutory authority and the Respondent has no legislative authority to collect the Royalty Fee; and

(b) licence fees under section 30 (1) of the ICT Act can only lawfully be collected if the obligation to pay them is set out in subsidiary legislation ("regulations"). The Regulatory Fee was never embodied in regulations and was not lawfully charged.

126. For the avoidance of doubt, but subject to hearing counsel if required, I would summarily reject the delay defence for present purposes. The Applicant has successfully appealed the initial refusal of leave to the Court of Appeal and has been permitted by that Court to pursue a full hearing on the merits. It is surely not properly open to this Court at the conclusion of that full hearing to decline even declaratory relief on the grounds of delay, in light of the Applicant's success on the legal merits its claims.

127. I will hear counsel, if required, on the terms of the Order and costs, even though it seems obvious that costs should follow the event.

THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT