**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIHCVAP2022/0003**

**BETWEEN:**

**TELECOMMUNICATION REGULATORY AUTHORITY**

Appellant

**and**

**[1] CARIBBEAN CELLULAR TELEPHONE LIMITED**
**[2] BVI CABLE TV LIMITED**

Respondents

**CONSOLIDATED WITH:**

**BVIHCVAP2022/0004**

**BETWEEN:**

**TELECOMMUNICATION REGULATORY AUTHORITY**

Appellant

**and**

**CABLE AND WIRELESS (BVI) LIMITED**

Respondent

**CONSOLIDATED WITH:**

**BVIHCVAP2022/0005**

**BETWEEN:**

**TELECOMMUNICATION REGULATORY AUTHORITY**

Appellant

**and**

**DIGICEL (BVI) LIMITED**

Respondent

**Before**:

The Hon. Mr. Gerard St. C. Farara — Justice of Appeal [Ag.]
The Hon. Mde. Ingrid Mangatal — Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore — Justice of Appeal [Ag.]

**Appearances:**

Mr. Javan Herberg, KC with him Mr. Terrence B. Neale and Ms. Nelcia St. Jean for the Appellant in all three appeals
Mr. Sydney A. Bennett, KC with him Ms. Anthea Smith for the Respondents, Caribbean Cellular Telephone Limited and BVI Cable TV Limited, in BVIHCVAP2022/0003
Mr. Brian Child and Mr. Litrow Hickson for the Respondents, Cable and Wireless (BVI) Limited in BVIHCVAP2022/0004
Mr. Nigel Pleming, KC and Mr. Paul Dennis, KC with them Ms. Asha Johnson-Willins and Ms. Catherine Dobson for the Respondent, Digicel (BVI) Limited, in BVIHCVAP2022/0005

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2025: October 13, 14;
2026: March 10.

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*Civil appeal – Judicial review – Telecommunications Act 2006 – Industry levy and royalty payments - Whether the learned judge erred in his interpretation and application of sections 58, 59, 60, 63, and 65 of the Telecommunications Act – Whether royalty payments under section 60 are part of the 'funds' of the Commission pursuant to section 58(1) – Whether the Commission acted ultra vires in deciding that royalties were intended for the Government to be paid into the Consolidated Fund – Whether royalties are funds of the Commission to be used to defray its permitted expenditures under section 58(2) – Whether royalties collected by the Commission can be transferred to the Government and paid into the Consolidated Fund under paragraph (f) of section 58(2) – Whether royalties are an 'expenditure' authorized by the Commission and whether they are 'properly chargeable to revenue' pursuant to paragraph (f) of section 58(2) - Whether royalties as funds of the Commission are to be factored into the estimated of income of the Commission to be approved by the Minister of Finance under section 63(3) – Whether royalties are to be factored into the estimates of expenditure and of income to be approved by the Minister of Finance in determining whether there is a 'net estimated expenditure' of the Commission shown in the audited accounts of the Commission for the previous year under section 59(2) for the purposes of calculating an industry levy – Whether the judge was correct in making an order of certiorari quashing the decision of the Commission to impose and collect an industry levy for the year 2019/2020 from the licensees - Whether the industry levy for the year 2019/2020 calculated and imposed by the Commission was ultra vires the Act, null and void – Whether the learned judge erred in finding that the Commission had failed to consult with the respondents – Whether the learned judge erred in law when he held that the Commission acted irrationally and unreasonably to engage in the consultation process on the imposition of an industry levy for the year 2019/2020 without completing* *the audited financial statements of the Commission for the year 2018/2019 - Whether the learned judge erred in deciding that royalty payments were meant for the Government of the Virgin Islands to be paid into the Consolidated Fund and that the industry levy should be paid by the respondents to fund the operational expenses of the Commission and royalties could not be used to fund the expenditure of the Commission – Whether the learned judge erred in finding that the Commission's conduct and statements in the matter gave rise to a legitimate expectation that the respondents would be consulted prior to the final demand for payment of the industry levy– Whether the learned judge erred in law in making a declaration in respect of the collection of the 2020/2021 industry levy as no industry levy has yet been issued by the Commission for this period – Whether the learned judge failed to or improperly exercised his discretion under rule 56.13(3) of the Civil Procedure Rules 2000 with respect to the appropriate reliefs to be granted on the respondents' application for judicial review*

These three appeals, filed by the Telecommunication Regulatory Commission ("the TRC") , challenged the findings of fact, conclusions of law, orders and declarations made by the learned judge in his judgment dated 4$^{th}$ April 2022 by which he gave judgment for the respondents on their respective claims brought by way of judicial review pursuant to Part 56 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR 2000"). The claims in the court below challenged the lawfulness, legality, and vires of the decisions of the TRC in calculating, fixing, apportioning, and imposing on each of the respondents, as licensed telecommunications providers under the Telecommunications Act, 2006 ("the Act"), an industry levy for the financial period 2019/2020 under section 59 of the Act. The respondents also sought judicial review of the legality of the TRC's decision in calculating and imposing on each of them a royalty payment for the financial year 2019/2020 under section 60 of the Act, and the vires of the TRC's decision that royalty payments were funds of or intended for the Government of the Virgin Islands to be paid over into the Consolidated Fund and were not to be treated as funds of the TRC under section 58(1) of the Act to be used, together with other funds of the TRC, to defray the operational expenses of the TRC under section 58(2) or to be factored into its calculation of the industry levy pursuant to section 59 of the Act. In their respective claims, the respondents, as claimants, also relied on certain other claims concerning the Commission's failure to comply with certain provisions of and acting ultra vires certain provisions of the Act, failure to conduct proper consultations, and whether the Commission had by its written statements to each of them and by its conduct created an enforceable legitimate expectation that it would not impose an industry levy on the licensees for the financial year 2019/2020.

In his judgment, the learned judge identified three main issues for his determination. The first issue was whether the Commission acted illegally and ultra vires the Act when it calculated, fixed and apportioned the 2019/2020 industry levy. The judge distilled four questions for consideration under this first issue. They were: (i) whether royalty payments are to be regarded as part of the income of the Commission and whether they are to be paid over to the Government for its operational expenses; (ii) whether the Commission was obliged to have audited financial statements for the previous financial year in seeking to calculate and fix the industry levy for the 2019/2020 period; (iii) whether the Commission was wrong to charge the industry levy to the estimated expenditure approved by the

Minister under section 63 of the Act as that which is described as the 'net estimated expenditure' under section 50 together with a 10 percent contingency, or is the 'net estimated expenditure' that amount by which the estimated expenditure approved by the Minister under section 63 exceeds the total amount of its expected income for that year; and (iv) whether the Commission acted ultra vires the Act ('committed a procedural impropriety') when it failed to conduct the statutorily imposed public consultation or adequate public consultations in calculating and apportioning the industry levy, in breach of its statutory duty to consult imposed by sections 59 and 63 of the Act. The second issue was whether the Commission acted irrationally and or unreasonably by suddenly imposing or seeking to impose an industry levy on each of the respondents in the circumstances and background relating to the Commission's historical approach to the industry levy and the outstanding and unresolved concerns of the operators in the telecommunications industry. The third issue was whether the Commission's statements and conduct gave rise to an enforceable legitimate expectation on the part of the licensees that the levy would not be imposed for financial year 2019/2020, particularly without prior consultation, reasonable notice and without compliance with the Act.

The judge found for the respondents on their respective claims. The judge made orders of certiorari quashing the imposition of the industry levy for the financial year 1st October 2019 to 30th September 2020 on each of the respondents. He also made declarations in favour of each respondent on their claim that: (a) in respect of the financial years 1st October 2019 to 30th September 2020 and 1st October 2020 to 30th September 2021, the Commission breached its statutory duty to conduct legally adequate consultations and had failed to submit to the Minister responsible for finance under the Act, proper estimates of expected expenditure and expected income, no later than three months before 1st October 2019; and (b) consequent upon the grant of the declaration in (a) above, that the Commission cannot now lawfully submit finance estimates or a work programme to the Minister under section 63 of the Act or set an industry levy under section 59 of the Act for the financial years 1st October 2019 to 30th September 2020 and 1st October 2020 to 30th September 2021. The judge also made an order awarding costs to each of the respondents.

Being dissatisfied with the learned judge's decision, the TRC appealed. In its Amended Notice of Appeal filed on 7th October 2022 the TRC relied on 10 grounds of appeal. However, as the appeal unfolded, several of these grounds, namely, grounds (a), (b) (c) and (d) were subsumed into what the parties described as 'the principal vires issue', which issue is central to the determination of the appeal. The principal vires issue concerns fundamentally the judge's approach in construing and the correctness of his interpretation of sections 58, 59, 60, 63 and 65 of the Act, and his application of these provisions and findings and conclusions on the four questions posited under the first issue identified for determination by the judge.

**Held**: dismissing all three appeals BVIHCVAP2022/0003, BVIHCVAP2022/0004, and BVIHCVAP2022/0005, affirming the declarations and orders of the learned judge at paragraphs [272] and [273] of the judgment in the court below, and awarding costs to all three respondents in the particular appeal pertaining to them, such costs to be assessed by a judge of the Commercial Court or by a Master, if not agreed within 30 days from the date of delivery of this judgment, that:

1. By section 64(4) of the Act, the accounts of the Commission are to be audited 'within 6 months after the end of each financial year' by independent accountants/auditors appointed for that purpose by the Commission. This requirement raises a serious practical timing issue, as it relates to or impacts the ability of the Commission to calculate an industry levy for the new financial year, and to do so within the period of 4 weeks from the date of approval of its estimates of expenditure and income by the Minister responsible for finance under section 63, as stipulated by section 59(1) of the Act. Thus, in circumstances where the accounts for the previous year are not audited until some time into the new financial year, but before 6 months has elapsed, it would mean that the industry levy for said year cannot be calculated until the accounts for the prior year have been audited, and this may not be possible within the 4 week period from approval of the estimates of expenditure and income as stipulated by section 59(1) of the Act for the fixing of an industry levy for the new financial year.

2. In the instant matter, the real dilemma is that the Commission did not have any audited accounts for the financial year 2018/2019 when it purported to calculate and to fix, under section 59, an industry levy for the financial year 2019/2020. Sections 59(2)(a) and (b) make the determination by the Commission of whether to add a 'deficit' or to subtract a 'surplus' in its calculation of the industry levy, a critical and essential part of the calculation. It is therefore most significant for the Commission to ascertain not just whether such a deficit or surplus existed for the previous financial year, but the correct amount of such 'deficit' or 'surplus' in order to properly and correctly calculate the industry levy for the new financial year. This is to be had not from the approved 'estimates' but, importantly, from the audited accounts of the Commission for the previous year. This requirement is an integral part of the intention of the legislature as gleaned from the statutory scheme and as is manifest from the clear and unambiguous words of section 59(2) the Act. The determination as to whether the Commission had a deficit or surplus from its operations under the Act for the previous year, can only be ascertained conclusively by an audit of its actual expenditure incurred and its income received or collected from all sources during that said year. Accordingly, the absence of audited accounts for the financial year 2018/2019 is fatal to any purported attempt by the Commission to embark upon, and to calculate, fix, apportion, and impose on the respondents, as licensees, an industry levy for the year 2019/2020. On this basis alone, the purported industry levy for the 2019/2020 financial year as calculated and imposed on the respondents by the Commission was ultra vires the Act and cannot stand.

   **Wayne Barratt, Campbell Walter, Brian Hill, Andrew Walter v Treatt** [2013] EWHC 3661 (Ch) applied.

3. It is pellucid that an industry levy legitimately calculated, fixed, imposed, and paid over to the Commission is part of or a component of its 'funds' in any financial year. This is made clear by sections 58(1) and 59(3) of the Act. Further, by section 59(5), it is the Commission, which is empowered to recover, by way of summary

proceedings, from a defaulting licensee or authorized holder, an industry levy and any accrued interest, as a civil debt due to the Commission. Further, the provisions of subsection (6) of section 59 are clear and unambiguous. It expressly provides and requires that monies received by the Commission from an industry levy are to be retained by the Commission, for its own use. The only exception permitted is where the Minister of Finance, with the approval of the House of Assembly, otherwise directs. Thus, neither the Commission itself nor the Minister of Finance can direct that monies received from an industry levy or portions of those monies be redirected by the Commission to some use other than the own use of the Commission, without the sanction and approval of the House of Assembly.

4. By section 60, licensees or authorization holders are liable to pay to the Commission, in accordance with the provisions of its licence or frequency authorization, a royalty calculated at the rate of 3 percent of their gross revenue annually. Royalty payments are clearly funds of the Commission caught by or declared by section 58(1), and to be used in accordance with the provisions of section 58(2) of the Act. There is, however, no equivalent provision pertaining to the use of royalty payments as appears in section 59(6) pertaining to the use of monies received by the Commission from an industry levy. This notwithstanding, the effect of section 58 of the Act is that royalty payments received by the Commission under section 60 of the Act immediately become part of the 'funds' of the Commission under section 58(1), and which 'funds', collectively with other funds of the Commission received from other prescribed sources, including funds received from payment of an industry levy, 'shall' be used and applied in the payment of the permitted classes of expenditures authorized by section 58(2)(a) to (f).

   **McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough** [1992] 2 AC 48 applied; **Ormond Investment Company Limited v Betts** [1928] AC 143 applied.

5. Paragraph (f) of section 58(2) of the Act permits the Commission to use or to apply its funds in payment of 'any other expenditure authorized by the Commission and properly chargeable to revenue.' It is clear on a proper interpretation of the word 'expenditure' in paragraph (f) that the making or transfer of royalty payments to the Government are not a legitimate 'expenditure' of the Commission, much less one 'properly chargeable to revenue' of the Commission. This is so notwithstanding that royalties are usually payment for the use of the intellectual property or some asset of another under the terms of a license. Under section 60 of the Act, royalties are a statutory charge imposed on licensees and authorization holders to be paid to and collected by the Commission, which, once paid, become part of the income or 'funds' of the Commission pursuant to section 58(1). In no sense does the Act provide or stipulate that royalty payments are payments to the Government, or to the Commission for and on behalf of the Government, to be passed on to the Government by transfer or payment into the Consolidated Fund. To the contrary, these royalties may be considered a working or operational expense or cost to the licensees and authorization holders, to be treated as such

by them in their annual accounts. It is therefore not an ‘expenditure properly chargeable to revenue’ of the Commission in the sense in which this term is used and to be understood at paragraph (f) of section 58(1).

**Anglo-Persian Oil Company Limited v Dale** [1932] 1 KB 1244 applied.

6. The learned judge’s conclusion that royalties are income or funds of the Commission to be used by it in defraying its operational expenses as permitted by section 58(2) is correct. The Commission has no power or authority under paragraph (f) of section 58(2) to transfer any of its income or funds to the Government, including royalty payments received by it under section 60 of the Act. Absent no other provision in the Act by which the Commission is required or permitted to transfer royalty payments (in whole or in part) to the Government, it follows that the learned judge was correct to find that by so doing, the Commission acted or was acting ultra vires the Act and illegally. It also follows that the learned judge was correct to hold that by excluding royalties from the Commission’s estimates of income in the 2019/2020 Draft Budget to be applied in defraying or meeting the approved expenditures of the Commission for that year and thereby excluding such sums from its calculation of the 2019/2020 industry levy, the Commission acted ultra vires the Act. Accordingly, the calculation, fixing and apportioning of an industry levy for 2019/2020 among the licensees/respondents is null and void and of no effect.

7. The only way which the Act permits monies part of the income, revenue or ‘funds’ of the Commission to be paid over to the Government by the Commission is where the circumstances contemplated by section 65 are applicable, that is, as a ‘surplus on the budget approved for the Commission’s expenditure for any financial year’. It is notable that there is no evidence to suggest that the Commission has realized or declared such a ‘surplus’ and has acted in fulfillment of its statutory obligation and duty prescribed by section 65. The learned judge was therefore correct in his conclusion that royalties are income or funds of the Commission to be used by it in defraying its operational expenses as permitted by section 58(2).

   **ECC Quarries Ltd v Watkis (Inspector of Taxes)** [1975] 3 All ER 843 applied; **Strick (Inspector of Taxes) v Regent Oil Co. Ltd** [1964] WLR 309 considered; **Regent Oil Co Ltd v Strick and BP** [1964] 3 All ER 23 considered; **BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia** [1965] 3 All ER 209 considered.

8. On a strict interpretation of the provisions of section 59, the learned judge was correct in his conclusion that the Commission was wrong in using the ‘expected expenditure’ in the estimates approved by the Minister of Finance pursuant to section 63(3) of the Act, as the ‘net estimated expenditure’ to be used under section 59(2) when calculating the industry levy. The calculation of an industry levy under section 59(2), involves as a starting point or precursor to embarking upon such an exercise, that there be a ‘net estimated expenditure’ of the Commission set out in the estimates approved by the Minister responsible for finance. To this is

then added a contingency of ten per cent of the net estimated expenditure. The resulting total is then adjusted upwards or downwards depending on whether the audited accounts of the Commission for the previous financial year shows as ‘deficit’ or a ‘surplus’. If there is no ‘net estimated expenditure’ arising from the approved estimates there is nothing to which can be calculated and added the 10 per cent contingency, as the sum total or base sum for calculating an industry levy. Absent any ‘net estimated expenditure’ from the estimates for the financial year under consideration, it follows, that the entire exercise of calculating an industry levy by adding a ‘deficit’ to or subtracting a ‘surplus’, pursuant to subparagraph (a) or (b) of section 59(2), from the total of the net estimated expenditure and the 10 per cent contingency, falls away or is rendered unnecessary and cannot be proceeded with for that new financial year.

9. The appellant has not surmounted two main issues in the appeals and in the court below, the effect of which in law, jointly or severally, render any challenge to the findings of the judge on the failure to adequately consult with the respondents, unsustainable, with the result that these grounds of appeal must be dismissed. The first is the incorrect, ultra vires and illegal approach by the Commission in its treatment of royalty payments in its estimates of income and in its budget for the financial year 2019/2020. This factor alone renders the public consultation process embarked upon by the Commission hopelessly inadequate and deficient to the point of being erroneous in that its accounts were based on a totally false or illegal premise. The second is the abject failure to have completed and included as an integral part of its public consultation process, and by extension its calculation, fixing and imposition of an industry levy for the 2019/2020 financial year, of audited financial statements of the Commission for the financial year 2018/2019. This was clearly in breach of its duty under section 64(4) and its obligations under section 59 of the Act. These two major failures, render any public consultation process undertaken by the Commission for the year financial year 2019/2020 woefully deficient, inadequate and not in keeping with its statutory and common law duty to conduct adequate consultations with the public, including, most importantly, the licensee/respondents. Therefore, the learned judge was correct that the consultation undertaken by the Commission was deficient, inadequate and in breach of its statutory duties to have public consultations under sections 63(1) and 59(1) of the Act.

10. The judge was entirely correct in his statements of principle and conclusions of law to the effect that the Commission has a statutory duty to engage its annual budget process and, in so doing, it is obliged to impose and collect any industry levy lawfully due. This is because the provisions of section 59 of the Act does not permit the Commission to forego the collection of an industry levy payment; there is simply no discretion given to it to do so. The fact that the Commission had foregone the calculation and collection of an industry levy for past financial years, that is, ‘waived’ the lawful imposition and collection of a levy in breach of section 59, cannot be the basis upon which the Commission may undertake not to seek to collect a future industry levy. Where the legislature has imposed an obligation on a public body to collect monies lawfully due to it in accordance with law, that body is

not entitled to promise that it would forego the collection of such sum, and where such a promise is in fact made, the promisee is not entitled to rely on that promise, whether expressed or implied, that collection would be waived.

11. Where a statute imposes on a public body a duty or obligation to assess each year the amount, if any, of an industry levy to be imposed on licensees or others, the public body, in this case, the Commission must embark upon all steps required under the provisions of the statute to conduct such assessment and calculation, with a view to imposing or charging such levy. This speaks directly to the obligations of the Commission in relation to its annual estimates under section 63(1) and to its obligations to use such approved estimates first to ascertain whether there is a 'net estimated expenditure' for the relevant year under consideration and, if so, to calculate an industry levy for the same financial year. Thus, where those circumstances do exist, the Commission must, following a public consultation and within 4 weeks of approval by the Minister of Finance of its estimates for a new financial year, embark upon a calculation and setting of an industry levy for the said new financial year. The Commission has no power or discretion, in such circumstances, to delay or to elect not to calculate and to set an industry levy, and any decision to do so is illegal and ultra vires the Act, in particular section 59.

12. The judge was correct in his reasoning and conclusion that while the Commission has a statutory obligation to calculate, fix, impose, and collect an industry levy for each financial year and, as a precursor to doing so, to conduct a public consultation in relation to its estimates of expenditure and income under section 63 of the Act and to obtain from the Minister of Finance approval of such estimates, it nevertheless has sufficient latitude under the Act to adopt a pragmatic approach to the actual collection of such industry levy from the licensees. In doing so, it may take into account the prevailing economic circumstances within the Territory and in the telecommunications industry as a whole; and even, in some appropriate instances, the particular or individual financial position of a licensee/payee. It follows, as the judge found, that the clear representations made by the Commission to the licensees/respondents that it would be adopting an 'amended approach' for collection of the industry levy, would introduce a 'path for payment of the industry levy', and would engage in discussions with stakeholders on the 2019/2020 industry levy during that financial year 'with a view of determining a mutually agreeable plan concerning the timing and approach for collection', were, collectively, capable of giving rise to an enforceable procedural legitimate expectation. Furthermore, any departure from or change to these representations ought to have been conveyed by the Commission in writing and within a reasonable time to the licensees/respondents, so that they could prepare themselves to meet and to pay any lawful industry levy for 2019/2020.

    **Demerara Distillers Ltd v Guyana Revenue Authority** [2008] 73 WIR 244 applied.

13. The learned judge was correct in the way in which the declaration at paragraph [273] (b) of the judgment was framed. It was not framed as if to say that the Commission had in breach of the Act issued or imposed an industry levy for the financial year 2020/2021. Instead, it was framed so as to declare the public consultation in relation to that financial year to be in breach of the Act. To the extent that the appellant argues that the judge was also incorrect in making that declaration as that financial year was not the subject of the judicial review claims, this is not entirely correct. Digicel (BVI) Limited, in its Claim Form, did seek a declaration with respect to the 2020/2021 financial year as to the Commission's failure to undertake and complete a public consultation, and a failure to submit to the Minister of Finance estimates of expected expenditure and expected income not later than 3 months before 1st October 2020. Digicel (BVI) Limited also sought a declaration that the Commission cannot lawfully submit finance estimates or a work plan under section 63 of the Act or set an industry levy under section 59 for the 2020/2021 financial year.

14. The judge was correct in his classification of the 'seriousness' of the breaches by the Commission of the Act and the meaningless outcome of each of its decisions, including, most importantly, the decision to calculate, fix and impose an industry levy for the 2019/2020 financial year. The judge also held that the decision to impose and implement the industry levy for the 2019/2020 year was 'irrational and Wednesbury unreasonable', for the reasons which he gave. Likewise, the Commission's conduct and statements gave rise to a procedural legitimate expectation that the Commission would consult with the licensees on the timing and approach to payments of the industry levy.

15. While the judge did not refer specifically to the discretion conferred on him by rule 56.13(3) of the CPR 2000, he clearly had in mind that he was exercising a discretion as to the nature, type and extent of the remedy or remedies to be granted having due regard to the key or significant findings which he had made in the judgement as to the Commission acting illegally, ultra vires and in breach of the Act, and irrationally. The judge gave due consideration to those findings and conclusions and, most importantly, as to how serious the breaches of the Act were, particularly in the context of the clear and unambiguous provisions of sections 58, 59 and 60. There can be no question that these breaches were serious, especially the decision of the Commission, without absolutely no statutory or other authority or power, to decide to transfer over to the Government by payment into the Consolidated Fund, royalty payments, and not to factor such payments into the income of the Commission in its estimates, in the face of the pellucid provisions of section 58(1), a point which the Commission conceded on appeal. These decisions were clearly irrational and Wednesbury unreasonable, warranting their quashing, by writ of certiorari.

Sections 20 and 31 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**, Cap. 80 of the Laws of the Virgin Islands considered; Rule 56.13(3) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied; Rule

56.13(3) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** applied.

## JUDGMENT

[1] **FARARA JA [AG.]:** These three separate appeals (BVIHCVAP2022/0003, BVIHCVAP2022/0004, BVIHCVAP2022/0005) from the written judgment of a learned judge of the High Court of Justice sitting in the British Virgin Islands ("BVI") dated 4th April 2022 ("the judgment"), were heard together by this Court on 13th and 14th October 2025 and judgment reserved. This case management decision for the three appeals to be consolidated and heard together, made by the order of a single judge dated 18th April 2023, was plainly the most sensible and convenient use of judicial time and resources. This is especially so because of the identical legal and factual issues canvassed by the respective grounds of appeal and the arguments and submissions posited by the appellant in its written and oral submissions in support thereof, and the reliefs sought therein; and the substantive commonality of submissions and counter-points relied on by each of the respondents and their respective counsel in their written and oral response thereto.

[2] Unsurprisingly, the underlying three separate claims for judicial review which are the subject of the judgment being appealed, one brought by Caribbean Cellular Telephone Limited ("CCT") and BVI Cable TV Limited ("BVI Cable TV"), and the other two respectively by Digicel (BVI) Limited ("Digicel BVI") and Cable and Wireless (BVI) Limited ("C&W BVI") were tried and heard together in the High Court, albeit there was no formal consolidation order made, and were determined by a single written reserved judgment of the court below. These three claims are (in order of filing): (i) <u>Claim No. BVIHC2020/0136</u> - CCT and BVI Cable TV, as claimants, against the Telecommunication Regulatory Authority ("TRC"), as defendant; (ii) <u>Claim No. BVIHCV2020/0153</u> - Digicel BVI, as claimant, against the TRC, as defendant; and (iii) <u>Claim No. BVIHCV2020/0160</u> - C&W BVI, as claimant, against the TRC, as defendant (collectively "the Claims"). The Claims

were heard together by the learned judge over 13 trial days in March, June and July 2021 and judgment delivered on 4th April 2022, just in excess of 8 months after the trial proceedings had concluded on 20th July 2021.

**The Claims – in summary**

[3] It is not necessary for present purposes to set out in full detail each of the Claims for judicial review either as pleaded by each claimant or as defended by the TRC. Suffice it to be said that there is a major commonality of legal and factual issues between each of the Claims and the defence thereto. Indeed, as will be made clear below, the learned judge conducted one joint trial and delivered a single judgment covering all three claims and the common issues raised therein. However, aspects of each claim will, to the extent necessary, be referred to later in this judgment when addressing the various grounds of appeal and issues for determination, and the arguments and counterarguments of the parties in relation to each of them.

[4] In brief, the Claims challenged, by way of judicial review proceedings under Part 56 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ("CPR 2000"), the lawfulness, legality, and vires of the decision of the TRC in calculating, fixing, apportioning, and imposing on each of them, as licensed telecommunications providers under the **Telecommunications Act, 2006**[1] ("the Act"), an industry levy for the financial period 2019/2020. By the Claims each of the respondents also sought, on the basis of improper purpose and lack of proper consultations, judicial review of the decision of the TRC in calculating and imposing on each of them a royalty payment for the years 2019/2020. By each claim, the claimants/respondents raised and relied on issues concerning the Commission's failure to comply with certain provisions of the Act and acting ultra vires certain provisions of the Act, failure to conduct proper consultations, and whether the Commission had by its written statements to each of the

[1] Act No. 10 of 2006 of the Laws of the Virgin Islands.

claimants/respondents and by its conduct created an enforceable legitimate expectation that it would not impose an industry levy on the licensees for the financial year 2019/2020.

**The Judgment below**

[5] The learned judge (Ramdhani J [Ag.]) in a lengthy, thorough and carefully reasoned judgment found for each of the respondents/claimants on their respective claims for judicial review, quashed the Commission's decisions in calculating and imposing on each of the respondents/licensees, proportionately, an industry levy and royalty payments for the financial year 2019/2020, and granted certain declaratory reliefs.

[6] The learned judge identified, in sequential manner at paragraphs [52] to [55] of the judgment, three main issues for his determination. They are:

> **Issue 1**: "Whether the Commission act[ed] illegally and ultra vires the Act when it calculated, fixed and apportioned the 2019/2020 Industry Levy."

The learned judge identified four questions for his consideration as arising from this first issue. These are:

> "(i) Whether royalty payments are to be regarded as part of the income of the Commission and whether they are to be paid over to the Government for its operational expenses.
>
> (ii) Whether the Commission was obliged to have audited financial statements for the previous financial year in seeking to calculate and fix the industry levy for the 2019/2020 period.
>
> (iii) Whether the Commission was wrong to charge the industry levy to the estimated expenditure approved by the Minister under section 63 [of the Act] as that which is described as the 'net estimated expenditure' under section 50 together with a 10 percent contingency. Or is the 'net estimated expenditure' that amount by which the estimated expenditure approved

by the Minister under section 63 exceeds the total amount of its expected income for that year?

(iv) Whether the Commission acted ultra vires the Act (committed a ‘procedural impropriety’) when it failed to conduct the statutorily imposed public consultation or adequate public consultations in calculating and apportioning the industry levy, in breach of its statutory duty to consult imposed by section[s] 59 and 63 of the Act.”

**Issue 2:** “Whether the Commission acted ‘irrationally and or unreasonably’ by suddenly imposing and seeking to impose industry levy on each of the claimants in the circumstances and background relating to the Commission’s historical approach to the industry levy and the outstanding and unresolved concerns of the operators in the telecommunications industry”.

**Issue 3:** “Whether the Commission’s statements and conduct gave rise to an enforceable ‘legitimate expectation’ on the part of the licensees that the Levy would not be imposed for Financial Year 2019/2020, particularly without prior consultation, reasonable notice and without compliance with the Act.”

[7] I now set out, sequentially and in some detail, the learned judge’s consideration, analysis, and determination of each of the three Issues which he posited, including the four questions/issues arising from Issue 1. As will be seen, Issue 1 is what has been identified and referred to by the appellant as the ‘principal vires issue’ for consideration in the appeal. This is so because enveloped within **Issue 1** and the four critical questions/issues raised with respect thereto, is the vires of the two main decisions of the Commission challenged by way of judicial review, namely, the calculation, fixing and demanding of payment by the licensees/respondents of an industry levy (s.59) and a royalty payment (s. 60) for the financial period 2019/2020. This issue and these four questions are matters, the determination of which hinges predominantly on the construction or interpretation of the provisions of sections 58,59, 60, 63 and 65 of the Act, ascertaining their correct meaning, purpose and effect, and considering and answering the question whether the

Commission, in conducting these exercises and deciding to impose these two levies on the licensees/respondents, acted illegally and/or ultra vires the Act.

**Issue 1 – Question 1**

[8] As to the first question posited under Issue 1 - *whether royalty payments under section 60 are monies which, albeit to be collected by the Commission, belong to the Government of the Virgin Islands to be paid over to the Consolidated Fund* - the learned judge, having summarized the competing arguments and counterarguments of the parties on this question, first examined the statutory context. He opined at paragraphs [81], [82] and [83] as follows:

> "[81] In my mind, the provisions providing for the Board of the Commission and its functions indicate a considerable degree of independence in carrying out the mandate of the Act. Even though the Minister may retain control over tenure and terms and conditions, he may not direct any Commissioner with regards [to] his or her functions under the Act.
>
> [82] No doubt, the legislative drafter deliberately intended that the 'fit and proper' members of the Commission, though acting in accordance with the established policy of the Minister, would be required to exercise independent judgment in carrying out his or her functions.
>
> [83] Whatever the policy reasons, the legislation intended that the Commission would be operating with a considerable degree of independence and that for this purpose it is required to be properly funded."

[9] Also, in relation to the statutory context, the learned judge had this to say at paragraphs [112], [113] and [114] of the judgment dealing with this first question under Issue 1:

> "[112] There cannot be any doubt that Part XI of the Act is intended to speak to all financial aspects of the Commission and to inform, in particular, how the Commission is funded, how its income is derived, how industry levy is calculated, how expenses are paid, and how monies may be diverted to government.

> [113] The overall context of the legislation confirm[s] these views by making it clear that this regulatory Commission is expected to operate with [a] considerable degree of independence, and to manage its funds and resources in accordance with the Act. It would have no power to demand payment or to use any of its 'funds' in any way except as authorized by the Act.
>
> [114] The legislators considered that one source of such funding would be royalty payments."

[10] The learned judge next considered the provisions of section 58 of the Act which, at subsection (1) expressly states or stipulates what constitutes the 'funds and resources' of the Commission. These include, expressly, at paragraph (b) '**industry levies**, **royalties**, fees, charges and other monies payable to the Commission under this Act'. (Emphasis added)

[11] The judge also set out in full, section 60 of the Act pertaining to royalty payments which, at subsection (1), provides for a licensee 'in accordance with the provisions of its licence or frequency authorization' to '**pay to the Commission** a royalty at the rate of three per cent of its gross revenue or such other prescribed rate.' (Emphasis added). The judge, while pointing out that the Act does not define the term 'royalty payment', cited and relied on the definition of the word '*royalty*' in **Black's Law Dictionary** as 'compensation for the use of property usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced.'

[12] At paragraphs [88] to [93], the judge pointedly disagreed with the Commission's argument that 'since the telecommunications rights belong to the Government, royalty payments rightfully belong to the Government'. He mused that this argument 'flies in the face' of the clear and unambiguous provisions of section 58(1) of the Act (royalty payments are part of the funds and resources of the Commission) and concluded at paragraph [89]: 'There is no ambiguity here as to whether or not the royalties must be regarded as funds of the Commission.' Further, as to how the funds of the Commission are to be dealt with, the learned

judge held that the answer lies in the clear, straightforward and unambiguous provisions of section 58(2) that the 'funds of the Commission shall be applied in accordance with the Act', which at subparagraph (2) sets out the various items upon which the Commission can expend monies. At paragraph [91] the judge observed 'Nowhere in the Act are there any provisions which allow the Commission to use its 'funds' for the purposes other than that which is provided for in section 58'; and that by section 10(5) it is proscribed that members of the Commission cannot be directed by the Government or any other authority in the performance of their duties and they may only act in accordance with the Act in the discharge of their respective duties.

[13] The judge also considered section 102 of the **Virgin Islands Constitution Order 2007**[2] ("the **Constitution**") which, in summary, provides or stipulates for all revenues or money *'*raised or received by or for the purposes of the Government of the Virgin Islands*'*, not including monies or revenues payable under some law into some other fund established for any specific purpose or by any law 'is to be retained by the authority that received them for the purpose of defraying the expenses of that authority', shall be paid into the Consolidated Fund. He concludes that this provision 'expressly recognizes that moneys (sic) collected by any Government Authority may be retained by that authority to fund its expenses if that is prescribed for by any law'. At paragraph [93] the judge held that in the case of the TRC (the Commission) that law is section 58(1) and (2) of the Act which states "…clearly without any doubt that royalty payments are part of the 'fund' of the Commission and that such 'funds' shall be applied to those permitted expenditure. I therefore respectfully disagree with learned Counsel Mr. Neale [for the Commission] when he submits that funds collected by any statutory authority 'are always collected by the Authority on behalf of Government and subsequently paid over to the government".

[2] No. 1678 of 2007 of the Laws of the Virgin Islands.

[14] The judge also rejected, at paragraph [94], the Commission's argument that royalty payments are not to be considered part of the funds and resources of the Commission by reference to any policy document or other extraneous material. He held, 'section 58(2) read together with section 102 of the BVI **Constitution** makes it rather clear. I do not see how I can embark on that journey that Mr. Neale seeks to persuade me to undertake.'

[15] The judge also considered the appellant's argument that, notwithstanding section 58(1) and (2) of the Act, there may be 'gateways' under the Act through which 'funds' of the Commission 'may be money received on behalf of the government to be paid into the Consolidated Fund, and not applied to expenses of the Commission.' In this regard, the judge considered specifically section 59(6). This provides for monies received by the Commission 'by way of industry levy' to be retained by it for its own use, 'unless the Minister responsible for finance, with the approval of the Council [the Cabinet], otherwise directs'. He concluded that this provision was of no assistance to the Commission's argument on this issue, for the reason that it does not speak to or deal with 'royalty' payments as monies or funds of the Commission to which section 59(6) and the power granted to the Minister thereby, would be applicable; and, secondly, the said power 'cannot be read to mean that other payments (including royalty) must be handed over to the government.'[3]

[16] Next, the judge considered section 65 of the Act which provides for any '*surplus*' on the budget approved (by the Minister pursuant to section 63) for the Commission's expenditure for any financial year 'to be paid into the Consolidated Fund, unless otherwise agreed upon with the Minister responsible for finance.' However, the judge held that section 65 does not help the Commission's position that royalty payments belong to the government. At paragraph [103], it is stated (in material part):

[3] Paragraph [100] of the Judgment in the court below dated 4th April 2022.

> "[103] To my mind, the intent of the drafter is again clear and to be found from the words themselves. Section 65, **if it is to make sense**, must be read to be speaking to those situations when the Commission has available from any previous year, monies over and above an approved budget for the Commission's expenditure for the upcoming year. **It would be that excess which would have to be regarded as a 'surplus' in the section 56 context**, and which shall, subject to the Act, [be] paid over to the Consolidated Fund, unless [otherwise] agreed by the Minister." (Emphasis added)

[17] Likewise, the learned judge opined that the Commission's reliance on a definition of the term 'royalty' to be found in various texts, does not assist the Commission in the face of the clear words of section 58(2) of the Act, and references to legislation in other jurisdictions, including Jamaica, is equally of no assistance to the Commission. Accordingly, the judge's conclusion and finding on this first question of Issue 1, is as follows:

> "[110] For these reasons, it is the firm view of this Court that **royalty payments belong to the Commission as the 'funds and resources' of the Commission**. If after calculating the budget for the upcoming period, there is an excess sum of money remaining with the Commission (and it matters not what were the sources of this sum of money), then, subject to the Act, it shall be paid over under the section 65 surplus gateway, unless the Minister otherwise agrees." (Emphasis added)

[18] As an adjunct to this interpretive finding, the judge at paragraph [111] provided, perhaps gratuitously, this further interpretive guidance:

> "[111] It is important to treat with one last question as part of this issue. Having regards to the legislative prescriptions, if royalty payments for any given year have been paid over to the government without it being considered surplus, they should nonetheless remain an accounting item in the audited statements of that year when the exercise of fixing the next year['s] budget is being considered. **This must be so, as the entire context of the Act requires that monies in the hand of the Commission which is paid by the licensees must be factored into any calculation of a surplus under section 58 in the adjustment of the Industry Levy**. It would make nonsense of these provisions if the licensees would lose the benefit of such payments which it is being paid over [to]

> the Consolidated Fund in an unauthorized manner." (Emphasis added)

**Issue 1 – Questions 2 and 3**

[19] The learned judge dealt with these two questions/issues together. They concern, respectively, whether the absence of an audited financial statement for the previous year (2018/2019) was fatal to the Commission's calculation and fixing of the industry levy for the 2019/2020 financial period; what is meant by 'net estimated expenditure' in section 59 of the Act and, whether in seeking to apply this provision and conducting its calculations of the industry levy for 2019/2020, the Commission failed to follow the mandatory prescriptions of the Act. In the judgment, question 3 (meaning of 'net estimated expenditure') was, logically, considered first by the judge.

[20] Regarding the correct meaning of 'net estimated expenditure' (3rd question), the judge noted that the Commission's position is that it had calculated the 2019/2020 Budget in accordance with and within the confines of its legislative mandate. He surmised, as the Commission's 'essential point', that the correct meaning of this expression in section 59(2) 'is the same estimate of the expected expenditure approved by the Minister under section 63. It is 'net' because it is the figure before the 'contingency' is applied to it.'[4]

[21] Having scrutinized the Commission's 2019/2020 Budget, the judge made a number of pertinent observations at paragraphs [124] and [126]. At paragraph [126], the learned judge observed:

> "[126] The Commission has not applied any of the income to funding its expenditure and requires that the licensees all pay an 'Industry Levy' to fund its total estimated expenses plus the contingency. Are these calculations compliant with section 59(2)?"

[4] Paragraph [121] of the Judgment in the court below dated 4th April 2022.

[22] Having set out the full text of section 59(1) and (2) of the Act, the learned judge held at paragraph [129] that these provisions make it clear that the first step in calculating the Industry Levy is to add the 'net estimated expenditure' as set out in the estimates approved by the Minister', to a contingency of ten percent of the net estimated expenditure.' The second step in the process is to adjust the total of these two sums by (a) the addition of the deficit, if any, shown in the audited accounts of the Commission for the previous year, or (b) the subtraction of the surplus, if any, shown in the audited accounts of the previous year.

[23] The judge also observed that the phrase 'net estimated expenditure' in section 59(2), over which there has been much debate between the parties as to its meaning, is not defined in the Act. The judge also considered the definition of the word 'net' in **Jowitt's Dictionary of English Law**, 5th edition and noted that while it offered 'some insight' as to the use of that word, this was not definitive of its meaning. He found that the meaning of the expression 'net estimated expenditure', 'is to be found from the 'immediate context' as well as the legislative context and the legislation's object and purpose.'[5] This is premised, observed the judge, on the clear understanding and prescription of section 58(1) that the income (the funds and resources) of the Commission must be applied to its permitted expenditure under section 58(2); and in 'fixing any budget for any upcoming year, the Commission must have regard to 'funds' in the section 58 context that it intends to collect.'[6] Here, he observed, that in looking at the Commission's draft Work Plan and Budget for 2019/2020, it was 'startling' to observe that, having regard to the requirements of section 58(1) as to the funds of the Commission including the industry levy and royalty payments, 'the income of the Commission would be completely ignored when a budget of the Commission is to be prepared.'[7]

[24] The judge next considered section 63 of the Act. At paragraph [139] of the judgment, he summarized the salient provisions of section 63, which provisions

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[5] Paragraph [136] of the Judgment in the court below dated 4th April 2022.
[6] Ibid, paragraph [137].
[7] Ibid, paragraph [138].

are of central importance to the calculation of the industry levy under and pursuant to section 59(2), and to the question of what is meant by the expression 'net estimated expenditure' in that subsection when calculating the amount of the industry levy for a financial year.

[25] The judge opined that where, in section 58(2) the concept of 'net estimated expenditure' arises for the first time in the Act, it 'must mean something different to the estimate of 'expected expenditure' under section 63', which latter provision requires the Commission to prepare estimates, inter alia, of its 'expected expenditure'. In support of this conclusion, the judge mused: "when Parliament uses a new word or phrase in any context, it must have intended that it would have a distinct meaning. As Carrington JA noted in **TRC v Cable and Wireless (BVI) Limited**, 'Parliament is expected to say what it means and mean what it says'".[8]

[26] As to the meaning of the expression 'net estimated expenditure' in section 58(2), the learned judge, held:

> "This Act and the provisions which are here, discussed that income must be applied to those permitted expenditure. The obvious meaning of 'net estimated expenditure' must be that amount of expenditure which remains after all the income has been applied to the expected expenditure which had been approved by the Minister under section 63."[9]

[27] And at paragraph [145], in reliance on the dicta and guidance of Lord Clyde in **Re Sutherland District Council**:[10]

> [145] "In my view, the relevant provisions of the BVI Act, in particular sections 58, 59 and 63, makes it clear that the Commission's permitted expenditure must be paid for by the funds (the income) of the Commission. Where the income of any financial year is not sufficient for all of the 'expected expenditure' for that financial year, one is left with a 'net estimated expenditure' which, together with a ten percent contingency, has to be now funded by an industry levy. This has to be also why the **industry levy cannot be factored into the income of the Commission for the purpose of preparing the estimates of income under section**

[8] Ibid, paragraph [140].
[9] Paragraph [141] of the Judgment in the court below dated 4th April 2022.
[10] [1987] Lexis Citation 150.

> **63**; **only the other sources of income are relevant for this exercise**." (Emphasis added)

[28] The learned judge also observed that while he did not consider the expert reports and evidence to be 'necessary to determine what is essentially a statutory interpretation point', the expert opinions 'were sound in logic and well-grounded in their considerable experience in the accounting world' and that 'their conclusions are consistent with the Court's views, and it would be useful to set these out.' I do not intend to, nor do I consider it useful for these purposes, to traverse the ground covered by the judge at paragraphs [147] to [151] of the judgment as to the expert evidence on this issue of interpretation and his summary of their respective opinions. Suffice it to be said that the learned judge expressly stated that he had not relied on them in construing the statutory provisions.[11]

[29] The judge, having examined the Commission's draft annual Work Plan and Budget 2019/2020 made the important (and perhaps fatal observation) that the Commission 'has used the expected expenditure which had been approved by the Minister pursuant to section 63 as what is meant by 'net estimated expenditure'', and concluded that to do so was the 'wrong' approach.[12]

[30] As to the vires or legality of this draft Budget, the learned judge drew these conclusions and made these critical findings at paragraphs [153] and [154]:

> "[153] Out of my earlier findings that royalty payments comprised the funds of the Commission to be used for the operating expenses of the Commission and not to be automatically sent on to the Consolidated Fund for the government's operating expenses, any budget which disregards any such royalty payments as money to be applied to expenses for the upcoming year is flawed and ultra vires the Act. A proper audited statement must consider royalty payment as part of the income of the Commission which is to be used for the purposes of the permitted expenses of the Commission.

[11] Paragraph [151] of the Judgment in the court below dated 4th April 2022.
[12] Paragraph [152] of the Judgment.

> [154] The Commission was duty bound to arrive at a 'net estimated expenditure' after balancing out the estimated income (excluding any notions of an industry levy) of the financial year 2019/2020 against the expected expenditure for that period. Expenditure which cannot be funded by the **normal sources of income**, is to be regarded as the 'net estimated expenditure' to which a contingency of ten percent must be added. This sum when adjusted under section 59(2)(a) or (b) represents the **industry levy** which is to be then apportioned among the licensees." (Emphasis added)

[31] Applying this approach and critical findings, the learned judge set out his analysis and conclusions as to the quantum of the industry levy for the financial periods 2019/2020 and 2020/2021:

> "[155] A simple arithmetic exercise for 2019 would mean that if the permitted expenditure for 2019 is $5,160,532.21, the total estimated income for 2019 that is the sum of $3,324,279.73 would have to be applied to it. That would leave the sum of $1,836,252.48 as expenditure to be funded.
>
> [156] Similarly, that arithmetic exercise for 2020 would show that if the permitted expenditure for 2020 is operating expenditure would amount is $4,197,913.62, the total estimated income for 2020 that is the sum of $3,156,754.74 would have to be applied to it. That would leave the sum of $1,041,158.88 as expenditure to be funded.
>
> [157] The sum of $1,836,252.48 and $1,041,158.88 plus ten percent of their total is then to be adjusted in accordance with section 59(2) with reference to audited statements of the previous financial year."

[32] The learned judge's primary conclusion on question 3 (meaning of 'net estimated expenditure') and what was the correct interpretation of sections 59(2) of the Act, is in these terms:

> "[158] The intention of the Act appears very clear from these provisions, that is **an industry levy would only be imposed if there are permitted expenditure which cannot be charged to income from all regular sources**. **It seems clear that the Act recognizes that royalty payments will amount to a significant sum which in turn, may likely cover a significant portion of the Commission's permitted expenses. Licensees and other**

> **operators should only expect to be further burdened to make such payment by way of industry levy to meet permitted expenditure which cannot be met from the 'funds' of the Commission.** It must be, that the legislator was concerned that the resulting financial strain would be passed on to consumers and **decided that royalty payments would not be diverted away unless and until all expenditure was accounted for and it fell into a pot called** '**surplus**'." (Emphasis added)

[33] By way of further elucidation, the learned judge opined:

> "[159] What logically flows from this is that the Commission cannot be heard to say that it has been wrongfully using royalty payments, that is money earmarked for the Consolidated Fund, to fund the Commission's expenditure. Those payments would have been properly applied to all the Commission's permitted expenditure."

[34] These are all critical findings by the learned judge, and which are central to the determination of the main issues in the appeals. They concern the meaning and purpose under the Act of royalty payments and industry levy, the proper interpretation of the provisions of sections 58, 59, 60 and 63 of the Act and the correctness of the learned judge's findings that in calculating, fixing and demanding payment of the industry levy and royalty payments for the financial year 2019/2020, the Commission acted illegally and ultra vires their powers under the Act.

[35] Regarding question 2 (the critical importance of audited accounts to the calculation and fixing of an industry levy), the learned judge remarked that the importance of audited accounts to the process under the Act for calculating an industry levy, was readily apparent. This he reasoned was the case because:

> "[160] …If the Commission's right to demand the industry levy is only justified when its estimated income cannot match its gross expenditure, the Commission must be required, in accordance with section 59(2) to account for any surplus which is shown by audited statements for the previous year. The Commission must give a proper account of monies which it collected. The failure to have such statements completed directly impacts on the quantum of any industry levy and perhaps whether an industry levy would be necessary in any event."

[36] Finally, at paragraph [161] of the judgment, the learned judge encapsulates his findings on questions 2 and 3 of Issue 1, viz:

> "[161] Having regards to all of the above, this Commission acted illegally and ultra vires the Act when it excluded royalty payments from its balance sheet as income to meet permitted expenditure. It also fell into grave error when it used the 'expected expenditure' approved by the Minister under section 63 as the 'net estimated expenditure' under section 59(2). It also acted ultra vires the Act when it failed to produce audited financial statements for the previous financial year. Properly audited statements might have shown that there is a considerable surplus from the previous financial year, and this would have had to be applied to the net estimated expenditure plus the ten per cent contingency. Who knows what this would have done [to] the industry levy?"

**Issue1 – Question 4**

[37] Question 4 of Issue 1 concerns the Commission's alleged failure to conduct public consultations, or adequate public consultations, as mandated by sections 59 and 63 of the Act, when purporting to calculate, fix and apportion the industry levy between the licensees/respondents. The learned judge, having set out the salient submissions of the parties on this issue or question, commenced his analysis with these general statements of principle:

> "[172] Whenever a public authority is under a duty to consult, it is required that such a process be legally adequate, grounded in fairness and (sic) be meaningful. Whenever consultations are statutorily required of any public authority, it is not an end in itself, to simply have it done and move on. Consultations must be viewed as that process which brings value to the decision-making process. The statutory authority which is obliged to consult must be conscious that the inquiry and those relevant considerations which could come out of proper consultations (sic)and then feed [them] into the decision-making process. It is a matter of good governance that all public bodies approach consultations in this manner."

[38] Having reviewed relevant case law and extracted certain important tenets of proper consultation by a public authority required by legislation to consult before making certain decisions, the learned judge opined at paragraph [181] as follows:

> "[181] The cases have also shown that the degree of specificity with which, in fairness, the statutory authority should conduct its consultations exercise may be informed by the statutory contexts of its obligation to consult as well as the identity of those particular persons whom it is required to consult. Where, out of the decision-making process, those consultees are persons who may eventually be imposed with a burden to pay levies, there is also a greater need to be fair."

[39] Reference was made by the judge specifically to the **Telecommunication Code (Part 1) (Public Consultations) and (Public Hearings) Guidelines 2010** published on 6th January 2011,[13] and the procedure therein to be followed by the Commission when conducting public consultations, including the requirement to publish on its website all responses to the consultation process. Reference was also made to section 59(1) of the Act which provides a clear prescription that the Commission is to first conduct a public consultation before setting an industry levy for any particular financial year and assessing the proportion of the industry levy to be paid by each licensee and authorization holder.

[40] Likewise, the learned judge observed that one of the prescriptions in section 59(1) (in addition to public consultations) is compliance with section 63 of the Act. Section 63 stipulates (in material part) that following a public consultation, the Commission "shall, not later than three months before the commencement of each financial year, prepare in respect of the financial year, and submit to the Minister responsible for finance estimates of (a) expected expenditure; and (b) its expected income, if any, arising from any source." The learned judge found that it was clear that the process mandated by section 63 must be complied with by the Commission before the section 59 process. Following on from this he posited two consequential questions, namely: (i) whether sections 59 and 63 required that two

[13] Made under section 91(3) of the Act.

separate public consultation processes being undertaken; and (ii) whether the consultations undertaken by the Commission were adequate.[14]

[41] As to the first of these questions, the learned judge opined at paragraph [201] that 'the legislation can be construed to (sic) requiring only one such process.' As to the type and sufficiency of such consultation under section 59, the judge opined:

> [201] "… I am of the view, however, that a purposive construction of this section **requires that before the Commission assesses the industry levy which it intends to impose on each of the licensees or authorization holder, it is obliged to provide an opportunity for adequate consultations**. Such adequate consultations would require that each of these (sic) entitled be, at the very least, informed of the apportioned amount and the basis on which it was so apportioned and allow them a reasonable opportunity to provide a response to this issue. It would have also required the Commission in the context of this case, to engage the licensees on the issue of timing and approach to payment."

[42] As to the section 63 public consultation component, the judge found that the Commission had failed to have adequate consultations. He found that the Commission, as a public authority:

> "…was obliged [by s. 63] to consult on its work plan and its estimated income and expenses **before** submitting this to the Minister for approval. This is a process which is likely to result in further obligations being imposed on licensees to pay an industry levy to fund the permitted expenditure of the Commission. It must therefore be a transparent process. A statutory body which is given control of public funds and to demand and collect payment of levy payments from licensed operators in that sector must be prepared to be publicly transparent as to how such monies are spent or to be spent. It is not sufficient that records of income and expenditure are kept. It is not sufficient that a draft work plan and a draft budget be sent out. There must be sufficient scrutiny and checks and balances."[15] (Emphasis added)

[43] The learned judge also cited and considered the provisions of section 64 of the Act which obliges the Commission, not only to keep proper books of account of its income and other receipts and expenditure maintained in such form and manner

[14] Paragraph [186] of the Judgment in the court below dated 4th April 2022.
[15] Ibid, paragraph [203].

that they are sufficient to record and explain the Commission's transactions and to enable the Commission's financial statements to be prepared and audited in accordance with this section 64, but within 3 months after the end of each financial year, to prepare and approve its accounts containing a statement of assets and liabilities and statement of revenue.

[44] Also, the learned judge considered section 66, which requires the Commission, within 3 months of completion of the audit of its accounts with respect to a financial year, to submit to the Minister responsible for finance: (a) a copy of its audited accounts; and (b) a written report of its operation and activities for that financial year, which documents are to be laid on the table of the House of Assembly by the said Minister within 3 months of receiving them.

[45] In light of all these statutory provisions and requirements, the judge was led to consider that these various documents and accounts, including the statements of assets and liabilities and audited accounts, play a crucial role in the section 63 consultation process, which consultations are to be 'viewed as being framed within the context [of] a transparent accounting system where (sic) all things are available for scrutiny'.[16] Furthermore, the availability of such financial records would allow the consultees/licensees 'to be able to respond intelligently on estimates for expenditure as they would have proper financial documents to make comparisons with.'[17]

[46] Additionally, the learned judge found that the Act provides for two levels of scrutiny over this aspect of the work of the Commission. These are (in brief): (i) the consultees would be well placed to screen budget items for inflation and to check and compare them with like budget items from previous financial years; and (ii) a transparent accounting system complete with audited statements with explanatory

[16] Paragraph [208] of the Judgment in the court below dated 4th April 2022.
[17] Ibid, paragraph [209].

notes and reports, may benefit the Commission and the Minister from 'informed responses from the consultees on relevant matters related to budget estimates'.[18]

[47] The learned judge found that the failure by the Commission to have a transparent accounting system and, in particular, audited financial statements affected its obligation to properly consult under the section 63 process and its statutory obligation to consult. Accordingly, he found that in this case having regards to the 'statutory construct of the Act', the Commission:

> "…did not provide those to be consulted, all the relevant information for those persons and entities to provide proper and effective responses; their participation in the decision-making process was therefore affected. In some instances, the Commission failed to provide sufficient details about particular items of expenditure to allow for meaningful responses. In another instance, it simply failed to follow through with its own indication that it would consult on a particular point."[19]

[48] This latter statement by the judge was a reference to a statement in the Commission's 2016 Work Plan and Budget that there would be 'discussions with the stakeholders on the Industry Levy during the 2019/2020 financial year with a view of determining a mutually agreeable plan concerning the timing and approach for collection'.

**Issue 2 – Irrationality / Reasonableness**

[49] At paragraph [230] of the judgment, the learned judge makes the preliminary observations that 'the Commission cannot be held to be acting unreasonably or irrational because it seeks to carry out its duties as required by the Act'; and 'the fact that there are circumstances which make the payment of such levies difficult is not a basis for a court to intervene and direct that the Commission may not engage the process and ultimately collect the lawful levies'.

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[18] Ibid, paragraphs [211] and [212].
[19] Paragraph [214] of the Judgment in the court below dated 4th April 2022.

[50] I observe at this juncture that the learned judge did not make any definitive finding on the pleaded issue of irrationality. He only considered and made a finding on the issue of unreasonableness. This notwithstanding, he went on in the subsequent section of the judgment dealing with 'Conclusions and Remedies' to conclude, at paragraph [265], that the Commission's decisions to impose and implement an industry levy 'was also irrational and Wednesbury unreasonable for the reasons which are set out above.'

[51] At paragraph [234] of the judgment, the learned judge confronted the issue of 'unreasonableness'. He found that 'no reasonable Commission, having regards to the statutory context of this Act, could have reasonably decided to engage the consultation process without completing its audited financial statements'. The judge also found that a reasonable Commission could not, in the face of the provisions of the Act and section 102 of the **Constitution**, have concluded that royalty payments belong to the Government to be paid into the Consolidated Fund. He also found it difficult to understand why 'the Commission sought to demand that the industry levy fund all expenses of the Commission without seeking to apply any of its income to offset any amount of this levy'; and by approaching its tasks in this manner, the Commission had 'seriously misdirected itself on several points of law',[20] which misdirection 'is identifiable and so the assessment of unreasonableness can easily be made.'[21]

**Issue 3 – Legitimate Expectation**

[52] Having summarized the submissions of both sides on this issue, the learned judge cited an extract at paragraph 50 of **Halsbury Laws of England**[22] dealing with a representation or promise by an administrative authority leading to a legitimate expectation; the guidance in the judgment of the Earl of Birkenhead in **Birkdale District Electric Supply Co Ltd v Southport Corpn**[23] as to the well-established

[20] Paragraph [235] of the Judgment in the court below dated 4th April 2022.
[21] Ibid, paragraph [237].
[22] Vol. 4.
[23] [1926] AC 355 at 364.

principle of law 'that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties'; and the dicta of Chang JA of the Guyana Court of Appeal in **Demerara Distillers Ltd v Guyana Revenue Authority**[24] that 'a promise made [by the President] could give rise to a legitimate expectation – substantive or procedural. But legitimate expectation cannot arise against a statute.'

[53] The learned judge considered these principles to be relevant to the legal status and position of the Commission and the question of whether writing and conduct could give rise to a legitimate expectation that the licensees would not be charged an industry levy for the period 2019/2020, and any such levy would not be made final without consulting with them or each of them.

[54] On the first of these questions, the learned judge held, on the aforesaid authorities, that any promise made by the Commission to the licensees/respondents (or any of them) to waive or to not impose or collect an industry levy lawfully assessed and made, cannot amount to an actionable 'legitimate expectation'. His analysis on this issue is captured at paragraph [254], which states:

> "[254] …This Commission has a statutory duty to engage its annual budget process and in so doing, it is obliged to impose and collect any industry levy which is lawfully due. The Act does not allow this Commission to forego the collection of this levy payment; there is simply no discretion given to it to so do. The fact that they have done so in the past, that is, waived the collection of any levy which might have been lawfully due, cannot be the basis for it to avoid its statutory duty to collect any levy which must be paid. Where parliament has imposed an obligation on a public body to collect monies lawfully due to it in accordance with law, that body is not entitled to promise that it would forego the collection of such sum, and where such a promise is in fact made the promisee is not entitled to rely on any promise, whether expressed or implied that collection would be waived."

[24] (2008) 73 WIR 244.

[55] The judge also agreed with the Commission when he held that in any event, 'the evidence does not show any promise by the Commission that it would not be seeking to demand and collect any 2019/2020 industry levy which is lawfully due'.[25]

[56] However, in relation to the second question and the operation of the principle or category of a promise giving rise to a 'procedural legitimate expectation', the judge held that 'clear and unambiguous promises may nonetheless give rise to a procedural right to be consulted or that the collection may only be done in accordance with a particular approach.'[26] Accordingly he held:

> "In keeping with my earlier finding on the consultations issue, I do find that the 'Commission's conduct and its statement gives (sic) rise to a legitimate expectation that the licensees would be consulted prior to the final demand for payment of the Industry Levy."[27]

This is a reference to a statement in the Commission's 2017/2018 Budget (referred to above), and which is referred to as a representation giving rise to a 'procedural right' to be consulted.

**Judge's Conclusions**

[57] At paragraphs [261] to [271] of the judgment the learned judge summarized his various findings and conclusions on each claim with respect to the issues of illegality, ultra vires, irrationality, Wednesbury unreasonableness, improper purpose, failure to properly consult, and legitimate expectation, as follows:

> "[261] The Court is satisfied that on these claims for judicial review of the several decisions of the Commission to implement, calculate, fix, apportion and demand an Industry Levy from each of the licensees, the Commission acted illegally and ultra vires the statutory prescriptions of the Act.
>
> [262] This Act intended and stated in clear and unambiguous language that the Commission was to collect and use royalty payments to fund some or all of its expenses and that a demand for the

[25] Paragraph [255] of the Judgment in the court below dated 4th April 2022.
[26] Ibid, paragraph [256].
[27] Ibid, paragraph [257].

payment of an industry levy could only be properly and legitimately be (sic) made if after all income from normal sources was charged to the Commission's gross permitted expenditure and there was a resulting 'net estimated expenditure yet to be funded.' The Commission cannot therefore divert the royalty payments or any part of it to the Government Consolidated Fund to fund the Government's operating expenses or use it for any purpose not authorized by the Act. To do so would be in breach of the Act.

[263] The Commission also breached clear and unambiguous provisions of the Act when it failed to apply the [C]omission's income to meet its expected expenditure and instead sought to call upon the licensees to pay an industry levy. So too was its failure to have audited statements for the purposes (sic) of making adjustments under section 59 of the Act. Further, not having these audited statements affected its statutory obligation to consult on its 2019/2020 Draft Work Plan and Budget. These consultations were also unfair when it failed to engage the licensee on the timing and approach to payments of the Industry Levy it was seeking to imposes (sic).

[264] These breaches were serious breaches, as these were critical matters connected as it were to the decisions to impose and collect a levy from these licensees. The decisions taken were effectively rendered meaningless.

[265] The Commission's decision to impose and implement an Industry Levy was also irrational and Wednesbury unreasonable for the reasons which are set out above.

[266] So too, the Commission's conduct and statements give right to a procedural legitimate expectation that the Commission would consult with the licensees on the timing and approach to payments of the Industry Levy.

[267] The only remedy is to quash the several decisions to impose and demand an industry levy from each of the licensees in keeping with their respective claim for relief.

[268] The Court has been asked to grant several declarations which would have the effect of preventing the Commission from seeking to engage the section 59(2) process for the 2019/2020 [and] the 2020/2021 financial years. The licensees are seeking to avoid payment of any levy for these financial periods altogether.

> [269] Having regards to the discussions and findings above, it appears that unless the licensees agree to extensions of time for the public consultations to be held for the years gone by, the claimants must be right that the Commission has run out of time to engage in public consultations in accordance with the clear provisions of the Act. The result would be that the Commission must now look to the 2022/2023 period to commence public consultations in accordance with section 63 and section 59 of the Act.
>
> [270] This Court is of the view that the Commission must complete audited statements for each and every year of its operations and to keep those records in accordance with the Act. In preparing any budget for any financial year going forward, the Commission is obliged to only seek to apply its income to 'expenditure' as permitted by section 58(2) of the Act. Once the Commission's income derived from normal sources would not be sufficient to meet all of its permitted expenditure, it would be entitled to determine that this resulting 'net estimated expenditure' would result in an actual industry levy in accordance with the section 59(2) mechanism. The licensees would be able to provide feedback on whether the past expenditure was permitted expenditure. The Commission would then be entitled to use its financial statements from previous years to make those necessary adjustments under section 59(2) to finally determine whether an industry levy for that period was to be paid.
>
> [271] If any monies, royalty payments or monies from another source, have been paid over during the year immediately preceding any financial year in which the consultation process has been engaged, these must be factored in on the income side of the balance sheets of the Commission so that there is a true accounting of the income which was in the hands of the Commission for that period. This accounting exercise is expected to ensure that no licensee is made to bear more than their statutory and legally permissible share of the permitted expenses of the Commission for any financial period going forward."

**Remedies Ordered**

[58] At paragraph [272] of the judgment, the learned judge, having found in favour of each of the respondents on the main bases of their claim, made the following orders:

"**In the claim brought by CCT and BVI Cable [TV] Limited** –

(a) An Order of Certiorari quashing the decision of the BVI Telecommunications Commission to impose and collect an industry Levy in the sum of US$825,087.58 and US$20,475.07 respectfully sought to be collected by the Commission from CCT and BVI Cable TV for the Financial Year 2019/2020.

**In the claim brought by Digicel** –

(a) An Order of Certiorari quashing the decision of the BVI Telecommunications Commission to impose and collect an industry Levy in the sum of US$1,680,202.17 sought to be collected by the Commission from Digicel for the Financial Year 2019/2020.

**In the claim brought by FLOW [Cable & Wireless]** –

(a) An Order of Certiorari quashing the decision of the BVI Telecommunications Commission to impose and collect an industry Levy in the sum of US$1,696,244.32 sought to be collected by the Commission from FLOW [C& W BVI] for the Financial Year 2019/2020."

[59] At paragraph [273] of the judgment, the judge also granted the following declaratory reliefs in favour of each of the claimants/respondents with respect to their claim:

"(b) A declaration that, in respect of the Commission's financial years 1st October 2019 to 30th September 2020, and the 1st October 2020 to 30th September 2021 the Commission is in breach of its statutory duty to conduct legally adequate consultations and has failed to submit to the Minister responsible under the Act proper estimates of expected expenditure and expected income, no later than three months before 1st October 2019.

(c) A declaration, consequent upon granting of the declaration referred to in Paragraph (b) above, that the Commission cannot now lawfully submit finance estimates or a work programme to the Minister under section 63 of the Act or set an Industry Levy under section 59 of the Act for the financial years 1st October 2019 to 30th September 2020 and 1st October 2020 to 30th September 2021."

[60] The learned judge also ordered the TRC to pay each of the respondents' costs which, if not agreed within 28 days, the parties were to file and exchange written submissions on costs on or before 3rd May 2022.

**The Appeal**

[61] By amended notice of appeal filed on 7th October 2022, the TRC challenged findings of fact made by the learned judge at paragraphs 8,9, 197 to 214, and 256 to 260; and findings and conclusions of law at paragraphs 13, 72, 89 to 114, 153,158 and 160 of the judgment. The appellant relies on 10 grounds of appeal set out at sub-paragraphs (a) to (j) of paragraph 4 of the notice. In brief, these 10 grounds challenge the findings and conclusions made by the judge on each of the three issues which he identified, and in relation to the declaratory reliefs which he granted. The appellant seeks orders of this Court reversing and setting aside the orders and declarations of the trial judge in his judgment dated 4th April 2022, an order dismissing the Claims for judicial review brought by the respondents, and order that the respondents pay the appellant's costs of the appeal and in the court below.

[62] These 10 grounds of appeal are:

> "(a) The Trial Judge erred in law when he held that Royalty payments under section 60 of the Act were not monies intended for the Government as a payment for the privilege of being granted a telecommunications license to provide telecommunications services in the BVI but was intended under section 58(2) of the Act to be applied towards the expenses of the Commission **[paras 89-114 and 153 of Judgment]**. The Trial Judge wrongly failed to consider and hold that the payment of Royalty payments to Government would be, and was, a lawful exercise by the Commission of its power to pay any expenditure authorized by the Commission and properly chargeable to revenue as it saw fit, within section 58(2)(f) of the Act.
>
> (b) (In so far as necessary), the Trial Judge erred in law when he held that there was no ambiguity in sections 58, 59 and 60 of the Act so as to make it necessary to apply a purposeful construction of those sections as opposed to a literal construction which resulted

in an absurd meaning that was contrary to the object and purpose of the legislature and Government in implementing the Act **[paras 89-114 of Judgment]**.

(c) The Trial Judge having cited the correct principle with respect to the interpretation of statutes namely, that "*The court may only depart from the natural and ordinary meaning of the words used when they lead to some result which cannot reasonably be supposed to have been the intention of the draftsman* **Sylvester v Spence et al v Regino Nicholas Civil Appeal No. 22 of 2019 (unreported)**" **[paras 68-71 of Judgment]** erred in law by failing to apply that legal principle to the facts of the present case (insofar as he departing from the natural and ordinary meaning, contrary to the Appellant's primary case) in particular by failing to take into consideration the reason why the Act was passed, the fact that Royalty was a payment to the owner of a particular right for the privilege of being allowed to use the right, the general practice in the telecommunications industry in such matters, the January 10, 2007 Policy Document of the Government and the various telecommunications agreement(s) between the Commission and Respondents **[paras 13 and 109 of Judgment]**.

(d) The Trial Judge erred in law in equating the payment of the Royalty under section 60 of the Act with the payment of tax when Royalty was in fact a payment by a license holder for the privilege of being granted a telecommunications licence consequently there was no presumption in favour of the Respondents in resolving any ambiguity in the Act and the case of **Dewar v IRC [1935] 2 KB 351** was therefore not applicable **[see para. 72 and 158 of Judgment]**.

(e) The Trial Judge erred in law when he held that audited accounts were necessary for the calculation of the industry levy for the 2019/2020 period despite the fact that this was the first time that the industry levy was being collected and that the Commission had indicated that it would exercise its powers under section 88 of the Act to waive collection of previous industry levies due to the difficulty in trying to collect same and that the purpose of audited accounts was to facilitate an adjustment of "over or under payment" of the industry levy for previous years **[para 160 of Judgment]**.

(f) The Trial Judge finding that the Commission had failed to consult with the Respondents was contrary to the weight of the evidence and/or was so fundamentally wrong that no court acting judicially and properly instructed as to the relevant law and facts could have come to such a finding and/or decision on the evidence before it **[paras 197-214 of Judgment]**.

(g) The Trial Judge erred in law when he held that the Commission acted irrationally and unreasonably as no reasonable Commission, having regard to the statutory context of the Act could have reasonably decided to engage in the consultation process without completing the audited financial statements, concluding that royalty payment was meant for the Government and that the industry levy should be paid by the Respondents to fund the expenses of the Commission **[paras 234-235 of Judgment]**.

(h) The Trial Judge's finding that the Commission's conduct and statements in the matter gave rise to a legitimate expectation that the Respondents would be consulted prior to the final demand for payment of the Industry Levy was contrary to the weight of evidence and/or was so fundamentally wrong that no court acting judicially and properly instructed as to the relevant law and facts could have come to such a finding and/or decision on the evidence before it **[paras 256-260 of Judgment]**.

(i) The Trial Judge erred in law in making a declaration in respect of the collection of the 2020-2021 industry levy as no industry levy had as yet been issued by the Commission for this period **[paras 268-270 of Judgment]**.

(j) The Trial Judge failed to exercise or improperly exercised his discretion under Rule 56.13(3) CPR 2000 with respect to the appropriate reliefs to be granted on the Respondents' applications for judicial review in circumstances where even if the Court held that there were procedural improprieties in the collection of the industry levy and/or the consultation process, a proper exercise of discretion would have required that directions be issued by the Court on the correct procedure to be followed rather than concluding that it was not possible for the Commission could (sic) to collect the industry levy for the period 2019-2020 and 2020-2021 **[paras 268-270 of Judgment]**."

**Order of Issues for determination**

[63] Grounds (a), (b), (c) and (d) will be dealt with together. These grounds of appeal are all concerned with what the appellant described in its written and oral submissions as ‘the principal vires issue’. These issues (and grounds of appeal) concern fundamentally the judge’s approach to (ambiguity or no ambiguity/literal versus purposive) and correctness of his interpretation and application of the provisions of sections 58, 59, 60, 63 and 65 of the Act and his corresponding findings on the four questions posited under his *Issue 1*. These issues and findings are central to the determination of the appeals. Importantly, if these fundamental issues are decided in favour of the respondents, they are determinative and the appeals must be dismissed. However, if decided in favour of the appellant, the Court is required to go on to consider and to deal with the other issues and grounds of appeal pertaining to the adequacy of the public consultation, the finding of procedural legitimate expectation, and the correctness of the reliefs granted.

[64] Ground (e), which is concerned with the absence of audited financial statements of the Commission, will be dealt with second. This issue is pertinent to and intertwined to a substantial extent with certain issues posited by grounds (a) to (d). More specifically, it concerns the admitted absence of audited financial statements of the Commission generally and, in particular, for the 2018/2019 financial period, that is, the financial year immediately preceding the 2019/2020 financial year to which the Claims for orders (made by the judge) quashing the industry levy and royalty payments, relate.

[65] Grounds (f) and (g) will be addressed third. They are in turn concerned first with the vires and adequacy of the Commission’s public consultation on the draft Work Plan and Budget for the 2019/2020 financial period and, second, with the vires and irrationality of the Commission’s decision in embarking upon a public consultation absent audited financial statements of the Commission for the 2018/2019 financial year.

[66] Next to be dealt with is Ground (h). This ground challenges the judge's factual and legal finding that the statements and actions of the Commission gave rise to an actionable 'procedural legitimate expectation'. This will be followed by a consideration of the 'Relief Grounds, that is, grounds (i) and (j) concerning, respectively, the correctness of declaration (b) pertaining to the financial year 2020/2021, and the appropriateness of the reliefs granted by the judge in quashing the industry levy and royalty payment for 2019/2020, instead of issuing directions on the correct procedure to be followed by the Commission for calculating, fixing and imposing an industry levy and royalty payment for the financial year 2019/2020, and going forward.

[67] In considering each of these grounds of appeal as indicated above, I will set out the pertinent provision(s) of the Act and deal with the correctness of the learned judge's construction of said provisions and where necessary, his findings of fact and application of that interpretation to those findings.

[68] Further, I wish to indicate at this juncture the approach which I intend to adopt when summarizing the submissions of the three sets of respondents and their respective legal counsel with respect to each ground of appeal and the issues to be dealt with arising out of the appeals, I will, for convenience, do so collectively, as opposed to individually, having regard to the major similarities (in many instances identical) points raised or made by each of them in response to the grounds and issues to be dealt with, especially the 'principal vires issue'. However, where there are instances (and they are few) where a particular respondent/lead counsel made or relied on additional or different points, I will also refer to that point in my summary and address it, to the extent necessary, when analyzing the competing submissions with regard to particular issues and reasoning to a conclusion thereon.

[69] By pre-arrangement amongst lead counsels for the respondents, Mr. Pleming KC, lead counsel for the respondent Digicel BVI, led off with his client's submissions in

response to appeals. He thoroughly traversed much of the common points and submissions between all respondents in dealing with the 'principal vires issue' and the appertaining grounds of appeal. His senior junior, Ms. Dobson, followed dealing solely with the issue of the adequacy of the public consultation conducted by the Commission, before the return of Mr. Pleming to address the issue of procedural legitimate expectation and his concluding submissions. Next, Mr. Bennett KC, lead counsel for CCT and BVI Cable TV, made his submissions, adopting wholesale Mr. Pleming's submissions, and offering up, in characteristic fashion, a few additional points or perspectives to which I shall revert to later in this judgment. Next at the crease in the line of batsmen for the respondents was Mr. Child, learned counsel for C&W BVI (FLOW), who also conveniently adopted the submissions made by Mr. Pleming KC and Mr. Bennett KC. In his turn, he also addressed a few further or additional points and submissions in response to the various issues and grounds of appeal. I shall refer to some of the main ones in my summary below. In adopting this approach, I, respectfully, do not intend to attribute particular submissions or points to particular or individual lead counsel for the respondents, unless I consider it to be necessary or prudent to do so. Finally, in the interest of complete clarity, I make mention of the fact that all parties (appellant and respondents) expressly relied on their respective written submissions, all of which were of much assistance to the Court.

**The Principal Vires Issue - grounds (a), (b), (c) and (d)**

(1) **Whether judge erred in not adopting a purposive construction to sections 58, 59 and 60 of the Act?**

(2) **Whether the judge erred in not using the Government's 2007 Telecommunications Policy document as an aid to construe the legislative intention in relation to Royalty payments and Industry Levy?**

**(3) Whether by section 58 Royalty payments are 'funds' of the Commission to be used to defray operational expenses of the Commission?**

**(4) Whether Royalty payments are payments by licensees for use of spectrum?**

**(5) Whether the Commission can resolve pursuant to section 58(2)(f) to transfer Royalty payments to the Government and pay them into the Consolidated Fund?**

**(6) Whether the judge was correct in holding that Royalty payments as funds of the Commission are intended to be used as a first call to pay for the Commission's operational expenses?**

**(7) Whether the judge erred in holding that an industry levy is only to be fixed and imposed on the licensees where and to the extent that the funding from Royalty payments and other sources of income are insufficient to meet the budgeted expenses of the Commission in any financial year?**

**(8) Whether the judge wrongly equated Royalty payments under section 60 with the payment of a tax?**

**(9) Whether the judge was correct in holding that Royalty payments and Industry Levy fixed and imposed by the Commission for the 2019/2020 financial year were calculated in breach of the Act and are ultra vires and illegal?**

**Appellant's Submissions – Principal Vires Issue**

**Principal vires issue**

[70] The appellant addressed in their submissions (written and oral) the principal or central vires issue identified by the learned judge at paragraph [53] and considered by him from paragraph [56] of the judgment as the first issue (comprising 4 stated questions or issues). The 'principal vires issue' is 'whether the Commission acted illegally and ultra vires the Act in calculating, fixing and apportioning the 2019/2020 Industry Levy on the basis that it was entitled to pay over the Royalty payments to the Government.'[28]

[71] The appellant's primary submission on this issue is that contrary to the judge's conclusion, the Commission was fully entitled to proceed on the basis that it would pay the royalty payments to the Government, and thus treat them as a legitimate

[28] Paragraph 10 of the Appellant's Skeleton Arguments.

expenditure of the Commission pursuant to its powers at paragraph (f) of section 58(2) of the Act.[29]

[72] It is submitted that in coming to his conclusion on this issue, the learned judge failed to properly construe sections 58, 59 and 60 of the Act and to recognize the 'true ambit of the regulatory framework.' In advancing this submission, the appellant accepts that the learned judge at paragraph [85] of the judgment correctly understood, from the clear words of section 58(1)(b) of the Act, that the definition of 'funds and resources of the Commission' includes both 'industry levies' and 'royalty payments'; and, secondly, that he also noted correctly, at paragraphs [86] and [87], that while section 60 of the Act did not define the expression 'royalty payments', it did in subsections (2) and (3) of that section expressly stipulate that (i) 'royalty payments' are to be paid to the Commission; (ii) a failure to pay royalties could result in a further liability to pay interest thereon to the Commission; and (iii) the Commission is empowered to recover from a defaulting licensee, 'as a civil debt in summary proceedings', royalty payments and accrued interest thereon for a financial year.

[73] Notwithstanding the above concessions, the gravamen of the appellant's criticism is that the learned judge did not fully appreciate the statutory regulatory framework applicable to this issue, in that he 'did not adequately focus on the ambit of the Commission's powers to apply its 'funds' under and pursuant to section 58(2) of the Act; incorrectly found at paragraph [91] of the judgment that the said provision was 'rather clear and straightforward'; and he 'appeared to assume that it did not permit expenditure by the Commission by way of passing the royalty payments on to the Government.'

[74] In seeking to make this submission good, Mr. Herberg KC, lead counsel for the appellant, examined in some detail the statutory framework of the Act. He took the Court to sections 5 (establishing the Commission); section 6(d), (j), (r), (n) dealing

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[29] Ibid, paragraph 11.

with specific functions of the Commission and (u) which empowers the Commission to 'do such other things necessary or expedient to give effect to its functions specified in paragraphs (a) to (t).'

[75] Counsel then focused on the more germane provisions of Part XI of the Act dealing with 'Financial and Reporting Provisions Applicable to the Commission'. First section 58(1) which deals with what comprises the 'funds and resources' of the Commission; and 58(2) which stipulates the permitted use of the funds of the Commission. Here the appellant's complete reliance was on the provisions of subparagraph (f). Indeed, it is fair to say that it is on the proper meaning of this provision, and the scope and ambit of its power thereunder, that the Commission's entire case in relation to the principal vires issue, and its appeals, hinges.

[76] In furtherance of his principal subsection (f) point, Mr. Herberg KC took the Court to section 59 of the Act which authorizes the Commission to impose an industry levy. He dealt specifically with subsections (1) and (2) dealing with the Commission's power to set and to calculate an industry levy, to assess the proportion of such levy to be paid by each licensee and provides expressly for the enforcement by the Commission of payment of an industry levy by way of summary legal proceedings before the courts. Mr. Herberg KC also confirmed the appellant's acceptance that the word 'net' in section 59(2) as part of the expression 'net estimated expenditure' therein, means 'estimated expenditure less income'. This is an important concession, as will become clear later in this judgment.

[77] Counsel also took the Court to section 60 of the Act dealing with the imposition of a royalty payment on the licensees 'in accordance with the provisions of [their] licence or frequency authorization', to be paid to the Commission at the rate of 3 percent of a licensee's gross revenue or such other prescribed rate. He underscored, on behalf of the appellant, that it was 'common ground' between the parties that royalty payments were properly 'payable' to the Commission, another

important concession. However, as the appellant's argument goes, this statutory prescription did not prevent or prohibit the Commission from legitimately resolving to transfer or to pay royalty payments over to the Government under and in pursuance of its power under section 58(2)(f).

[78] Learned King's Counsel also referred to section 62 of the Act which proscribes that the 'financial year' of the Commission 'shall be for the period 1st October in each year to 30th September of the following year'; and section 63, an important provision for present purposes, which stipulates that the Commission must, within 3 months of its financial year, before the commencement of each financial year, prepare for that financial year 'estimates' of its expected expenditure and income, if any, arising from 'any source'; the submission of these estimates to and for the approval of the Minister responsible for finance; and once approved, the laying of the approved estimates and the work programme/plan for the relevant year before the Legislative Council (now, by the **Constitution**, the House of Assembly).

[79] The appellant observed that both sections 59(1) and 63(1) of the Act require the Commission to conduct a 'public consultation'. However, it is the appellant's contention that the Commission is entitled to run both consultations together at the same time, as opposed to conducting one public consultation for the purposes of each provision of sections 59 and 60. This approach to the requirements for public consultations was considered and seemingly accepted by the judge at paragraph [201] of the judgment when he concluded that 'the legislation can be construed as requiring only one such process'. There has been no appeal from this apparent conclusion by the judge, which conclusion seems to adopt a pragmatic and practical approach to the requirements for public consultations necessary for both the estimates/budgetary approval process and the calculation of the industry levy which under section 59(1) is linked or connected to the time period of four weeks from the Minister's approval under section 63(3).

**Paragraph (f) of Section 58(2) Power**

[80] The appellant's principal contention is that the Commission has the power under and pursuant to section 58(2)(f) of the Act to resolve to pay royalty payments received by it from the licensees/respondents over to the Government, and to pay the said sums/funds into the Consolidated Fund. It is submitted that the power conferred on the Commission by section 58(2)(f) 'any other expenditure authorized by the Commission and properly chargeable to revenue', is ample and wide enough for the Commission to resolve to authorize the payment by it of royalty payments received from the licensees (or any other source) as funds of the Commission, 'by way of transferring them to Government' ("the section 58(2)(f) gateway").

[81] The appellant's case regarding the 'principal vires issue' is, therefore, entirely hitched on its interpretation and construction of the section 58(2)(f) expenditure power of the Commission. This interpretation is said by the appellant to accord with a literal or purposive interpretation of the said provision within the statutory framework of the Act. Further, submits the appellant, royalty payments under the Act were not intended by the drafter of the Act and the Legislature as funds to be retained by the Commission to be used to meet its usual operating expenses as budgeted. This is because conceptually royalty payments are payments by licensees for the use of a right, asset or intellectual property of the Government, in this case, for use by the licensees of its 'spectrum', which is not an asset, right or intellectual property of the Commission. It is contended that this meaning and purpose of the expression 'royalty payments', is in keeping and wholly consistent with the conventionally accepted meaning of 'royalties' in the telecommunications industry in the Caribbean and elsewhere. Furthermore, this meaning and purpose accords with and is illustrated by the way in which, prior to the Act, royalties were treated and imposed by and made payable to the Government by the telecommunications monopoly, Cable and Wireless (West Indies) Limited.

[82] In this respect, it is submitted by the appellant that the learned judge erred fundamentally in finding that royalty payments generally were to be retained to cover or to meet the operating expenses of the Commission. This finding, the appellant argues, runs contrary to the clear provisions at section 59(6) which by comparison stipulates that monies received by the Commission by way of industry levies 'shall be retained by the Commission for its own use', whereas no such stipulation is made in section 60 applicable to royalty payments to be paid annually by the licensees.

[83] Much of what follows is a summary of the salient points and more expansive argument and submissions advanced by the appellant on the principal vires issue at paragraphs 12 to 18 of its written submissions, and in oral argument.

**Section 58**

[84] The appellant submits that section 58(1) of the Act does not suggest that a transfer of royalty payments by the Commission to the Government is impermissible or that such transfer would fly in the face of the section 58(1) categorization of what constitutes the 'funds and resources' of the Commission, as the judge incorrectly concluded at paragraph [89] of the judgment. Section 58(1), while requiring such payments to be made to the Commission and empowering the Commission to pursue its collection by summary civil proceedings against a defaulting licensee, is, at minimum, silent as to whether it is permissible for the Commission to then transfer those funds to the Government. This is so, as it is subsection (2) which provides for the use of the Commission's funds for certain specified purposes, and not subsection (1).

**Comparison of Sections 59 and 60 - the different treatment of industry levies and royalty payments**

[85] Further, the way the Act at section 60 treats 'royalties' is in 'marked distinction' to the status and the way in which it treats 'industry levies' at section 59. Importantly, argues the appellant, the Act specifies in section 59(6) that industry levies 'shall be retained by the Commission for its own use, unless the Minister responsible for finance, with the approval of the Cabinet, otherwise directs.' The short point here is that there is no equivalent or analogous provision or stipulation applicable to royalties to be found in the Act, neither in section 60 or otherwise. In this respect and because of this important difference, asserts the appellant, the framers of the Act and the Parliament clearly contemplated and intended that royalties (unlike the industry levy) would be liable to be passed on to the Government, by way of a decision of the Commission, and '**without Ministerial direction**.' (Emphasis added). Whereas industry levies pursuant to section 58(6), are expressly declared by the Act to be monies to be received and retained by the Commission '**for its own use**'. (Emphasis added).

[86] It was submitted that the judge failed to have regard to this material distinction, and thereby erred in his interpretation of sections 59 and 60 of the Act when he concluded that royalty payments were funds intended under the Act to be retained by the Commission and used to pay its operating expenses; and industry levies were only to be calculated, fixed and demanded from the licensees/respondents in circumstances where the ordinary funds of the Commission (including royalties collected), where inadequate to cover or to defray the approved and budgeted operating expenses of the Commission. This is a fundamental point of departure between the appellant's interpretive case, and that of the respondents and the conclusion reached by the learned judge on this critical issue.

[87] In summary, the appellant argues that the legislative framework under the Act, and the prior contemplation and legislative intention of the Legislature in passing the Act, accords with the basic concept and natural meaning of 'royalty payment'. This concept and meaning is inconsistent with the interpretation and contention advanced by the respondents (and accepted by the judge) that royalty payments

were intended to be used to defray or to offset the normal and permitted operating expenses of the Commission and could not be transferred to the Government under the Act. In this vein, the appellant argues further that a 'royalty payment' is, in essence, a payment by one party to another party for the ongoing permission to use or to exploit that party's asset or right or intellectual property; and it is typically 'based on a percentage of gross or net revenues derived from the use of the asset/right as set out in the licence or other agreement which permits its use.'[30]

[88] In my considered opinion, there can be little, if any, serious disagreement with this 'definition' of what is usually meant by 'royalties' conceptually. However, the more important question in the instant matter is whether the Act, on a true construction of its relevant provisions (sections 58(1) and (2), 59, 60 and 63), it is clear that subsection (f) of section 58(2) conferred on the Commission a power or gave it the authority to intra vires resolve to transfer royalty payments received by it from licensees under the Act for any financial year, and which sums automatically became 'funds' of the Commission and not funds held by the Commission on the account of the Government, to be transferred, at the discretion and behest of the Commission, either wholly or in part, to the Government and paid into the Consolidated Fund. Further, whether those royalty funds must be segregated from its other 'funds' and cannot be used by the Commission, in whole or in part, to defray its permitted operating expenses, as budgeted and approved by the Minister responsible for finance under section 63 of the Act.

[89] In this instance, the appellant points to the operative telecommunications licensing agreements granted by the Commission to each of the respondents/licensees. It is submitted by the appellant, that it is the Government, and not the Commission, which is the owner of 'spectrum' or of any other form of telecommunications rights liable to be exploited by the licensees (or any other authorized person or entity). Accordingly, it is unsurprising that the Act would permit the Commission to

[30] Paragraph 12(c) of the Appellant's Skeleton Argument.

transfer, by way of its legitimate power under section 58(2)(f), the royalty payments received by it to the Government.

[90] Whatever may be the attractiveness of this point, there is no clause or provision in any of the licensing agreements which expressly authorizes or requires the Commission to do so. More fundamentally, even if there was such a provision in these agreements, this could not be acted upon, unless the Commission indeed has the power to or is required under the Act to make transfers of royalty payments received by it as its funds, to the Government, regardless of what conceptually is understood to be the usual definition of 'royalties'.

**Government's 2007 Policy Document as aid to Construction of the Act**

[91] Furthermore, argues the appellant, the Government's January 10, 2007 Policy document ("2007 Policy") issued publicly on the Act itself, after its passage but prior to the issuance or distribution of telecommunications licenses to each of the four licensees/respondents, clearly sets out the intention of the Government with respect to the payment of 'royalties' and 'industry levies' under the Act. Specifically, the appellant relies on three clauses or paragraphs of the 2007 Policy. The first, paragraph 8.7.4, states:

> "8.7.4. The BVIG considers that in a low tax environment such as the BVI it is appropriate that a competitive, prosperous and expanding sector such as the telecommunications should make a direct contribution to the public finances, comparable to that made in other administrations by direct taxation. Such contributions have hitherto taken the form of royalty payments from monopoly franchises. The BVIG now considers that **a more appropriate arrangement following telecommunications liberalization would be an obligation on the part of the network licensees to make annual payments to the BVIG in proportion to the annual turnover of the business concerned.** These payments would be set at a level that broadly reflected the level of Government income derived from the sector." (Emphasis added)

[92] The appellant contends that the 2007 Government Policy position was a continuation of the Government's previous position when there was a monopoly

licensee, Cable & Wireless, and a 3 percent annual royalty was imposed on the said licensee. Viewed in this way, the continuation of this practice (through the aegis of the Commission's section 58(2)(f) power,) is not surprising, especially when it is appreciated that corporate income tax in the BVI has since been 'zeroed' (or effectively abolished) in 2005, and the only revenue which thereafter the Government was able to derive from licensees, such as the respondents, 'for the privilege of being granted a telecommunications license to operate in the [T]erritory', was royalty payments.

[93] Moreover, argues the appellant, in some of the other Caribbean jurisdictions where operators such as FLOW and Digicel are also licensed to provide telecommunications services, these licensees pay or have paid 'substantial licence fees' to the respective governments for the privilege of being granted such a licence. In this respect, the appellant points to the unchallenged evidence before the judge that Digicel had paid US$85 million to the Government of Jamaica in 2014 for the 'privilege' of having its licence renewed for a further 15 years; and likewise, FLOW paid US$30 million for the same privilege. On this point and to this extent, it is the appellant's submission that the judge below wrongly held at paragraph [109] of the judgment that the evidence of regional and global practices with respect to payment by licensees of an industry levy and royalty or licence fees, were not relevant in determining the true intention of the Legislature in the BVI when passing the Act.

[94] I would merely observe, as nothing turns on it, that these two examples are of lump sum payments for the 'renewal' of existing telecommunication licenses. As I understand it, in the BVI context, royalty payments were, prior to the coming into force of the Act, a charge or fee imposed by the Government on its monopoly licensee, Cable & Wireless, as a percentage of its annual turnover, and was not a charge or fee for renewal of its existing licence, which licence was in force for an extended term.

[95] The appellant also submits that the Government's position reflected in the 2007 Policy regarding royalty payments is to be contrasted with the Government's policy position with respect to the industry levy at paragraph 8.6.4 of the Policy, and the initial start-up costs of the Commission at paragraph 8.6.5 of the said document. By these paragraphs it is stated:

> "8.6.4 The TRC [Commission] will be financed by annual renewal fees for network operators called the "industry levy" which will be subject to a maximum of 2% of the licensees' turnover. This will mean that the full-time staff of the TRC will be very few. For more complex issues, the TRC will be able to call on advice of outside experts as necessary.'
>
> 8.6.5 The costs to the BVIG and to the TRC of establishing the new regulatory regime will be met from the initial licence issue fees for the network licenses."

[96] On the basis of these three provisions of the 2007 Policy document, it is the submission of the appellant that the intention of the Government, the drafter of the Act and the mover of the legislation before the Legislature, was that the operational expenses of the Commission would be funded from the industry levy, and that royalty payments 'would continue to be paid over to the Government for the privilege of the Respondents being granted a telecommunications licence.' It is submitted that the judge's interpretation of sections 58, 59 and 60 of the Act to the effect that royalty payments were intended by the Legislature to be used by the Commission to meet its operational expenses before the calculation and imposition of an industry levy for the particular financial year, 'involves the unlikely proposition that the Legislature had (without making this clear) decided to terminate the stream of royalty payments which the Government had previously enjoyed from the monopoly provider, Cable & Wireless.'[31]

[97] I merely observe at this juncture that there appears to be somewhat of an obvious disconnect and variance between what is stated at paragraphs 8.7.4, 8.6.4 and 8.6.5 of the 2007 Government Policy document, on the one hand, and the actual

[31] Paragraph 12(f) of the Appellant's Skeleton Arguments.

provisions of the Act, it having gone through the usual legislative process before being passed and assented to by the Governor on behalf of Her Majesty (now His Majesty). These disconnects or 'differences' may be explicable on the basis that changes may have been made to the original version of the Bill during the legislative process, including at the Committee stage, in the Legislature or that the 2007 Policy document was prepared at an early stage in the drafting process for the Bill. However, there was no documentary or other evidence before the judge to elucidate or to explain away these 'differences'. In the final analysis, it is impermissible to speculate about this in the absence of reliable evidence, and I do not seek to do so.

**Application of Literal or Purposive Interpretation**

[98] More fundamentally, in my view, it is the actual words of the Act itself which a court is called upon to construe, within the four corners of the statute, assisted by the rules of statutory interpretation and by any legitimate and accepted aids to interpretation of a statute, such as the Hansard, the objects of the Bill and the marginal notes of the Act. In conducting this interpretive exercise, a judge will first examine the provision or provisions under scrutiny and decide whether its meaning is clear from the natural and ordinary meaning of the words used therein and within generally the context of the statute to be gleamed from a full reading of it. This is usually referred to as the 'literal' interpretation. It is precisely this approach to and method of statutory interpretation which the learned judge utilized in the instant matter, and which is the subject of criticism and challenge by the Commission in the Appeals. Where a provision or provisions are found to be unclear or ambiguous or worse where the literal interpretation leads to an absurdity, the court may adopt a 'purposeful' or some other accepted method of interpretation.[32] Indeed, it is the appellant's case on appeal that the judge ought to have resorted to a purposive interpretation of sections 58, 59, 60 and 63 of the Act, a point which is roundly rebutted by the respondents.

[32] Halsbury Laws of England 4th ed. Vol 44(1) para. 1475.

[99] The appellant submits that the learned judge was wrong when, at paragraphs [108] and [109] of the judgment, he dismissed the 2007 Government Policy document and the provisions of paragraphs 8.7.4, 8.6.4 and 8.6.5 as not relevant or helpful. Instead, he ought properly to have had regard to the pre-enacting and post-enacting history of the legislation; and to the official statements published by the Government in its 2007 Policy document about the Act, especially regarding the purpose and meaning of industry levy and royalty payments.

[100] In support of these points, the appellant relies on the principle that statements published by a government department charged with administering an Act or by any other authority concerned with the Act, may be taken into account by a court as 'persuasive authority' as to the meaning of its provisions. This is said to be especially so where such statements are a 'contemporary exposition' which helps in showing what all concerned (including licensees) must have thought the Act or certain provisions of it meant, in the period immediately before it was passed. Secondly, the appellant relies on the 'doctrine of updating construction', that is 'an Act is always speaking and therefore construction is always being updated.'[33] The appellant also argues, in the alternative, for the application of either of two other methods of statutory interpretation, namely: construction by reference to a mischief;[34] and construction against evasion.[35]

[101] It is submitted by the appellant that had the learned judge adopted the purposive interpretive approach to construing sections 58, 59 and 60 of the Act, it would have led him to, apparently, not treat royalty payments as some form of tax, but rather (as is its usual or conventional meaning) as 'a payment for exploitation of an asset or right' of the Government, namely, its 'spectrum'. In adopting the 'purposive' approach to interpretation, it is submitted that the judge would be

[33] Statutory Interpretation 3rd edn., Bennion at pp. 14-16; Halsbury Laws of England Vol. 44(1) 4th edn. paragraph 1427.
[34] Halsbury Laws of England 4th edn., Vol. 44(1) para. 1474.
[35] Ibid, paragraphs 1377-1430 and 1470 -1476.

giving effect to the manifest legislative intention as contended for by the appellant. Otherwise, appreciating that there is some ambiguity in section 58(2)(f) (the absence of an express definition of the term 'royalty payment') and in section 60 (any specific provision for royalties to be paid over to the government), the judge ought to have adopted a purposive approach to his interpretation of these provisions and found that the Commission was entitled, pursuant to section 58(2)(f), as part of its legitimate expenditure, to pay royalty payments over to the Government.[36] However, in oral submissions, Mr. Herberg KC accepted that if the Act is in fact clear, the appellant will not get very far in seeking to rationalize and to support its position that royalty payments are to be paid over and can be paid over to the Government by the Commission pursuant to section 58(2)(f).

**Meaning of 'properly chargeable to income'**

[102] Specifically with respect to what is meant by the expression 'properly chargeable to revenue' in section 58(2)(f) of the Act, counsel for the appellant proffered that it means a 'recurring payment to the Government not chargeable to a capital account', but which, as an accounting matter, would fall under either revenue or expenditure.

**Audited Accounts**

[103] The appellant referred to the prescription in section 59(2)(a) and (b) for there to be audited accounts of the Commission for the previous year, when calculating and fixing the industry levy. Reference was also made by Mr. Herberg KC to section 66 of the Act which imposes on the Commission a further or additional obligation with regard to its audited accounts. Thereunder, the Commission is obligated, within 3 months of completion of the audit of its accounts for a financial year, to submit to the Minister a copy of the audited accounts, and a written report of its operations and activities for that financial year together with a copy of the audited financial statements.

[36] Paragraph 14 of the Appellant's Skeleton Arguments.

[104] It is accepted as common ground that the Commission's accounts for the financial year 2018/2019 (the immediately preceding year) were not audited at the relevant time when the Commission was calculating and imposing an industry levy for the financial year 2019/2020. It is also suggested that the accounts for some of the prior years have also not been unaudited.

[105] In its submissions, the appellant sought to downplay and to minimize the importance and significance to the calculation of an industry levy under section 59(2) of the absence of audited accounts of the Commission for the previous year 2018/2019. First it argued that the judge appeared to have rightly accepted at paragraph [160] of the judgment, that the only potential relevance of audited statements or accounts of the Commission for the previous years was, in relation to this claim, if they disclosed any amount for a 'deficit' or 'surplus' from previous years that would fall to be (respectively) added to or subtracted from the 'net estimated expenditure' plus 10 percent contingency, to produce the amount of the industry levy under section 58(2).

[106] This assertion does not accord with my reading of paragraph [160] of the judgment, where, contrary to the appellant's characterization, the judge was at some pains to emphasize what he considered to be the obvious or apparent importance of audited accounts for the previous year to the Commission's calculation, fixing and imposition of an industry levy for the current financial year under and pursuant to section 59(2) of the Act.

[107] Based on this approach and its arguments on this issue, the appellant submits that the Commission's non-compliance with section 64(4) of the Act to have its accounts for each financial year audited was 'irrelevant to these applications for judicial review, unless (as set out above) they would or might have shown a relevant deficit or surplus which should have been taken into account.'[37] It is on

[37] Paragraph 20 of the Appellant's Skeleton Arguments.

this basis that the appellant argues that the judge ought to have found that "absence of audited statements was indeed wholly irrelevant to the claims, because their absence can only have benefitted the respondents (if it made any difference at all), for the reasons advanced by the appellant at paragraphs (a) to (e) of paragraph 21 of their written submissions." In my view, respectfully, there is no merit in this line of argument by the appellant.

[108] In response to a question from the Court, Mr. Herberg KC accepted that the timing set out in section 59 of the Act for the holding of public consultations and for calculating the industry levy using audited accounts of the Commission from the previous year, and the timing in section 64 (4) as to when audited accounts for a financial year of the Commission must be produced, is illogical and impractical. With this submission, I am entirely in agreement. However, counsel for the appellant argued that it is nonetheless sufficient and acceptable for the Commission to use its unaudited accounts for the financial year 2018/2019 to calculate and to fix the industry levy for the financial year 2019/2020. This submission will require more scrutiny.

[109] The appellant also referred to section 65 of the Act, which stipulates:

> "65. Where there is a surplus on the budget approved for the Commission's expenditure for any financial year, such surplus shall, subject to this Act, be paid into the Consolidated Fund, unless otherwise agreed upon with the Minister responsible for finance."

[110] This is the only provision in the Act which provides for funds of the Commission to be paid into the Consolidated Fund, that is, to the Government, to became part of its general revenue to meet the recurrent expenses of the Territory, subject to its compliance with the dictates of section 102 of the **Constitution**.

**Section 102 of the Constitution**

[111] It is also the submission of the appellant that: (i) the judge was wrong to place any reliance at paragraphs [92] and [93] of the judgment on section 102 of the

**Constitution**, since properly read, it does not assist the respondents' interpretation (as upheld by the judge) as it does not say anything about whether a particular source of revenue (here, royalty payments) pursuant to the Act is to be retained by the Commission and used to defray its expenses or may be legitimately and properly transferred to the Government. Also, for the Commission to succeed on the interpretation it contends for, it is not necessary to establish that it was 'obliged' to transfer the royalty payments to the Government. It is sufficient that it has the power to resolve do so (section 58(2)(f)), as it plainly has exercised that power when it transferred such funds in its 2019/2020 draft Budget as 'regulatory contributions'.

**Section 63(3) - Power of Minister to require transfer of royalty payments to Government**

[112] It is also submitted that, in any event, by virtue of the minister having the power under section 63 of the Act to approve the Commission's budget for a financial year, he/she 'had the 'effective practical power' to require the Commission to budget for the transfer of Royalty Payments to Government'.[38] In oral submissions, however, Mr. Herberg KC accepted when pressed that in circumstances where the Minister elects, as part of his budgetary approval process and power under section 63, not to have royalty payments for a particular financial year included in the budget as funds to be paid over to the Government, those funds would remain part of the income of the Commission to be taken into account when calculating the amount of the industry levy for the relevant year.

[113] In my considered view, this concession totally undermines any argument that the Commission must or is obliged under the Act to transfer or to pay over royalty payments to the Government into the Consolidated Fund, as such payments are conceptually payments by licensees for the use and exploiting of what is, essentially, the right to use the asset or intellectual property of the Government, namely, 'spectrum'.

[38] Paragraph 15(b) of the Appellant's Skeleton Arguments.

[114] Also, and I say so respectfully, the attempt by way of this submission to ascribe to the Minister a power to demand or to dictate that the Commission transfer or not transfer royalty payments to the Government via or through the mechanism of the budgetary approval process and procedure under section 63 of the Act, has been strained to the point of being unsustainable. Put simply, if, within the four corners of the Act, the Commission does not have the power to transfer or the Minister does not have the power to compel the Commission to transfer, royalty payments (or the monetary equivalency thereof) to the Government for payment into the Consolidated Fund, then no such power exists and cannot be implied or imputed. The power of approval by the Minister of the budget under the section 63 procedure does not somehow imbue the Minister with a power which was not conferred on him/her by the Act; and absent such a statutory power, any such dictate or attempt by the Minister to dictate or to compel the Commission through the section 63 budget approval procedure to do so, would be ultra vires, illegal and unenforceable. What is clear is that the only requirement under the Act compelling the payment of income of the Commission into the Consolidated Fund is section 65 relating to 'surplus', and even in such instances, the Minister may agree otherwise.

**2019 / 2020 Work Plan and Budget**

[115] It is therefore the appellant's case on 'the principal vires issue' that the judge's interpretation, approach and conclusions regarding the provisions of sections 58, 59 and 60 of the Act were flawed and patently wrong and must be set aside by this Court. The approach which the Commission in fact adopted in treating royalty payments as funds which it had the power to transfer over to the Government as 'regulatory contributions' was therefore correct and intra vires the Act. Importantly, this was the approach adopted and implemented in its 2019/2020 Work Plan and Budget. Those sums (royalties) are reflected in the said Budget as a 'regulatory contribution', which the Commission was entitled to include pursuant to its section 58(2)(f) power. Having correctly done so, the Commission was entitled to set an

industry levy for 2019/2020 and did so under section 58(2) of the Act by (a) calculating its total income; (b) subtracting the capital expenditure and the estimated operating expenditure, including the regulatory contribution, so as to (c) calculate the net estimated expenditure, and then (d) adding a contingency of 10% of the net estimated expenditure. It is submitted that having done so correctly, the resulting sum was the industry levy for 2019/2020, as there was no deficit to be added or surplus to be subtracted within the meaning of section 59(2) (a) or (b).[39]

[116] The appellant argued that the result of this exercise is that the Commission did produce a Budget which complied with the requirements of section 63(1) of the Act, and nothing done or carried out by it was ultra vires the Act or illegal. For these reasons the judge's analysis at paragraph [124] of the judgment, it is submitted, was flawed "in that he did not recognize that the Commission could decide to transfer Royalty Payments to the Government as part of its permitted expenditure [under and pursuant to section 58(2) of the Act], with the result that the next (sic) estimated expenditure and hence the Industry Levy fell to be calculated with Royalty Payments 'stripped out'*".*[40]

**Respondents' Submissions - principal vires issue**

[117] The respondents' submissions with respect to the 'principal vires issue' are to be had in their respective written and oral submissions. These written submissions are:

> Digicel BVI – written submissions (further updated) filed on 9th October 2025 at paragraphs 35 to 55, including responding to the appellant's submissions in the appeal on this principal issue;
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> CCT and BVI Cable TV – written submissions filed on 8th July 2024 at paragraphs 10 to 31; and
>
> Cable & Wireless BVI – written submissions filed on 28th October 2024 at paragraphs 7 to 7.9.

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[39] Paragraph 17 of the Appellant's Skeleton Arguments.
[40] Ibid, paragraph 18.

[118] As mentioned previously, each of the respondents, in their oral submissions, adopted wholesale the written submissions of the other two respondents on all issues and grounds of appeal. Further, in both their written and oral submissions, I was unable to discern any particular point or principle of difference or departure between the three sets of respondents and their case in answer to all issues in appeals.

[119] In the summation below, I have endeavored to highlight and to fairly and accurately capture the key points and submissions of each of the respondents regarding the 'principal vires issue' and grounds (a) to (d) of the appellant's notice of appeal. However, in the interest of clarity, I stress that in attempting to summarize the respondents' points and counterpoints below, I have thoroughly read, re-read, considered and evaluated all of their submissions, written and oral, in relation to each issue in the appeals, whether summarized here or not.

**Appellant's Central Argument in court below**

[120] In addressing the 'principal vires issue', the respondents underscored that in the trial below it was the 'central' plank of the Commission's case that royalty payments made to and received by the Commission pursuant to section 60 of the Act, were funds belonging to the Government (not the TRC), and the Commission was obliged to transfer those funds to the Government by paying them into the Consolidated Fund, and could not retain such funds for its use in defraying its operational expenses. This was the evidence of its CEO/MD, Mr. Guy Malone that 'the Royalty payments are funds collected on behalf of the Government'.[41] Moreover, the Commission's position, as expressed by Mr. Malone, was that it 'has had to utilize the Royalty payment which by law was intended for the Government to fund its operational expenses'.[42]

[41] Hearing Bundle Vol. 1 page 597, paragraph 51.
[42] Appellant's Amended Submissions, Hearing Bundle Vol.2 Tab 5 at paragraph12.

[121] This latter statement by Mr. Malone is confirmatory of the fact that, notwithstanding the Commission's approach to royalty payments and its central argument, the Commission nevertheless did not transfer royalty payments received after it came into existence pursuant to the terms of the Act and up to and including the financial year 2019/2020 over to the Government but, instead, did use these funds to fund it operational expenses. I shall return to this inconsistence below.

[122] I would remark further, at this juncture, that the two statements above from the CEO/MD Mr. Malone regarding the Commission's core legal position with respect to royalty payments being the funds of the Government and how it has treated with those funds during the financial periods up to 2018/2019, are obviously inconsistent. If indeed royalty payments collected by the Commission are funds of the Government under the Act, on what basis would it be legally permissible for the Commission, of its own volition and decision, to use such moneys to fund its operational expenses? These funds are either Government's money to be paid into the Consolidated Fund to be used to meet Government's expenses and are not to be factored into the budget of the Commission for approval of the Minister, or they are funds of the Commission to be used to meet its operational expenses and hence are to be factored into its budget as income of the Commission. Second, the practice of the Commission from its inception up to the financial year 2018/2019 would suggest that the Commission treated royalty payments as if they were its funds available to it to meet or to defray its operational expenses, and there was no legal compulsion to transfer these funds to the Government by payment into the Consolidated Fund.

[123] The respondents stress that this central plank and argument of the Commission as to the statutory purpose and permitted use of royalty payments, was roundly rejected by the learned judge. At paragraph [89] of the judgment, the judge remarked that it 'flies in the face of the clear provisions of section 58(1) which states [that] 'royalties' are part of the funds and resources of the Commission', which must only be used for purposes permitted by the Act, as stipulated by

section 58(2) or any other provision. However, no such provision of the Act permits or provides for monies received by the Commission as part of its 'funds and resources' under section 58(1), to be paid into the Consolidated Fund and not applied to the expenses of the Commission.[43]

**Appellant's New Central Argument – Section 58(2)(f)**

[124] The respondents submit, however, that the Commission has in the Appeal abandoned this central argument or case which it relied on in the court below. In its stead it now argues, for the first time, that the Commission has a discretionary power under section 58(2)(f) of the Act to transfer royalty payments to the Government.

[125] This observation is, of course, correct. I note at this juncture that the Commission has in the appeals changed its position on this central issue. It now concedes that royalty payments are part of the funds and resources of the Commission pursuant to section 58(1) of the Act, but maintains that the Commission has the power under 58(2)(f) to pay over or transfer royalty payments or their monetary equivalent to the Government and, further, such payments can be legitimately included in its budget to be submitted to and approved by the Minister.

[126] Importantly, however, during oral argument Mr. Herberg KC, learned counsel for the Commission, conceded that if no such power exists under section 58(2)(f), then there is no power or legal basis under the Act for the Commission to treat royalty payments as funds to be transferred to the Government, except in the circumstances contemplated by section 65 of the Act whereby any 'surplus' on the budget approved for the Commission's financial year shall be paid into the Consolidated Fund, unless otherwise agreed upon by the Minister responsible for finance.

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[43] See paragraphs [96] to [114] of the Judgment in the court below dated 4th April 2022.

[127] The respondents submit that in any event this new ‘central’ argument based on a section 58(2) sub-paragraph (f) power is untenable for a number of reasons. The first is that this new line of argument by the appellant if correct would lead to an absurdity, as the learned judge aptly found at paragraph [100] of the judgment. It would lead to the absurd result that any and all income of the Commission (including spectrum fees, submarine cable fees, domain registration fees and radio license fees) could likewise be transferred by it to the Government; or to any third party in circumstances where the Act specifies in section 14(c) that the Commission may ‘invest its funds not immediately required for the discharge of its functions in such manner as it considers prudent’; and pay any surplus on the approved budget to the Consolidated Fund.

[128] The respondents’ second reason why the Commission’s reliance on the section 58(2)(f) power is untenable, is that it is inconsistent with the statutory scheme whereby the Commission’s operating expenses must always be a first call or be first to be paid out of its received income under the Act, and before any industry levy is imposed. This is clear, argues the respondents, from the statutory purposes for which the Commission must use or apply its ‘funds’ stipulated by section 58(2) of the Act, and the statutory scheme under section 60 for calculating the industry levy.

**Section 58**

[129] In relation to the permitted use of the ‘funds’ of the Commission, the respondents submit that royalty payments and other monies paid over as income to the Commission, are intended to be used to cover the Commission’s capital and operating expenses. It is argued that this much is clear from the provisions of section 58(2) of the Act whereby all funds of the Commission from any source must be applied in payment of one or more of the permitted purposes listed in the said subsection, which categories comprise of the Commission’s operating and capital expenditure. Accordingly, the Commission’s new central argument would require one to disregard the mandatory provisions of section 58(2). In relation to

the calculation of an industry levy pursuant to section 60, it is submitted that by section 59, properly construed, an industry levy can only be calculated and fixed once the Commission has calculated its 'net estimated expenditure' as set out in the estimates and budget to be approved by the Minister under section 63. Furthermore, by section 63(1)(b), income is defined as 'arising from any source'.

[130] In seeking to debunk the Commission's argument that there is nothing in the wording of section 58(1) of the Act which prohibits the transfer of royalty payments to the Government, the respondents submit that the judge did correctly observe at paragraph [89] of the judgment that the appellant's argument that there is nothing in section 58(1) which suggests that a transfer of royalty payments to the Government is impermissible, flies in the face of the clear provisions of section 58(1). In making this statement, the learned judge was addressing the appellant's case in the court below that royalty payments 'belong' to the Government, a position which the appellants have now resiled from on appeal and one which clearly flies in the face of the express provisions of section 58(1) that royalty payments are part of the 'funds' of the Commission.

[131] The respondents also counter that subsection (1) only sets out the sources from which the Commission is to derive its funds and resources. It does not purport to regulate how those funds are to be used or applied, which is the purpose and function of section 58(2).

[132] It is also submitted that the argument by the appellant at paragraph 12(b) of its skeleton that in the absence of any provision which obliges the Commission to retain royalty payments to its own use similar to section 59(6) in relation to the Commission retaining the industry levy for its own use, it is reasonable to conclude from this 'important difference' that the drafter of the legislation clearly 'contemplated' that royalties would be passed on to the Government, ignores the fact that the Commission is a statutory body (a creature of statute) whose powers are limited to those expressly conferred by the Act and, as such, the Commission

cannot by this means be visited with a power to do anything not prohibited by the Act.

[133] Moreover, argues the respondents, what is clear is that the Act does not give the Commission any power to transfer funds to the Government, save and except in two instances. The first is section 65, as 'surplus' in the circumstances contemplated and provided for therein. The second is section 59(6) which empowers the Minister to direct the Commission to transfer funds from the industry levy (not royalty payments) as he may otherwise direct which may very well include a transfer of such funds or some of it to the Government itself.

[134] Also, section 58(1) of the Act treats royalty payments as 'funds' of the Commission not funds held by the Commission for the Government; and, further, but importantly, submits the respondents, it is stipulated at section 58(2) that the 'funds' of the Commission 'shall' be applied in accordance with the Act 'and in the payment' of all expenditures permitted by subparagraphs (a) to (f). Tellingly, says the respondents, royalty payments were not shown in the 2019/2020 Budget of the Commission submitted to the Minister for approval under section 63 either as part of its income or as part of its 'operating or capital expenditure', but as 'regulatory contribution', which term is itself not included in the total estimated expenditure of the Commission for that financial period.

[135] Specifically, with regard to the force and effect of section 58 of the Act, the respondents also submit that subsection (2) provides an exhaustive list of expenditure on which the funds of the Commission can be applied, and expenditure for any purpose not permissible by subsection (2) is unlawful and ultra vires the Act.

[136] This much is certainly now uncontroversial. However, the Commission's new central argument is not based on an impermissible expenditure by way of the transfer of royalty payments to the Government, but that such a decision and

transfer by the Commission is permissible, legal, and intra vires the Act pursuant to paragraph (f) of section 58(2). It is this 'central' issue and what, correctly construed, is the meaning of the expression 'properly chargeable to revenue' in section 58(2)(f), upon which the outcome of this appeal turns.

**Construing Paragraph (f) - 'expenditure … properly chargeable to revenue'**

[137] The respondents submit that the Commission's new central plank whereby they rely on paragraph (f) of section 58(2) to contend that the statute provides a basis by which the Commission can legitimately resolve to pay over royalty payments received by it to the Government is misconceived, contrary to the ordinary and clear meaning of section 58(2) and, in particular, paragraph (f) thereof which empowers the Commission to apply its funds (as defined) to 'any other expenditure authorized by the Commission and properly chargeable to revenue.' It is submitted that paragraph (f) is also contrary to the clear provisions of section 60 whereby royalty payments are payable to the Commission and section 58 whereby royalty payments are part of the 'funds' of the Commission and shall be used by the Commission to defray its permitted expenses catalogued in subsection (2) of section 58. It is submitted further, that the wording of paragraph (f) is not wide enough to accommodate such a power now sought to be relied on by the Commission in its appeal.

[138] The respondents submit that the learned judge was correct when he held that Part XI of the Act is intended to speak to all financial aspects of the Commission and to inform, in particular, how the commission is funded, how its income is derived, how an industry levy is calculated, how expenses of the Commission are paid, and how monies constituting 'funds' of the Commission may, in certain limited circumstances such as section 65, be paid to the Government.

[139] Further paragraph (f) must be construed in the context of the entire provision of section 58(2) which relates to expenses of the Commission concerning the repayment of sums borrowed by the Commission, salaries, remuneration,

maintenance of the property of the Commission, and sums for removal, replacement or renewal of property of the Commission. Properly construed, paragraph (f), consists of two requirements, which must be construed as intended to refer to any other 'expenditure' not captured by paragraphs (a) to (e). It must be read in context of the kind of other permitted 'expenditures' at paragraphs (a) to (e), none of which provide for any function, duty or power of the Commission to authorize the payment of its funds to the Government as an 'expenditure' or as a 'regulatory contribution'. These provisions are linked to certain categories of operational expenses of the Commission itself with respect to which payment is authorized to be made by the Commission from its 'funds'. They are not linked to the operational expenses of the Government. Further, argues the respondents, the payment over of royalty payments to the Government is not and could not be an 'expense' of the Commission, and by classifying them in the 2019/2020 draft Budget as a 'regulatory contribution' does not make such payment a legitimate expense or expenditure of the Commission.

[140] The respondents also submit that there is nothing in the appellant's submissions which assert that the transfer of royalty payments to the Government is an expense due from the Commission to the Government or from the licensees to the Government, such that it would fall within the general category of 'expenditure' of the commission properly chargeable to the Commission's income or revenue. Further, by section 67 of the Act, the Commission is expressly exempt from 'payments of all taxes, levies and licence fees on its income and operations and from the payment of all taxes, duties and rates on its property and documents.' Accordingly, no expenditure is payable to the Government from the income earned by the Commission, including royalty payments from licensees.

[141] The respondents also contend that the expression 'properly chargeable to revenue' at paragraph (f), while not defined in the Act (although it appears 3 times in subsection (1) of section 58), 'refers to expenditure that does not involve any addition to or withdrawal from fixed capital but is 'purely a working expense'.' In

support of this definition, reliance is placed on the dicta in **Anglo-Persian Oil Company Limited v Dale (Inspector of Taxes)**.[44] Moreover, argues the respondents, payment of royalties to the Government is not an 'expenditure properly chargeable to revenue' within section 58(2)(f) of the Act, as it has no connection with costs incurred in running or operating the Commission. This is so even if it is accepted that, in principle, royalty payments are usually made for the use or exploitation of a right, asset or intellectual property of the Government, for example, spectrum, as nowhere in the Act does it provide for the Commission to fix and charge a royalty as a charge for the use by the licensees of the spectrum, much less stipulating that such royalties are to be paid over to the Government for the exploitation or use of spectrum.

[142] As regards the proper interpretation and effect of paragraph (f), the respondents, apart from the point that a transfer of royalty funds, as funds of the Commission, to the Government is not based on any express authorization or requirement under the Act to do so, such a transfer is not strictly an 'expenditure' at all. It is submitted that the Commission's new central argument and reliance on the said provision to permit the Commission to resolve to make such a transfer or transfers, is based on a fundamental misconception and incorrect interpretation of paragraph (f) itself.

[143] The respondents submit that, properly construed, expenditure 'properly chargeable to revenue' means 'expenditure not being capital expenditure and normally chargeable against the income of the Commission in arriving at its profit or loss.' In support of this submission, the respondents cite, by way of example, the case of **Strick (Inspector of Taxes) v Regent Oil Co. Ltd**.[45]

[144] It is the respondents' contention that by definition, expenditure which is properly chargeable to revenue, is expenditure 'which is a proper debit item to be charged against the incomings of a trade in order to compute profit generally, but not

[44] [1932] 1 K.B. 124 at 140A.
[45] [1964] 1 WLR 309.

necessarily for taxation purposes.'[46] In support of this definition, the respondents cite the helpful review of the authorities and guidance provided in the first instance decision in **ECC Quarries Ltd v Watkis (Inspector of Taxes)**.[47]

[145] The respondents also rely on this passage from the judgment of Viscount Cave L.C. in **British Insulated & Helsby Cables Ltd v Atherton (Inspector of Taxes)**[48] :

> "But there remains the question, which I have found more difficult, whether, apart from the express prohibitions, the sum in question is (in the words used by Lord Summer in *Usher's* case) (1) **a proper debit item to be charged against incomings of the trade when computing the profits of it; or, in other words, whether it is in substance a revenue or a capital expenditure**. This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case…" (Emphasis added)

[146] Based on the guidance to be derived from these authorities, it is the respondents' case that the expression expenditure 'properly chargeable to revenue' in paragraph (f) of section 58(2) must be interpreted to mean 'expenditure not being capital expenditure and normally chargeable against the income of the Commission in arriving at its profit or loss.' Further, where expenditure is made for the purpose of 'creating an asset or advantage of long-term benefit to a company it is treated as capital expenditure' and not treated as expenditure properly chargeable to revenue or income of the Commission. However, where the expenditure is one incurred to enable the company (Commission) to earn its income, it is chargeable to revenue. The difference, submits the respondents, is that 'expenditure chargeable to revenue' is normally deductible from income tax 'as the cost of earning that income' while capital expenditure or expense is not. In the circumstances of this matter, the respondents contend, paragraph (f) gives to the Commission a wide discretion 'to expend such monies as it sees fit for the purpose of and as part of the process of earning its income', in this instance, its funds and resources as defined in section 58(1).

[46] See paragraphs 12.5 & 12.6 of the Respondents' CCT and BVI Cable TV's Skeleton Arguments.
[47] [1975] 3 All ER 843, at pages 859h to 890h.
[48] [1926] AC 205 at 212 -213.

[147] The respondents argue that when this definition of expenditure 'properly chargeable to revenue' is applied to the wording of paragraph (f), it is clear that the Commission has no power pursuant to the said provision or under the Act, to transfer royalty payments received from the licensees to the Government, as contended for by the Commission in the appeals for the reason that such a transfer or payment over is not permissible under paragraph (f), and there is no other power under the Act, save and except as 'surplus' by virtue of the operation and within the meaning of section 65. Accordingly, the learned judge was correct in concluding that no such power exists under the Act and the Commission's central point as then formulated and relied on as the main plank of its case in the court below is unsustainable and must be rejected. Furthermore, that conclusion remains the correct one in the face of the Commission's concessions and its reliance in the appeals, for the first time, on paragraph (f) of section 58(2), which reliance is equally misguided and incorrect.

**Section 59(6) Exception**

[148] The respondents also argue that the learned judge was correct that section 59(6), which provides for the industry levy to be 'retained by the Commission for its own use, unless the Minister responsible for finance, with the approval of the Council [House of Assembly] otherwise directs', cannot be construed to make permissible the transfer or payment of royalties and fees to the Government, other than the industry levy, and then only at the Minister's directive and with the approval of the House of Assembly. This the judge saw as an absurd proposition 'because that would mean that every other kind of monies, other than the industry levy, received by the Commission for its funding, would fall in this grey zone of monies destined for the consolidated fund or for the operational expenses of the government'.

[149] The respondents stressed that the learned judge also reasoned that royalty payments must be included as an accounting item in the audited statements of the

Commission when being compiled and submitted for approval by the Minister under section 63 of the Act. With respect to this point, the learned judge stated:

> "…This must be so as the entire context of the Act requires that monies in the hand of the Commission which is paid by the licensees must be factored into any calculation of a surplus under section 58 in the adjustment of the Industry Levy. It would make nonsense of these provisions if the licensees would lose the benefit of such payments which it is being paid over to the Consolidated Fund in an unauthorized manner."[49]

[150] Furthermore, it is submitted that the appellant's argument based on section 59(6) is misplaced and misstates the proper meaning and purpose of that provision, which is 'to confer on the Minister a power to direct the Commission to use some monies (part of the industry levy) other than for its own use, as an exception to that general position'*.* This is a discretionary power which the Minister had not used and one which, argues the respondents, if ever invoked will result in the Commission having to 'use its remaining funds and [re]sources to discharge its statutory functions.'[50] Additionally, it is the respondents' submission that the fact that the Legislature included these two provisions (sections 59(6) and 65) as 'exceptions', serves to undermine the appellant's central argument on appeal based on an incorrect interpretation of section 58(2)(f) of the Act.

[151] The respondents strenuously argue that it follows from these provisions that the purpose and function of an industry levy within the statutory scheme is to cover the expected expenditure of the Commission in the next financial year, which is not covered by its estimated income for that year, and any deficit from the previous financial years, as is clear from section 59(2)(a).

[152] The respondents submit that the Commission's new central argument is untenable in that it is inconsistent with the approach which the Commission in fact adopted when calculating the industry levy for 2019/2020. Here the respondents again

[49] Paragraph [111] of the Judgment in the court below dated 4th April 2022.
[50] Paragraph 48 Digicel BVI's Skeleton Arguments.

point out that the Commission's position in the court below was that 'net estimated expenditure' for the purposes of section 59(2) 'referred to the estimate of expenditure calculated pursuant to section 63(1)(a) without deducting any items of estimated income'. However, that approach, argue the respondents, which was taken in the 2019/2020 Budget, 'is a clear breach of the requirements of section 59(2) of the Act to bring income into account when calculating net expenditure'. The Commission did not include royalty payments as an item of estimated expenditure but, instead, it was included on the budget as a separate item called 'regulatory contribution'.[51]

[153] The respondents contend that the position of the Commission on the calculation of the industry levy has also changed in the appeals from its position in the court below. In this regard, the respondents observe that the Commission now suggests, at paragraph 17 of its appeal submissions, that it set the 2019/2020 industry levy by (a) calculating the total income and (b) subtracting the capital expenditure and estimated operating expenditure, including regulatory contributions, that is royalty payments, and (c) adding a contingency of 10% to the net estimated expenditure. The respondents argue that, in fact, this is not the approach taken by the Commission in the 2019/2020 Budget and the Commission acknowledges this discrepancy at footnote 22 which states:

> "The Commission appears not to have brought all of the non-royalty payment income into account in calculating the net estimated expenditure, with the consequence that it is accepted that that figure (and hence also the 10% contingency figure) is too high as set out in the19/20 Draft Budget..."

**Section 65 – Surplus**

[154] The respondents also argue that the Commission's new central point or new reading of section 58(2)(f) of the Act, conflicts with section 65 which is the only provision, other than section 59(6), which permits funds of the Commission to be transferred to the Government. Section 65 creates an obligation and not a power

[51] Paragraph 43 of Digicel BVI's Skeleton Arguments.

or discretion. It obliges the Commission where there is a surplus on the budget approved for the Commission's expenditure for any financial year, such surplus 'shall, subject to this Act, be paid into the Consolidated Fund, unless otherwise agreed upon with the Minister responsible for finance'. However, mused the respondents, it does not empower the Commission to transfer the funds of the Commission, including its royalty funds, to the Government as an item of expenditure in its budget, and the Commission cannot not now contend that its payment over of royalty fees to the Government falls within section 65 of the Act.

**Natural Meaning of 'Royalty' - purposive construction**

[155] As to the appellant's argument that the customary or usual meaning and use of the term 'royalty payment'[52] supports their argument that royalty payments were intended under the Act for the Government, the respondents submit that the statutory scheme, in particular, sections 58(1) and 60, are clear. They expressly provide that 'royalties' are to be paid by licensees to the Commission, they are 'funds' of the Commission, and by section 58(2) they shall be applied in payment of the permitted categories of payments at (a) to (f) of the said subsection. Any argument that royalty payments are intended for the Government or can be paid over by the Commission to the Government is not supported by the legislative scheme and by any provision of the Act. Accordingly, this central argument by the Commission is inconsistent with the statutory scheme, as the judge correctly concluded at paragraph [89] of the judgment.

[156] With respect to the Commission's argument that the judge erred in not applying a purposive construction to sections 58, 59 and 60 of the Act and was wrong in finding that these provisions were sufficiently clear on a literal or textual reading, the respondents submit that the primary objective of the court in construing the meaning of statutory provisions is to identify the intention of parliament when it passed the relevant statute. The intention of parliament is to be inferred or deduced from the words of the statute as enacted having gone through the various

[52] See paragraph 12(c) of the Appellant's Skeleton Arguments.

legislative steps. It is submitted that the learned judge did consider the natural and ordinary meaning of the words used in sections 58, 59 and 60 and within the statutory framework. In reasoning to his conclusion he also considered the appellant's argument in favour of a purposive rule of construction at paragraphs [67] to [71] of the judgment. His decision that the ordinary and natural meaning of the words used in these provisions are clear and unambiguous and do not lead to an absurd or repugnant meaning is correct, and unassailable.

[157] It is also submitted that the judge considered the issue of construction in the context of determining the correctness of the Commission's then central argument that royalty payments under section 60 must be paid over by the Commission to the Government, and it is impermissible under the Act for these funds to be used by the Commission to defray the operational expenses of the Commission. Additionally, the Commission having conceded in the appeal the incorrectness of this central plank of their case at trial, it cannot now be persuasively argued that the learned judge erred in reaching the conclusion that there was no uncertainty or ambiguity in these provisions of the Act, such as would justify him giving them a purposive (and not a literal) construction.

[158] Further, the appellant has not, in arguing for a purposive construction, identified any mischief which the provisions of these sections of the Act were designed or intended to address and which remain unremedied. The only 'purpose' identified and argued for by the appellant to be achieved is to secure royalty payments as a revenue stream for the Government and to seek to do so by proffering a construction which runs contrary to the express provisions of the Act itself and the clear legislative intention of the House of Assembly in passing and enacting it.

[159] This clear legislative purpose is to be gleaned from the purpose or objects of the Act as declared in section 1: 'An Act to establish a Telecommunications Regulatory Commission to license, regulate and develop the telecommunications services industry in the Virgin Islands and to provide for other matters connected therewith';

and the functions of the Commission set out in section 6, and the financial reporting requirements at sections 58 to 67. It is submitted that it is clear from these provisions that:

> "…the purpose of the Act is to establish a statutory framework for the regulation and development of the telecommunications services industry in the Virgin Islands, and in furtherance of that purpose to provide for the establishment and funding of a Regulatory Commission to administer and supervise that process."[53]

[160] It is also submitted that there is nothing in the Act which is directed towards achieving the objective of raising financing for any purpose other than the funding of the Commission's operations. More fundamentally, the respondents submit that in rejecting the Commission's central argument as not being in keeping with the clear wording of sections 58, 59 and 60 of the Act, the learned judge was correct (as the Commission now accepts) to conclude that, pursuant to sections 58(1) royalty payments under section 60 are funds of the Commission which it is expressly authorized and empowered by section 58(2) to apply in payment of its operational and capital expenses permitted by paragraphs (a) to (f) of section 58(2). The respondents also submit that, in any event, this conclusion is to be gleaned from the natural and ordinary meaning of the words in sections 58, 59 and 60, which provisions are a clear and unambiguous statement of the intent of the Legislature, and of the legislative scheme under the Act.

[161] Further, the respondents argue, this conclusion by the learned judge is no less correct or sound, in the face of the Commission's newly minted 'central' argument in the appeal, which argument rests on a skewed and wholly incorrect interpretation of paragraph (f) of section 58(2). Moreover, the argument that the Commission is or may be empowered by paragraph (f) to legitimately resolve to transfer royalty funds (or portions of it) to the Government, as an 'expenditure' of the Commission 'properly chargeable to revenue', and to include such

[53] Paragraph 22.6, page 21 of the Respondents' CCT and BVI Cable TV Limited's Skeleton Arguments.

payment/transfer as a ‘regulatory contribution’ in the budget of the Commission for approval by the Minister under section 63, is misguided and incorrect.

[162] The respondents submit that the only place in the Act which provides for or requires the Commission to transfer funds paid to it to the Government is section 65 whereby the Commission must pay into the Consolidated Fund any ‘surplus’ on the approved budget for a financial year, unless otherwise agreed by the Minister responsible for finance. As the argument goes, this requirement is limited only to circumstances where there is such a ‘surplus’; and it does not provide or stipulate for ‘royalties’ received or portions of it to be paid or transferred over to the Government, and on an annual basis, as a matter of course. To the contrary, under the scheme of the Act the reason why in section 60 there is no analogous provision to section 59(6) applicable only to an industry levy, is because it is not intended to exempt the Commission, in any circumstances, from its obligation under section 58 to retain monies received by it by way of royalty payments in any circumstances and not at the behest or direction of the Minister, the Cabinet or the Government.

[163] Similarly, contends the respondents, section 60 of the Act which provides for the payment of royalties, does not speak to or make the essential connection between the payment of royalties as a payment by licensees to the Government or to the Commission on behalf of the Government for use of ‘spectrum’ or any other asset or intellectual property of the Government. To the contrary, the wording of section 60 is clear. All royalty payments shall be paid by a licensee ‘in accordance with the provisions of its licence or frequency authorisation’, to the Commission, a statutory body independent of the Government and with its own legal personality, and which once paid becomes part of the ‘funds’ of the Commission under section 58(1) to be used as such in payment of its expenditure permitted by section 58(2). Further, by section 60 the Commission is the sole ‘person’ authorized to recover such royalty payments and any accrued interest thereon from a defaulting licensee ‘as a civil debt in summary proceedings.’ Accordingly, the ‘description’ of the term ‘royalties’

gleaned from texts and other telecommunications legislation in the region or elsewhere, are irrelevant to construing section 60 and paragraph (f) of section 58(2)(f) of the Act.

**2007 Policy**

[164] As to the appellant's point[54] that support for their interpretation of the statutory meaning and purpose of 'royalty payments' as funds intended to be paid over to the Government by the Commission can be had from the Government's 2007 Policy document (dated 10th January 2007), as a permissible aid to construing the relevant provisions of the Act, the respondents, make several points in seeking to debunk this line of argument. As a preliminary point, the respondents say that it is clear from the said Policy document that it was either drafted at an intermediate point during the process of discussion and deliberation by policymakers and advisers to the relevant ministry or was probably drafted before the Bill had gone through its various legislative changes in the House, was passed and came into force on 24th October 2006.

[165] The respondents' first substantive issue with this line of argument by the appellant is that the said documents contain no statement as to the meaning of any of sections 58, 59 and 60 of the Act but, to the contrary, the statements at paragraphs 8.6.4, 8.6.5 and 8.7.4 of the 2007 Policy document are inconsistent with the said statutory provisions in several respects.

[166] One of these telling inconsistencies or inaccuracies is at paragraph 8.6.4, and the reference to the Commission being financed by 'annual licence renewal fees', a term which does not appear in the Act, and it being called the 'industry levy' when that is not how the latter is described in section 59 of the Act. Also, the statement in the said paragraph that 'annual licence renewal fees' will be subject to a maximum of 2% of the licensees' turnover. This latter statement appears to conflate an 'industry levy' with what is more aptly described in section 60 of the Act

[54] See paragraph 12(d)-(f) of the Appellant's Skeleton Arguments.

as ‘royalty payments’ based on a certain percentage of the licensees’ turnover, when the calculation of an industry levy at section 59 has nothing to do with the ‘annual turnover’ yardstick.

[167] Second, paragraph 8.6.5, refers to ‘licence issue fees’, a term not used in the Act; and third, paragraph 8.7.4 where it is stated that direct contributions to public finances have ‘hitherto’ taken the form of royalty payments from monopoly franchises, whereas the Government envisages the future position to be an obligation on licensees to make annual payments to the Government itself, not to the Commission, as in the case of both royalties and industry levy pursuant to sections 58, 59 and 60 of the Act.

[168] As the respondents see it, the 2007 Policy document post-dates the enactment and entry into force of the Act, therefore it cannot be used as an aid to its interpretation, but at best, may be only used as a guide ‘in the way of academic commentary’. In support of this submission the respondents rely on the dicta of Lord Jones in **Chief Constable of Cumbria Constabulary v Wright and another**,[55] cited with approval by Lord Hope in **Grays Timber Products Ltd v Revenue and Customs Commissioners**.[56]

[169] It is also submitted that post-enactment guidance issued by the executive cannot alter the legal meaning of the legislation, opined by the learned authors of **Halsbury Laws of England** thus:

> “Official statements published by the department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the meaning of its provisions. The courts will not, however, allow departments or others to use post-enactment guidance or other documents as a way of trying to turn what they did enact into what they wish they had enacted; those who introduced an enactment, or who are responsible for its administration, are not entitled to any special deference from the courts in determining questions of what it means.”[57]

[55] [2007] 1 WLR 1407 at paragraph [17].
[56] [2010] 1 WLR 497 at 54-55.
[57] 2018 Vol. 96 at paragraph 745.

[170] And at paragraph 24.17 of **Bennion, Bailey and Norbury on Statutory Interpretation**:

> "Whatever weight it has, guidance is not a source of law and cannot alter the true legal meaning of a statute. In the context of statutory construction, guidance 'has no special legal status'. The judiciary, not the executive, determine the meaning of legislation. Guidance that tries to explain what the legislation means will be given no more weight than the quality of any reasoning contained in it deserves. If it is wrong, the courts will not hesitate in saying so. But where guidance is consistent with the view that the court is in any event inclined to adopt, the court may find it of some reassurance."

[171] The respondents submit that the 2007 Policy document containing provisions and statements not reflected in the Act as ultimately enacted, is not a useful, accurate and reliable aid to interpretation of the Act and its provisions. In support of this point, they rely on this extract from judgment of Lord Wright in the House of Lords in **Assam Railways and Trading Company Ltd v The Commissioners of Inland Revenue**:[58]

> 'It is clear that … the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.'

[172] Reliance is also placed by the respondents on a statement of principle by Lord Nicholls of Birkenhead in **R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd**.,[59] concerning the usefulness of position papers, reports and recommendations made during the course of the legislative process. The learned Law Lord opined that these documents:

> "… are part of the legislative background, but they are no more than this. This cannot be emphasized too strongly. Government statements, however they are made and however explicit they may be, cannot control the meaning of an Act of Parliament. As with extraneous material, it is for the court, when determining what was the intention of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a Government statement. The weight will depend on all the circumstances…"

[58] [1935] AC 445 at 458.
[59] [2001] 2 AC 349 at 399.

[173] The respondents also rely on the guidance of Lord Diplock in **Fothergill v Monarch Airlines Ltd**[60] where it is stated:

> "The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation."

[174] And at page 398 C to F, Lord Nicholls cautioned:

> "Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. **But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity**." (Emphasis added)

[175] It is therefore the submission of the respondents that it is not a purpose of the Act and there is nothing in its provisions which requires or provides for royalty payments to be made to the Government or for the procurement of royalty payments as a source of revenue for the exploitation by the licensees of telecommunications assets or rights of the Government. Further there is nothing which contradicts the plain and express provisions in the Act that royalty payments are to be made to the Commission, when made comprises part of the 'funds' of the Commission, and are to be used to defray or help to defray the permitted operational and other expenses of the Commission under section 58(2). Moreover, the court should decline the appellant's invitation to, in effect, legislate so as to create an entitlement which is not to be found in the statute.[61]

[60] [1981] AC 251 at 279-280.
[61] Per Lord Simon of Glaisdale and Lord Diplock in Maunsell v Olins [1975] AC 373 at 393.

[176] The statement in the 2007 Policy document that the operation of the Commission was to be financed by annual fees paid by network operators calculated at a maximum of 2% of their turnover, does not reflect correctly the provisions of the Act as enacted and it is clear that this stated intention in the Policy ultimately evolved into the current provision and arrangement for the Commission to be primarily financed by annual fees (termed 'royalties') calculated at a fixed 3% of the licensee's annual turnover. Further, the 'policy' or intention that annual payments of a fixed percentage of the licensee's turnover, was to be paid to the Government, was clearly not acted upon and never enacted. It is thus not the current law as reflected in sections 58, 59 and 60 of the Act. Moreover, had it been intended that royalty payments were intended for or are to benefit the Government and its coffers, the Act would have provided for those payments to be made directly to the Government or to be made to the Commission for and on behalf of the Government. This it clearly did not do.

**Section 63 - Annual Budget approval by Minister**

[177] It is the respondents' submission that the Commission's argument that royalty payments can be paid over by the Commission to the Government through the mechanism of having its annual budget approved by the minister under section 63(3), is equally untenable. This proposition is based on the unstated 'assumption' that the minister has unlimited power to require the Commission to include such payments over in its budget. In fact, the minister's powers in relation to the Commission are limited only to those specified by the Act. They do not include any authority to dictate to or direct the Commission that royalty funds be transferred or paid over to the Government or that such 'payment' or 'transfer' to the Government be included in its annual budget.

[178] The Minister's role, functions and powers under the Act are limited to developing a telecommunications policy and in relation to 'matters of international telecommunications affecting the Virgin Islands' under and pursuant to section 4 of the Act, with respect to which he/she must consult with the Commission; the

appointment of Commissioners to the Board under section 7, and their tenure under section 10; giving policy directions to be taken into account by the Board when establishing the policy of the Commission under section 8(2); receiving the resignation and the removal of a Commissioner under section 11; appointment of a Chief Executive Officer pursuant to section 12; approval of the Commission's annual budget pursuant to section 63(3); directing with the approval of the House of Assembly, that an Industry levy (or a part thereof) shall be used for some other purpose than being retained by the Commission for its own use pursuant to section 59(6); deciding whether to agree for a 'surplus' to be used for some purpose other than being paid into the Consolidated Fund by the Commission to meet the general operating and capital expenses of the Government; bringing a resolution to the floor of the House of Assembly for approval of any borrowing of money by way of loan, advance or overdraft requested by the Commission in accordance with section 61; and causing the Commission's audited account to be laid in the House of Assembly as required by section 67.

**Section 102 of the Constitution**

[179] The respondents take issue with the appellant's characterization and denouncing of the judge's reliance on section 102 of the **Constitution** which provides for payments to be made into the Consolidated Fund. They argue that the learned judge was correct in pointing out that royalty payments are monies '…that may, by or under any law', in this case section 58, 'be retained by the authority that received them for the purpose of defraying the expenses of that authority.' Accordingly, by section 102 royalty payments made to the Commission pursuant to section 60 of the Act are exempted from the requirement that they must be paid into the Consolidated Fund under section 102 of the Constitution. Further, by section 58, royalty payments are indeed the 'funds' of the Commission to be used to defray it permitted operational and other expenses.

**Industry Levy – Section 59**

[180] The respondents' principal submission on this issue is that the Commission's calculation, fixing and imposition of the industry levy for the 2019/2020 financial year was procedurally and substantively manifestly incorrect and in breach of the requirements of the Act in several ways, including but not limited to, the absence of audited financial statements of the Commission for the preceding financial period 2018/2019. It is submitted that the provisions of sections 59 and 63 of the Act are clear as to the procedure to be followed by the Commission when embarking upon and conducting a calculation of the industry levy for a particular financial year running from 1st October in a calendar year to 30th September in the next calendar year.[62]

[181] It is contended that in following the correct procedure under the Act, the Commission must comply with the provisions of both sections 59 and 63. By section 63(1), following a public consultation, the Commission is required to, not later than 3 months before the commencement of each financial year, that is, not later than 1st July, prepare in respect of that financial year and submit to the Minister for approval (pursuant to section 63(3)), estimates of (a) its expected expenditure, and (b) its expected income, if any, 'arising from any source'. These estimates are to be accompanied by a work program (referred to as a Work Plan) which provides a general description of the work and activities that the Commission 'plans' to undertake in the said financial year for which the estimates have been prepared.

[182] Pursuant to section 63(3), where the estimates of income and expenditure and the Work Plan have been submitted to the Minister, he shall consider them 'as soon as practicable' with a view to (a) approving the estimates 'with or without modification'; or (b)remitting them to the Commission 'without approval', in which latter case the Minister is required to provide to the Commission his 'reasons for his non-approval' of the said estimates, including 'any specific recommendations

[62] Section 62 of the Act.

for modification' of them. However, where the estimates have been approved by the minister, he shall, within 3 months of the approval, 'cause them and the work plan to be laid before the [House of Assembly].'

[183] It is recognized and underscored by the respondents in their submissions (as do the Commission in theirs), that the preparation by the Commission and the approval by the Minister of the estimates of income and expenditure of the Commission under section 63(3), is crucial to the process of calculating an industry levy pursuant to section 59 of the Act. Likewise, the respondents (as do the appellant) recognize and accept that integral to both processes under sections 59 and 63, that is, the preparation of the estimates and work plan by the Commission under section 63(1) in advance of them being sent to the Minister for his/her approval and the calculation and setting by the Commission of an industry levy for a financial year under section 59, is the process or requirement of 'public consultation'. This process of 'public consultation' is a statutory pre-requisite to both the preparation by the Commission of its estimates and to the Commission embarking upon the process of calculating and fixing an industry levy. As mentioned, this much is uncontroversial between the appellant and the respondents.

[184] In construing section 59, the respondents observe that in fashioning the procedure for calculating and imposing an industry levy the Legislature, by subsection (1), required that there must first have been a 'public consultation'; followed secondly by the approval by the minister of the Commission's estimates of income and expenditure in respect of the applicable financial year under section 63; which, thirdly, triggers a 4 week period from the approval date within which the Commission must (a) set an industry levy for that financial year 'in accordance with subsection (2) of section 59 and assess the proportion of the set industry levy to be paid by each licensee and authorization holder (as defined in the Act). Accordingly, the steps to be taken to actually set the industry levy are dictated by subsection (2).

[185] The respondents submit that the procedure to be followed by the Commission when calculating and fixing an industry levy is clear from the wording of section 59 of the Act, which procedure was not followed or adopted in several respects by the Commission when purporting to calculate and fix the 2019/2020 industry levy, as held, correctly, by the learned judge and his finding that the Commission had calculated, fixed and purported to impose an industry levy for the financial year 2019/2020 which was ultra vires the Act and illegal, resulting in an order of certiorari quashing such decision, is correct as a matter of law and fact and unassailable.

[186] By subsection (2), the industry levy for the applicable financial year is to be calculated by adding the 'net estimated expenditure' of the Commission as set out in the approved estimates and 10 percent of the net estimated expenditure as a contingency, and by adjusting the sum (total) of the net estimated expenditure and the contingency by:

(1) the addition of the deficit, if any, shown in the audited accounts of the Commission for the previous year; or

(2) the subtraction of the surplus, if any, shown in the audited accounts of the Commission for the previous financial year.

[187] As to the mechanics and operation of the procedure mandated by subsection (2) of section 59 when calculating the industry levy for a financial year, the respondents assert that where the projected income of the Commission for the new financial year exceeds the projected expenditure of the Commission for that year as set out in the estimates approved by the Minister under section 63(3), there will be a 'net estimated income' for that financial year. Likewise, where the approved projected expenditure exceeds the projected income of the Commission for the financial year, there will be a 'net estimated expenditure.'

[188] Based on this line of reasoning, it is a primary submission of the respondents that only where a net estimated expenditure for a new financial year is shown in the

estimates approved by the Minister, that the Commission is permitted under section 59(1)(a) and (b), properly construed, to set an industry levy for the said financial year and to apportion its payment between the licensees and authorization holders. On the other hand, where the approved estimates and budget showed a net estimated income for that year, the Commission is projected from its income from all sources to have a 'surplus' for that year, and hence it cannot proceed to calculate and to impose an industry levy on the licensees and authorization holders for that year. In simple terms, it is and was the respondents' case before the learned judge below and remains their case on appeal that where no estimated or projected loss or deficit is shown in the approved estimates and accounts of the Commission for a new financial year, no industry levy can be imposed on the licensees and authorization holders.

[189] Where the imposition of an industry levy is legally justified by the Commission, the levy itself is to be calculated by (i) adding to the 'net estimated expenditure', that is, the extent to which projected expenditures exceed projected income in the approved estimates, the 10 percent contingency, that is 10% of that projected loss or deficit; and (ii) adjusting the resulting total or aggregate of those sums by either adding to it the 'deficit', if any, shown in the audited account of the Commission for the previous year or by subtracting from that total sum any 'surplus' shown in the audited accounts for the previous year; and the resulting sum is the industry levy for the financial year under consideration.

[190] Again, with respect to this outline of the statutory procedures and steps for calculating an Industry Levy, there seems to be no real point of difference or divergence between the appellant and the respondents, except that the appellant contended that the learned judge got it wrong when he held that royalties as funds of the Commission must be factored into the 'income' side of the Commission's estimates and used in determining whether there is a projected 'deficit' or 'surplus' or 'break even' position projected in the approved estimates and budget of the Commission for the new financial year, and only if there is such a projected 'deficit'

can the Commission then resort to imposing an industry levy for that financial year aimed at addressing such projected 'deficit'. The appellant also differs from both the respondents and the learned judge on another point of significance. They argue that the judge's conclusion that royalties are to be a first call so to speak in financing the operational expenses and cost of the Commission and cannot be transferred to the Government, flies in the face of the clear words of section 59(6) of the Act which expressly provides that monies received by the Commission as an industry levy 'shall be retained by the Commission for its own use', unless the Minister agrees otherwise.

[191] The respondents have roundly criticized the Commission's draft Work Plan and Budget for 2019/2020 financial year. They make the following key points about it:

(1) The Commission unlawfully and in breach of the Act, in particular section 58(1) and (2), transferred part of its income derived from Royalty fees to the Government, thereby vastly reducing its estimated income for the 2019/2020 financial year by the sum of $2,050,104.74.

(2) The Commission wrongly and in breach of the Act treated the said royalty sum of $2,050,104.74 as a 'regulatory contribution', a term not appearing in or sanctioned by the Act, and thereby, wrongly, vastly inflated its 'expenditures' by the said sum.

(3) Even using the unaudited figures put forward by the Commission in its estimate for 2019/2020, it can be seen that the said sum of $2,050,104.74 unlawfully diverted from the income of the Commission as a 'regulatory contribution' is not taken into account, the difference between the stated expected income and expenditure for that year ($3,156,754.74 as net income before regulatory contribution) and the expenditure ($3,829,217.77) for that year approved by the Minister would be approximately $672, 463.03 not $3,156,754.74 as stated, resulting in a vastly lesser sum to be used in the calculation of the Industry Levy for the said year pursuant to section 59(2) of the Act.

(4) In fact, the Commission calculated a 10 percent contingency of $419,791.36, which sum could only be correct if the net estimated expenditure for the 2019/2020 year was $4,197,913.60. However, no such figures appear in the estimates prepared by the Commission for the Minister's approval. Instead, the draft budget shows the sum of $3,829,217.77 as 'estimated operating expenditures' and $368,695.85 as 'capital expenditures', totaling $4,197.913.62, of which a 10 percent contingency would amount to $419,791.36. This latter sum is

incorrect as it is based wrongly and in breach of section 59 of the Act, on the sum total of 'estimate operating expenditures' and 'capital expenditures'.

(5) It is clear that the 10 percent contingency is calculated not as 10 percent of the net estimated expenditure approved by the minister, but as an arbitrary sum equal to 10 percent of the aggregate of the total estimated expenditure and the projected capital expenditure.

(6) It is apparent from the 2019/2020 draft Budget which made provision for the sum of $4,249,009 as 'industry levy fees', that this amount was calculated not be reference to the net estimated expenditure of the Commission for the relevant year, but by reference to a gross figure stated as "total estimated expenditure with contingency".

(7) There was no adjustment upward or downwards by the addition or subtraction of any deficit or surplus as shown in the audited accounts of the Commission for the year 2018/2019 as required by section 59(2)(a) and (b).

(8) It is an admitted fact that at the time the Commission did not have and hence did not use 'audited accounts' of the Commission for the previous year (2018/2019) in its calculation of the 2019/2020 Industry Levy as mandated by section 59(2). Therefore, the calculations of the Industry Levy were done by the Commission in clear breach of the Act, and the resulting assessed Industry Levy for 2019/2020 as shown in the draft 2019/2020 budget was erroneous, illegal and in breach of the Act, and the judge was correct in quashing the said calculation and decision to impose the Industry levy for the said financial year.[63]

[192] The respondents also take issue with the appellant's argument that the expression 'net estimated expenditure' in section 59(2) of the Act means the estimated expenditure approved by the Minister of Finance. It is submitted that this expression means 'the difference between the expected income of the Commission from all sources for that year and its estimated expenditure for that year as approved by the Minister pursuant to section 63(3)'. They point out that the learned judge, having observed that there is no definition of that term in the Act, and having considered the issue from paragraphs [131] to [144] of the judgment reasoned to the same conclusion as the respondents at paragraph [141] of the

[63] Record of Appeal Vol.1. pages 56-57.

judgment, which reasoning the respondents submit is impeccable and irrefutable. At paragraph [141] the learned judge concludes:

> "…The obvious meaning of 'net estimated expenditure' must be that amount of expenditure which remains after all the income has been applied to the expected expenditure which had been approved by the Minister under section 63."

[193] In reasoning to his conclusion, the learned judge considered the wording of sections 58, 59 and 63 of the Act, the definition of the word 'net' in the **Jowitt's Dictionary of English Law, 5th ed**, similar provisions in the **Housing (Financial Provisions) (Scotland) Act 1978** as amended in 1981 and re-enacted in section 91 of the **Housing (Scotland) Act 1987** as considered in **Re Sutherland District Council**,[64] and the guidance to be had from this statement of Lord Clyde:

> "… In the present case it appears that the Secretary of State has apportioned the total in proportion to the **estimated net expenditure** of each Local Authority, which as I understand it is precisely in accordance with the deficit which he estimated for each Authority." (Emphasis added)

[194] The respondents also rely on the conclusions expressed by the learned judge at paragraph [145] of the judgment, and his observation at paragraph [146] that while this issue is 'essentially a statutory interpretation point' and he did not consider the expert reports and evidence as 'necessary to determine' it, he noted that their conclusions are consistent with the court's view. Paragraph [145] states:

> "In my view, the relevant provisions of the BVI Act, in particular sections 58, 59, and 63 makes it clear that the Commission's permitted expenditure must be paid for by funds (the income) of the Commission. Where the income of any financial year is not sufficient for all of the 'expected expenditure' for that financial year, one is left with a 'net estimated expenditure' which together with a ten percent contingency, has to be now funded by an industry levy. **This has to be also why the industry levy cannot be factored into the income of the Commission for the purpose of preparing the estimates of income under section 63**; **only the other sources of income are relevant for this expense**." (Emphasis added)

[64] [1987] Lexis Citation 150.

[195] Accordingly, the respondents' case on the vires of the 2019/2020 industry levy are as follows:

(a) The Commission made an unauthorized transfer of part of its income (royalties) to the Government and on the basis ultra vires act calculated the industry levy for the 2019/2020 financial year by reference to the budget in which the estimated of net income of the Commission is reduced by the sum of $2,050,104.74 on account of a 'regulatory contribution' equal to the amount of the royalty payments received by the Commission.

(b) It wrongly calculated the industry levy on the erroneous basis of total estimated expenditures of the Commission rather than by calculating the same based on the 'net estimated expenditure' (as interpreted by the respondents and construed by judge) of the Commission for the said financial year as was required by section 59(2) of the Act.

(c) It wrongly calculated the sum added on account of contingency in determining the amount of the proposed levy as an arbitrary figure equivalent to 10 percent of the aggregate of the total estimated operating expenditure and 10 percent of the capital expenditure for the said financial year rather than a 10 percent of the 'net estimated expenditure' of the Commission as shown in the approved estimates for that year.

(d) In calculating the industry levy the Commission made no provision for the aggregate of the net estimated expenditure and the 10 percent contingency in the approved estimates to be adjusted upwards or downwards by the addition or subtraction of any 'surplus' or 'deficit', as the case may be, carried over from or incurred in the previous year (2018/2019) as shown in audited accounts of the Commission, as required by section 59(2).[65]

**Absence of Audited Accounts**

[196] It is accepted that the Commission had no audited accounts for the previous year (2018/2019). The respondents submit that the importance and relevance of audited accounts of the Commission for the financial year immediately preceding the financial year for which the industry levy is to be imposed to the lawful calculation and imposition of an industry levy, is correctly summarized by the

[65] Paragraph 30 of the Respondents' CCT and BVI Cable TV Limited's Skeleton Arguments filed on 8th July 2024, at page 31.

learned judge at paragraph [160] of the judgment. Further, the argument and reasons advanced by the Commission in submitting that audited accounts are irrelevant to the calculation and imposition of industry levy are misplaced and wrong.

[197] In summary, it is the respondents' submission that from the clear wording of section 59(2)(a)and (b) of the Act, an industry levy could be imposed only if there is a shortfall between the amount required by the Commission to fund its projected and approved expenditure in a particular year and the resources available to it to fund those approved expenditures in that year, including royalty payments. It is also submitted that the Commission's argument that since there had been no industry levy imposed for the previous years (in fact 2019/2020 would be the first time) there could be no deficit or surplus from previous years that would fall to be added or subtracted from the net estimated expenditure (plus contingency) in determining the amount of the industry levy, is based on a fallacy, which is the proposition that a surplus can only be created from the payment of sums levied in previous years.

[198] Moreover, the Commission is required by section 64 of the Act to keep proper books of account in sufficient detail to record and explain the Commission's transactions during the relevant year, so as to enable its financial statements to be prepared and audited. In the instant matter, the respondents argue that the Commission had been in existence for over 13 years during which it has been engaged in operations generating income, receipts and expenditures which by law it is required to detail in audited accounts and which accounts will show any deficit or surplus for a financial year.

[199] The respondents submit that the obligations imposed by section 59(2) on the Commission to factor into the calculation of an industry levy deficits or surpluses 'shown in the audited accounts of the Commission from the previous year' are intended to ensure that an industry levy is imposed only where there is a shortfall

in the amount of money that is available to the Commission to fund its operations in any given year, and the amount of the levy must take into account, at the time of the assessment, any surplus or deficit appearing in the audited accounts of the Commission for the precious year. Thus, the purpose of the statutory arrangement in section 59 for the calculation and imposition of industry levies is to ensure that 'the amounts of levies are the exact amounts required to make up such shortfall' for the relevant year. It follows, argues the respondents, that the Commission cannot exact a levy from licensees to fund shortfalls in income to fund its expected expenditure while maintaining surpluses from which those shortfalls could have been funded, wholly or partly. Likewise, in determining such shortfalls in income, the Commission is not entitled to exclude or to disgorge from its 'funds' as defined in section 58(2) and pay or transfer to the Government, royalty payments received from the licensees.

[200] In seeking to rebut the appellant's argument based on the operation of section 65 to pay any surplus into the Consolidated Fund, the respondents submit that this requirement is expressly 'subject to this Act', which includes its obligation to apply its funds for the purposes of and in defraying the permitted expenses set out in section 58(2), and to make adjustments and allowances in section 59(2)(a) and (b) with regard to income for the previous years. The respondents' core point here is that for practical purposes a 'surplus on the budget approved for the Commission's expenditure for any financial year' means any amount remaining after the sums in the Commission's possession have been treated as required by sections 58 and 59 of the Act; and in any event, section 59(2) does not require the Commission to make any actual payment to industry operators.

[201] This is a somewhat convoluted way of expressing what may be a simple point. It is that the obligation under section 65 to pay any surplus into the Consolidated Fund is expressly made subject to the Act which includes the Commission's authority or requirement under section 59 to calculate and to impose an industry levy for a financial year, where in its approved estimates its projected income from all

sources, including royalties, falls short of its estimated expenditures; and in calculating the amount of the industry levy needed to meet such shortfall, to add to the next estimated expenditure as set out in the approved estimates, a 10 percent contingency (to provide a further cushion to cover any actual shortfall), but to adjust the amount of the net estimated expenditure element of the calculation, by either adding any deficit or by subtracting any surplus shown in the audited accounts of the Commission for the previous year. In this way, any resulting 'surplus' for that financial year is then caught by the section 65 obligation to pay it into the Consolidated fund, unless the Minister otherwise agrees.

[202] As to the appellant's point that it was permissible for the Commission in calculating the 2019/2020 industry levy to rely on the financial statement prepared in accordance with section 64 of the Act, the respondents retort that the production of an audited financial statement is a mandatory obligation as opposed to a directory requirement of the Commission under section 64(4) of the Act, and the use of audited accounts of the Commission in the calculation of an industry levy is likewise mandatory under section 59(2). The requirement for audited accounts and for them to be used in the calculation of an industry levy, submits the respondents, gives the industry operators the assurance that the accuracy and reliability of the financial statements of the Commission have been independently verified and conform to applicable accounting standards. This is an important requirement and safeguard because the licensees/operators are subject to the power and authority of the Commission to impose industry levy for such sums as the Commission may requisition on the basis of those very accounts and/or financial statements which fall to be audited.

[203] In support of these contentions the respondents, helpfully, place some reliance on the case of **Wayne Barratt, Campbell Walter, Brian Hill, Andrew Walter v Treatt plc**[66] where Morgan J held:

[66] [2013] EWHC 3561 (Ch).

> "…I consider the requirement in the definition that the parties use the audited accounts, rather than management accounts, was intended to be an important safeguard. The requirement of auditing was designed to improve the reliability of the figures in the accounts … I conclude that the notice served in this case did not comply with the requirements of the SPA and that the consequence of that non-compliance is not to be overlooked but is fatal to the validity of the notice…"[67]

[204] Further, the respondents assert that, in any event, no copy of the Commission's financial statements, audited or unaudited, for the financial year 2018/2019 were made available to any of them during the Commission's process of setting an industry levy for the 2019/2020 financial year. The only time that unaudited versions of these statements were produced by the Commission to and seen by the respondents was during the discovery phase of the proceedings in the court below. It follows, argues the respondents, that the Commission's failure to comply with the statutory requirement to produce audited accounts, to produce copies for the previous year to the licensees as part of its statutorily mandated public consultation, and its failure to use audited accounts in the calculation and imposition of the industry levy for the 2019/2020 financial year, must necessarily invalidate any action which the Commission is authorized to take and decision to make or to conduct using audited accounts. This includes the fixing of an industry levy for the 2019/2020 financial year, and it is no valid excuse to say that the respondents have not challenged the accuracy of the unaudited accounts.

[205] In response to the appellant's argument that even if the learned judge correctly concluded that the preparation and production of audited accounts of the Commission for the 2018/2019 financial year was a mandatory requirement for computing the quantum of the industry levy for the 2019/2020 year, he ought to have ordered a recalculation of the levy based on audited accounts rather than quashing the process and decision to impose the levy. The respondents contend:

> "(1) having regard to the timeline specified by sections 64(4) and 59(1), it is no longer possible for the Commission to comply with these requirements within the time limits specified by the Act and it is

[67] [2013] EWHC 3561 (Ch) at paragraphs [45] and [47].

unclear that the courts have the power or discretion to extend those times for that purpose;

(2) in any event the exercise is pointless as the unaudited accounts produced by the Commission during the course of the proceedings in the court below showed that its current assets ($4,620,247.99) far exceeds its current liabilities ($261,579,69) and the cash flow statement showed that the Commission had the sum of $4,126,112.97 cash in hand at the end of the 2018/2019 accounting period. Accordingly, it is clear, argues the respondents, that the unaudited accounts furnished by the Commission reflected a surplus in excess of $4 million, and when this sum is subtracted from the net estimated expenditure for 2019/2020 financial year, no levy could possibly have been lawfully imposed for that financial year."

**Analysis and Conclusion – Principal Vires Issue**

**The Statutory Framework**

[206] The **Telecommunications Act** is described therein as an Act 'to establish a Telecommunications Regulatory Commission to license, regulate and develop the telecommunications services industry in the Virgin Islands.' The Act came into force by the assent of the Governor of the BVI on 24th October 2006. The Act consists of 17 Parts, the most important as far as relevant to the Court's determination of the issues in these appeals is the Part XI titled '**Financial and Reporting Provisions Applicable to the Commission**'.

[207] The Act was intended to and does provide the statutory basis, foundation and regulatory framework upon which the Government of the day and the Legislature determined to usher into full effect what was termed the 'liberalization' of the telecommunications sector and services in BVI by ceasing the then monopoly rights enjoyed by Cable and Wireless (West Indies) Limited in relation to land lines and certain other telecommunications services, and CCT in relation to mobile. By section 94, the Act repealed the **Cable and Wireless (West Indies) Act**[68] and the **Telecommunications Act**.[69] However, section 94(2) expressly provided for the

[68] Cap. 168 of the Laws of the Virgin Islands.
[69] Cap. 171 of the Laws of the Virgin Islands.

Regulations, Rules and Orders made under the **Telecommunications Act** to remain in force until they were replaced by corresponding subsidiary legislation made pursuant to the Act.

[208] Likewise, by section 94(3), licenses issued under the **Telecommunications Act**, and which were in force at the commencement of the Act, were to remain in force for at least 3 months, but no later than such date or dates as the Commission may determine. However, this saving provision was subject to the proviso that 'any provision in any such license or agreement that expressly or indirectly grants or purports to grant any exclusive right to operate or provide any telecommunications network or telecommunications service is null and void as of the day this Act comes into force'. Further, by subsection (4), persons holding a telecommunications license under the **Telecommunications Act** and operating a telecommunications network, radiocommunications service or broadcasting service and is required to obtain a license or frequency authorization under the Act to continue such operation or provision of service, were required, within 3 months or a date determined by the Commission under subsection (3), to apply to the Commission for such a licence or frequency authorization 'to continue operating such network or providing such service as he operated or provided the day this Act comes into force.'

[209] This transitional provision at section 94(4) targeting those persons or entities with then current licenses, would have been applicable to three of the four respondents, namely, Cable and Wireless (West Indies) Limited (subsequently Cable and Wireless (BVI) Limited), CCT and BVI Cable TV. Accordingly, subsection (7) provides:

> "The Commission may approve any application submitted pursuant to subsection (4) in accordance with this Act and any licence or frequency authorization granted shall be subject to the provisions of this Act."

[210] The responsibilities of the Minister with responsibility for telecommunications (not the same person as the Minister responsible for finance) are set out in general terms under section 4 of the Act, and are as follows:

> "4. (1) The Minister shall be responsible for
>
> (a) developing and reviewing telecommunications policies consistent with the purposes of the Act; and
>
> (b) matters of international telecommunications affecting the Virgin Islands, including international, regional and bilateral frequency coordination.
>
> (2) In the exercise of his functions and powers under this Act, the Minister shall consult with the Commission."

[211] Section 5 provides for the establishment of a commission to be known as the Telecommunications Regulatory Commission ("the Commission"). The Commission is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name, and which may own or dispose of property, enter into contracts and 'perform such acts as a body corporate may legally perform'. Section 6 sets out the functions of the Board of Commissioners. Importantly, these include at paragraph (d) responsibility for 'the regulation of licensees and authorization holders and for ensuring fair competition among licensees and all other operators of telecommunications networks or providers of telecommunications services'; at (e) determining 'applications for licences and frequency authorisations for any purposes specified in this Act...'; at (f) to 'manage the spectrum'; at (j) to 'collect all fees and any other charges payable to the Commission under this Act'; and at (u) to 'do all such other things as are necessary or expedient to give effect to its functions specified in paragraphs (a) to (t).

[212] Section 7 provides for the establishment of a Board of the Commission, for the Minister responsible for telecommunications to make appointments to the Board, and the persons or class of persons disqualified for appointment thereto. By subsection (7), the Board may appoint a member of staff of the Commission, other

than a Commissioner, to act as Secretary to the Board and to determine the duties of such office holder. Section 8 provides that the Board shall be the governing body of the Commission. The functions of the Board as set out in section 8 include, importantly, at (d) 'preparing the estimates and work programme referred to in section 63'; and at (e) 'preparing and approving the Commission's accounts under section 64.' Sections 10 and 11 provide, respectively, for the tenure of the appointment of Commissioners, and the resignation and removal of Commissioners from office.

[213] By section 14, the general powers of the Commission are, subject to the Act and any other enactment, to 'do all things necessary for, or reasonably ancillary or incidental to, the pursuance of the carrying out of its duties, functions or powers under this Act…'

[214] Part III of the Act regulates the application for and issuance of telecommunications licences and frequency authorizations. Accordingly, it is proscribed that no person shall operate a telecommunications network or provide a telecommunications service, in the BVI, without having been granted a licence by the Commission. Once granted, the Commission shall cause a notice of its issuance to be published in the *Gazette* and on its website. A licence issued to a licensee is non-assignable without the prior written approval of the Commission. Moreover, persons owning or holding a 'significant interest in a public supplier' (defined as 'an operator or a service provider') cannot sell, transfer, charge or otherwise dispose of his interest in such public supplier, or any part of his interest, without the prior written approval of the Minister; nor can a public supplier merge or consolidate with another company without such approval of the Minister.

[215] The term 'spectrum' is defined in section 2 of the Act to mean 'the complete range of electromagnetic frequencies which may be used for telecommunications.' Section 19(1) stipulates as follows: 'subject to this Act, no person shall use the spectrum without a frequency authorization **granted by the Commission**.'

(Emphasis added). Accordingly, a person wishing to use the spectrum, must 'apply to the Commission in the manner specified in the Telecommunications Code.' By subsection (3),'the Commission may grant or refuse any application for frequency authorisations based on applicable policies and the Regulations.' Once an application for a frequency authorization has been granted by the Commission, it shall publish on its website and in the Gazette and a newspaper published and circulating in the BVI, a notice to that effect.

[216] Subsection (8) of section 19 provides:

> "(8) A frequency authorization shall be consistent with the **spectrum plan established pursuant to section 34** and any Regulations and shall confer the right on the authorization holder to use a certain frequency band or bands subject to such terms and conditions as may be set out in the frequency authorization." (Emphasis added)

[217] Part VII of the Act deals with 'Spectrum Management, Numbering and Domain Name Management'. Section 34 deals specifically with 'spectrum' allocation and use, and provides:

> "34. (1) The Commission shall allocate the uses of the spectrum in order to promote the economic, orderly and efficient utilization of frequencies for the operation of all telecommunications networks and provision of all telecommunications services**, and to recover the cost thereof**.
>
> (2) The Commission may adopt an interim spectrum plan and shall, in cooperation and consultation with all users of spectrum in the Virgin Islands, develop and adopt a **spectrum plan**, which may be amended from time to time, in order to allocate the uses of the spectrum.
>
> (3) In developing a spectrum plan and in frequency coordination, the Commission shall **consult with the Minister** and engage in such other bilateral, regional and international consultations as it thinks fit.
>
> (4) The Commission shall make the spectrum plan available to members of the public on its website and may charge for each paper copy of the spectrum plan such fee as may be prescribed.

> (5) The spectrum plan shall state how the spectrum shall be used and the **procedures by which the Commission shall assign frequency bands** used to provide telecommunications services.
>
> (6) The procedure referred to in subsection (5) may include, but are not limited to **authorising use of frequency bands**
> (a) by auction;
> (b) by tender;
> (c) at a **fixed price**;
> (d) on a first-come, first-served basis; or
> (e) on other stated criteria." (Emphasis added)

[218] It is notable that nowhere in section 34 or in the Act authorizes the Government to issue, allocate or to charge licensees under the Act for use of spectrum and allocated frequency bands in the conduct of their operations as telecommunications network operators or telecommunications service providers. Full authority in relation to such matters is bestowed exclusively on the Commission under section 34 of the Act. Further, the Act does not permit the Government to charge licensees for the use of spectrum and frequency bands by way of 'royalties' or any other levies or fees. Likewise, the Commission is not authorized to charge and collect a fee from licensees for use of spectrum either as a fee to be retained by the Commission or to collect any such fee or charge for and on behalf of the Government and to pay that fee or monies received therefrom into the Consolidated Fund. It is the Commission which is charged under section 34 with developing a spectrum plan and frequency coordination in consultation (only) with the Minister; and to adopt a spectrum plan in consultation with all users of spectrum in the BVI. By section 34(1), the Commission in allocating the uses of spectrum, may 'recover the cost thereof'. However, absolutely no connection is made in section 34 of the Act between the allocation of spectrum and frequency bands to a charge or payment of a fee by licensees or by way of royalty payments under section 60 of the Act.

[219] Part XI of the Act deals with the 'Financial and Reporting Provisions Applicable to the Commission'.

**Sections 58(1) and (2)**

[220] Section 58(1) stipulates what comprises the ‘funds and resources’ of the Commission. They are:

> “(a) such monies as may be appropriated by the Legislative Council [House of Assembly] for the purposes of the Commission;
>
> (b) **industry levies**, **royalties**, fees, charges and other monies payable to the Commission under this Act;
>
> (c) monies paid and property provided to the Commission by way of grants, fees, charges, rent, interest and other income derived from the investment of the Commission’s funds;
>
> (d) monies derived from the disposal of or dealing with real or personal property held by the Commission;
>
> (e) monies borrowed by the Commission in accordance with this Act; and
>
> (f) any monies or property lawfully received by or made available to the Commission.” (Emphasis added)

[221] Section 58(2) is in mandatory terms. It stipulates:

> “The funds of the Commission **shall be applied** in accordance with this Act and in payment of the following:
>
> (a) the principal of, and any interest or other charges related to the repayment of, any **sums borrowed by the Commission**;
>
> (b) the **remuneration** of the Commissioners and the salaries, remuneration, allowances, pensions, gratuities, provident fund and other superannuation benefits of the **officers and staff employed in or in connection with** the activities carried on by the Commission;
>
> (c) the **working and establishment expenses of the Commission**, including expenses relating to the maintenance of the property and installations of the Commission and the discharge of the functions of the Commission **properly chargeable to revenue**;
>
> (d) such sums as the Commission may deem appropriate to **set aside** for the purposes of the future removal, replacement or

renewal of **property or installations** due to obsolescence and depreciation;

(e) the cost, or any portion thereof, of **any new works, property or installations**, not being a replacement or renewal of property or installations, **as the Commission may determine to be properly chargeable to revenue**;

(f) **any other expenditure authorized by the Commission and properly chargeable to revenue**." (Emphasis added)

[222] Sections 58(1) and (2) are clearly very important financial provisions. Subsection (1) defines in clear and unambiguous terms what are the 'funds and resources' of the Commission. It is therefore unquestionable that both royalty payments and industry levies fixed and received by the Commission pursuant to, respectively, sections 59 and 60, are 'funds' of the Commission. Any argument to the contrary or which seeks to undermine the force and legal effect of this provision are simply unfounded and erroneous in law. This must have now been accepted by the appellant and hence is common ground in the appeals. It is also now correctly accepted by the appellant, as the learned judge held, that both royalties and industry levies, as funds of the Commission, fall to be applied by the Commission in payment of all expenditures permitted under section 58(2) of the Act at paragraphs (a) to (f). The combined effect in law of the provisions of section 58(1) and (2) is profound, and central to the determination of the principal vires issue.

[223] The only material point of departure between for the appellant and the respondents with regard to the interpretation and effect in law of the provisions of section 58(1) and (2) of the Act, is in relation to paragraph (f) of section 58(2). Here the appellant argues strenuously that paragraph (f) was intended to and does confer upon the Commission the statutory power and authority to 'authorise' or to resolve to treat royalty payments as an 'expenditure' of the Commission 'properly chargeable to revenue', and to transfer such sums over to the Government by payment of them into the Consolidated Fund. The determination of the appellant's case in these appeals is hinged entirely on this submission and what can be

described as the ‘paragraph (f) power’. If the appellant is unable to succeed on this point, the appeals must be dismissed. This much has been recognized and accepted by Mr. Herberg KC, for the appellant.

[224] The respondents, on the other hand, argue that this is a new point being put forward by the Commission and relied on for the first time in the appeals, and hence was not one with which the learned judge was invited to consider and to pronounce on in the trial below. In my view, this is a fair point, but nevertheless one with which this Court must give due consideration and come to its own conclusions on. Second, and in any event, argue the respondents, the paragraph (f) power properly construed cannot apply to the payment over to the Government, wholesale or piecemeal, of royalty payments charged by the Commission to and received from or collected by it from the licensees, for the simple but telling reason that such a transfer would not be, legitimately or correctly, an ‘expenditure’ of the Commission at all nor would it be one ‘properly chargeable to revenue’ as that term is to be understood.

[225] This difference or dichotomy of opinion and argument, is at the core of this Court’s determination of the principal vires issue, and the correctness of the learned judge’s determination of it, notwithstanding that he was not invited by the appellant to consider this issue in the context of the ‘paragraph (f) power’, now being relied on by the Commission. There the Commission’s central point on this issue was that under the Act royalty payments received under section 60 were monies of the Government to be transferred to it by payment into the Consolidated Fund and could not be monies used by the Commission to fund or to defray its operational expenses. In the judgment being appealed, the learned judge found favour with the respondents’ argument and contention that royalty payments are not and were never intended by the Legislature to be funds of the Government to be transferred or paid over by the Commission to them as a matter of statutory duty or obligation. This principal or central issue will be considered later in more detail.

**Section 59**

[226] Section 59 concerns the Commission's calculation and setting of an industry levy. It is necessary to replicate this important provision wholesale, as I now do:

"(1) Following a **public consultation** and within **four weeks** of the approval by the Minister responsible for finance **under section 63**, of its estimates in respect of a financial year, the Commission **shall**

(a) set an industry levy for that financial year **in accordance with subsection (2)**; and

(b) assess the **proportion** of the industry levy to be paid by each licensee and authorisation holder.

(2) The industry levy for a financial year shall be calculated by adding the **net estimated expenditure** of the Commission as set out in the **estimates approved by the Minister** responsible for finance and a **contingency of ten per cent** of the net estimated expenditure, and by **adjusting the sum** of the net estimated expenditure and the contingency by

(a) the **addition of the deficit**, if any, shown in the **audited accounts** of the Commission for the **previous financial year**; or

(b) the **subtraction of the surplus**, if any, shown in the **audited accounts** of the Commission for the **previous financial year**.

(3) The amount assessed by the Commission on a licensee or an authorization holder shall be **paid to the Commission** within four weeks after receiving notification of the assessment.

(4) Without prejudice to any other enforcement action available to the Commission, a licensee or an authorization holder that does not pay an assessment made in accordance with this section is **liable to pay interest to the Commission at the rate of five per cent per annum** or such other prescribed rate.

(5) The assessment and any interest under subsection (4) may be **recovered by the Commission** as a civil debt in summary proceedings.

(6) Monies received by the Commission by way of the industry levy **shall be retained by the Commission for its own use**, unless the Minister

responsible for finance, with the approval of the Council, otherwise directs." (Emphasis added)

[227] Section 59 is also of importance to the determination of the principal vires issue. In construing this provision, it is significant to state that its provisions and the various steps to be engaged with and their sequential application in the calculation and fixing of an industry levy by the Commission, are clear and unambiguous, and the duty to calculate annually an industry levy is expressed in obligatory terms.

[228] The Commission is required by subsection (1) to proceed to calculate an industry levy for a financial year following the conclusion of a 'public consultation' and within four weeks of the approval by the Minister for Finance of the Commission's estimates in respect of that financial year as provided for by section 63. Further, by section 59(1) the obligation to embark upon a calculation of an industry levy applicable to the new financial year is triggered by the date on which approval of the estimates of expenditure and income for that year by the Minister of Finance under section 63 has been received by the Commission, which then has a 4 week period from that date within which to calculate and fix the industry levy.

[229] Second, the requirement at section 59(1) for a public consultation as a precursor to the Commission embarking upon a calculation of an industry levy is, in my view, the same as the requirement of a 'public consultation' prescribed under section 63(1) which triggers a 3 month maximum period within which the Commission must prepare in respect of a new financial year estimates of expenditure and of income for submission to the Minister of Finance for his/her approval. In my considered view, the Act does not require the Commission to conduct two separate and distinct 'public consultations' one for the benefit of section 59(1) and the other for the benefit of section 63(1). It is one and the same consultation under which the objectives of both exercises are to be appropriately canvassed with the public, including the licensees and authorization holders, sufficient and pertinent information and documents provided or summarized to solicit informed and meaningful responses to relevant issues, sufficient time allotted within which to

garner such responses and input from the public, and for the Commission to properly and faithfully give consideration to matters which have been flagged or which have been challenged as part of such exercise. Thus, this common requirement for a 'public consultation' in sections 59 and 63 must relate and concern the Commission's preparation of its estimates of expenditure and estimate of income for submission to and approval of the Minister of Finance, and the use of such approved estimates as a trigger for and in its calculation of an industry levy under section 59 of the Act. Any interpretation of sections 59 and 63 as requiring two separate public consultations would in my considered opinion be incorrect, not in keeping with the Act, impractical, and wholly unwarranted.

[230] Third, the calculation of an industry levy under section 59 for the new financial year is tied to the approval of the estimates by the Minister of Finance. Thus the obligation on the Commission to commence a calculation of the industry levy for the new financial year and to do so within the specified 4 weeks in section 59(1), is triggered by its receipt of approval of its estimates of expenditure and estimate of income for that new year by the Minister of Finance under and pursuant to the process contemplated by section 63. If that process or the actual approval is delayed, this will obviously cause or result in a delay in the calculation of an industry levy for the said new financial year. To be clear, it is not the laying of the approved estimates for that new financial year along with the work plan before the Legislative Council [now House of Assembly] which triggers the obligation and duty on the Commission to calculate and to fix an industry levy for the said year. It is the approval of the estimates by the Minister that is the trigger provided for in section 59(1).

[231] In properly and timely embarking upon a calculation of an industry levy for the new financial year, the Commission is required to do so in accordance with the procedure and process set out in subsection (2) of section 59. That entire process rests on the approved estimates showing a 'net estimated expenditure', as that ought to be construed and understood. In doing so, it is not for the Commission to

apply to its calculations any factor or bases not prescribed by section 59(2) as informing such calculations and its fixing of an industry levy. In this regard, the provisions of subsection (2) are proscriptive, obligatory, and sequential in their application. Thus, using the approved estimates, the Commission must first add to the 'net estimated expenditure' of the Commission set out therein (bearing in mind that these are not actual expenditures, but approved estimated expenditures and estimated income),10 per cent of that sum as a 'contingency'. To add a sum as a contingency, apart from being mandated by section 59(2), is prudent. It makes sense from both a financial and practical perspective, since, at this stage, the Commission is dealing with only approved 'estimates', and not with actual expenditure and actual income.

[232] The resulting sum (from adding net estimated expenditure and contingency) must then be subjected by the Commission to either the addition of any 'deficit' shown in the audited accounts of the Commission for the previous year, that is the year immediately prior to the new financial year, in the instant matter the 2018/2019 financial year; or the subtraction of any 'surplus' shown in such audited accounts for the previous year, in order to arrive at the amount of the industry levy for that new financial year. Accordingly, the adjustment exercise to be conducted by the Commission to the sum of the net estimated expenditure and 10 % contingency, pursuant to subsection (2)(a) or (b), requires, and presupposes that, the accounts of the Commission for the previous year have been audited in accordance with section 64(4) of the Act.

**Audited Accounts**

[233] By section 64(4) of the Act, the accounts of the Commission are to be audited 'within 6 months after the end of each financial year', by independent accountants/auditors appointed for that purpose by the Commission. This requirement raises a serious practical timing issue, as it relates to or impacts the ability of the Commission to calculate an industry levy for the new financial year,

and to do so within the period of 4 weeks from the date of approval of its estimates of expenditure and income by the Minister responsible for finance under section 63, as stipulated by section 59(1). Thus, in circumstances where the accounts for the previous year are not audited until some time into the new financial year, but before 6 months has elapsed, it would mean that the industry levy for said year cannot be calculated until the accounts for the prior year have been audited, and this may not be possible within the 4 week period from approval of the estimates of expenditure and income as stipulated by section 59(1) of the Act for the fixing of an industry levy for the new financial year.

[234] Most significantly, where said accounts are not audited until after the 6 month period specified by section 64(4) for their audit to have been completed, this would further push back and delay any completion of the calculation and fixing of an industry levy. Also, to the extent that in any year audited accounts of the Commission for the previous year are not available to the Commission until after the 4 week period from the approval of the estimates by the Minister of Finance as specified in section 59(1) within which the Commission is required to calculate an industry levy for the new financial year, it raises the question as to whether the Commission would be justified, and acting intra vires the Act, to nevertheless proceed with and fix an industry levy for the said new year after the statutorily mandated period has lapsed. Furthermore, all this must be viewed and weighed in circumstances where the Act does not make provision for any of these prescribed statutory mandated periods in sections 59(1) and 64(4) to be extended by the Commission or by the Minister of Finance or by Cabinet or by any other lawful authority.

[235] Even more importantly, however, the real dilemma in the instant matter is that the Commission did not have any audited accounts for the financial year 2018/2029 when it purported to calculate and to fix, under section 59, an industry levy for the financial year 2019/2020. As mentioned previously, this fact has been admitted by the Commission in these proceedings. However, the Commission seeks to argue

that it could rely instead on the ‘approved estimates’ for calculating the industry levy for the 2019/2020 financial year, and the absence of audited accounts is of little or no moment to the vires of its actions in so doing.

[236] In my judgment, respectfully, this argument is incorrect and erroneous. Sections 59(2)(a) and (b) make the determination by the Commission of whether to add a ‘deficit’ or to subtract a ‘surplus’ in its calculation of the industry levy, a critical and essential part of the calculation. It is most significant to ascertain not just whether such a deficit or surplus existed for the previous financial year, but the correct amount of such ‘deficit’ or ‘surplus’, in order to properly and correctly calculate the industry levy for the new financial year. This is to be had not from the approved ‘estimates’ but, importantly, from the audited accounts of the Commission for the previous year.

[237] This requirement is an integral part of the intention of the Legislature as gleaned from the statutory scheme and requirement as is manifest from the clear and unambiguous words of section 59(2) of the Act. The determination as to whether the Commission had a deficit or surplus from its operations under the Act for the previous year, can only be ascertained conclusively by an audit of its actual expenditure incurred and its income received or collected from all sources during that said year. Accordingly, the absence of audited accounts for the financial year 2018/2019 is fatal to any purported attempt by the Commission to embark upon, and much less to calculate, fix, apportion, and impose on the respondents, as licensees, an industry levy for the year 2019/2020. On this basis alone, the purported industry levy for the 2019/2020 financial year as calculated and imposed on the respondents by the Commission was ultra vires the Act and cannot stand.[70]

**Industry Levy and Subsection 6 of section 59**

[70] Wayne Barratt, Campbell Walter, Brian Hill, Andrew Walter v Treatt [2013] EWHC 3661 (Ch) per Morgan J.

[238] It is pellucid that an industry levy legitimately calculated, fixed, imposed and paid over to the Commission is part of or a component of its ‘funds’ in any financial year. This is made clear by sections 58(1) and 59(3) of the Act. Further, by section 59(5), it is the Commission which is empowered to recover, by way of summary proceedings, from a defaulting licensee or authorized holder, an industry levy and any accrued interest as a civil debt to the Commission.

[239] Much has been made in these proceedings as to the meaning, import and legal effect of subsection (6) of section 59. By this provision it is expressly made clear that any industry levy lawfully imposed and collected by the Commission ‘shall be retained by the Commission for its own use’. The appellant argues that this requirement must be interpreted within the statutory framework of the Act, and in contrast to the provision at section 60 applicable to royalty payments which do not use the same or similar language as section 59(6). As this argument goes, royalty payments and industry levies are in different categories of ‘funds’ of the Commission as far as their usage is concerned, with industry levies to be used to fund the operational expenses of the Commission, unless the Minister of Finance, with the approval of the Council, otherwise directs. By contrast, royalty payments are not so circumscribed at all in their purpose and use by the Commission. The appellant’s argument goes further. It is that royalty payments may be retained by the Commission and excluded from the funding of its operational expenses and hence not used in calculating the industry levy; and, further, may be legitimately paid or transferred over to the Government under the section 58(2)(f) power and authority of the Commission, by way of the Commission resolving to do so as a ‘regulatory contribution’, as it did in the draft 2019/2020 Work Plan and Budget.

[240] The respondents argue that since royalty payments are funds of the Commission which it is required to use for the permitted purposes and expenditures under section 58(2), these funds cannot be excluded from the Commission’s income when preparing its estimates for approval by the Minister under section 63 and therefore must form part of the calculations based on said approved estimates

which inform the fixing of an industry levy. However, the respondents go one step further. They argue, as they did in the court below, that it is the royalty payments which must be used first by the Commission to fund its operational expenses based on the approved budget, and it is only where these funds from royalties along with other fees and charges of the Commission under the Act, excluding industry levies, are insufficient to cover its estimated expenditures, that the Commission can embark upon, calculate, and fix an industry levy for a new financial year pursuant to section 59 of the Act.

[241] In my view, the provisions of subsection (6) of section 59 are clear and unambiguous. It expressly provides and requires that monies received by the Commission from an industry levy are to be retained, that is, kept by the Commission, for its own use. The only exception permitted is where the Minister of Finance, with the approval of the House of Assembly, otherwise directs. Thus, neither the Commission itself nor the Minister of Finance himself, can direct that monies received from an industry levy or portions of those monies, be redirected by the Commission to some use other than the use of the Commission, without the sanction and approval of the House of Assembly. This raises the question: what is meant by the words 'for its own use' in subsection (6)? In my opinion, these words must harken back to the provisions of section 58(2) of the Act which proscribes the permitted categories of use and expenditure of the Commission's 'funds', of which industry levies are expressly made a source or part of by section 58(1). The net effect of this is that industry levies calculated, fixed and received from licensees and authorized holders are to be also used to fund the operational expenses of the Commission, as are royalties, fees, charges and other monies payable to the Commission under the Act, and monies appropriated by the House of Assembly for the purposes of the Commission under section 59(1)(a).

[242] After considering and construing the provisions of section 60, I will examine below the critical question as to whether the learned judge was correct or not in concluding that, pursuant to sections 59 and 60 of the Act, royalty payments along

with other fees and charges of the Commission (not including industry levies), are to be used as a first call to fund the operational expenses of the Commission, and it is only where there is a projected shortfall in expenditures in the approved estimates of the Commission for the new financial year that the Commission is required and enabled by the Act to calculate, fix and impose an industry levy on the licensees for the new financial year, intended or designed to meet such shortfall for that fiscal year.

**Section 60 – Royalties**

[243] Section 60 of the Act provides:

> "60. (1) A licensee or authorization holder **shall**, in accordance with the **provisions of its licence or frequency authorization**, **pay to the Commission** a royalty at the rate of three per cent of its gross revenue or such other prescribed rate.
>
> (2) Without prejudice to any other enforcement action available to the Commission, a licensee or an authorization holder that does not pay the royalty in accordance with this section or the provisions of its licence or frequency authorization, as the case may be, is **liable to pay interest to the Commission** at the rate of five percent per annum or such other prescribed rate.
>
> (3) The royalty and any interest payable under subsection (2) may be recovered **by the Commission** as a **civil debt** in summary proceedings." (Emphasis added)

[244] By section 60, licensees or authorization holders are liable to pay to the Commission, in accordance with the provisions of its licence or frequency authorization, a royalty calculated at the rate of 3 percent of their gross revenue annually. Royalty payments are clearly funds of the Commission caught by or declared by section 58(1) and (2) of the Act. There is, however, no provision, such as appears in section 59(6), to the effect that royalty payments shall be retained by the Commission for its own use. Does this avail to the Commission an avenue or gateway by or through which it may resolve to disgorge royalties paid by the licensees or authorization holders to it, from funds of the Commission for a

particular financial year to be used to defray its normal or usual operational expenses for that financial year, and to elect, instead, to pay or transfer such funds to the Government?

[245] In my considered opinion, the effect of section 58 of the Act is that royalty payments received by the Commission under section 60 of the Act immediately become part of the funds of the Commission under section 58(1), and which 'funds', collectively, with other funds of the Commission received from other prescribed sources. All such funds, including funds received from payment of an industry levy, 'shall' be used and applied in the payment of the permitted classes of expenditures authorized by section 58(2)(a) to (f).[71] In relation to paragraph (f) of section 58 of the Act, it is clear that royalty payments are not an 'expenditure' much less one 'properly chargeable to revenue' of the Commission. By their very nature, royalties are a statutory charge imposed on licensees and authorization holders by section 60 of the Act, to be paid to the Commission, which, once paid, become part of the income or 'funds' of the Commission pursuant to section 58(1). In no sense whatsoever does the Act provide or stipulate that royalty payments are payments to the Government or to the Commission for and on behalf of the Government, to be passed on to the Government by transfer into the Consolidated Fund. To the contrary, royalties may be considered a working or operational expense or cost of the licensees and authorization holders, to be treated as such by them in their annual accounts. It is therefore not an 'expenditure properly chargeable to revenue' in the sense in which these terms are used and to be understood at paragraph (f) of section 58(1).

[246] The learned judge's conclusion that royalties are income or funds of the Commission to be used by it in defraying its operational expenses as permitted by section 58(2) is correct. For all these reasons, the Commission has no power or authority under paragraph (f) of section 58(2) to transfer any of its income or funds

[71] McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough [1992] 2 AC 48, per Lord Lowry at 67 B-H; and Ormond Investment Company Limited v Betts [1928] AC 143, per Lord Atkinson at 162.

to the Government, including royalty payments received by it under section 60 of the Act. Absent no other provision in the Act by which the Commission is required or permitted to transfer royalty payments (in whole or in part) to the Government, it follows that the learned judge was correct to hold that by so doing, the Commission was acting ultra vires the Act and illegally. It also follows that the learned judge was correct to hold that by excluding royalties from the Commission's estimates of income in the 2019/2020 Draft Budget to be applied in defraying or in meeting the approved expenditures of the Commission in the 2019/2020 Budget and thereby excluding such sums from its calculation of the 2019/2020 industry levy for 2019/2020 is null and void and of no effect. There is no legal basis under the Act or otherwise by which the Commission may segregate royalty payments as a part of its annual income to be factored into its annual estimates of income for a new financial year for approval by the Minister of Finance, which estimate will, in turn, form the basis of the calculation of an industry levy to be paid by the licensees for the said new financial year. Likewise, such royalties as paid, must be factored into the determination and calculation of any 'deficit' or 'surplus' in its annual audited accounts for the preceding year in accordance with section 64(4), and to be also used in deciding whether to add or to subtract a sum from the aggregate of the net estimated expenditure plus a 10 percent contingency under section 59(2) in arriving at an amount of the industry levy for the new financial year.

**Section 61 – Commission's Borrowing Powers**

[247] Section 61 permits the Commission, subject to an affirmative resolution of the House of Assembly, to borrow monies to the extent that such borrowing is necessary to the discharge of its functions, whether by way of loan, advance or overdraft. Section 62 stipulates that the financial year of the Commission shall be for the period 1st October in each year to 30th September of the following year.

**Section 63 – Approved Estimates of Expenditure and Income**

[248] Section 63 has been much alluded to earlier, as another important provision relating to the finances and budgetary processes of the Commission. It reads as follows:

> "63. (1) Following a public consultation, the Commission shall, not later than three months before the commencement of each financial year, prepare in respect of the financial year, and submit to the Minister responsible for finance estimates of
>
> (a) expected expenditure; and
>
> (b) its expected income, if any, arising from any source.
>
> (2) The estimates shall be accompanied by a work programme containing a general description of the work and activities that the Commission plans to undertake in the financial year.
>
> (3) The Minister responsible for finance shall, as soon as practicable, consider the estimates and work programme submitted by the Commission with a view to
>
> (a) approving the estimates, with or without modification; or
>
> (b) remitting the estimates back to the Commission without approval.
>
> (3)(sic) Where the Minister responsible for finance remits the estimates back to the Commission, he shall provide the Commission with the reasons for his non-approval of the estimates, including any specific recommendations for modification.
>
> (4)(sic) Where the estimates are approved, the Minister responsible for finance shall, within three months of the approval, cause them and the work plan to be laid before the Legislative Council [House of Assembly]."

[249] Again the wording of section 63 is clear and unambiguous. As has been addressed above, section 63 and its operation leading to approved estimates of expected income and expenditures of the Commission for the new or next financial year, is critical and integral to any assessment and fixing by the Commission of an industry levy for that new financial year, as is made pellucid by section 59(1) of the Act. Furthermore, the required process of public consultation as a means to the preparation of estimates of expenditures and income from all sources and,

ultimately, their approval (with or without modification) by the Minister for Finance, has already been considered above in the context of the requirement for public consultation and approved estimates in the context of section 59(1), and the Commission's obligation to calculate and fix an annual industry levy.

**Section 64 – Proper and Audited Books of Accounts**

[250] By section 64, the Commission is required to keep proper books of account of its income and other receipts and expenditure; ensure that all monies received are properly brought to account, all payments out of monies are correctly and properly authorized; that adequate control is maintained over its property and 'over the incurring of liabilities by the Commission'; and that such books of accounts are maintained in such form to provide a sufficient record of and to explain its transactions, so as to enable its financial position to be determined with reasonable accuracy at any time, and are sufficient to enable its financial statements to be prepared and audited.

[251] By subsection (3), the Commission is required, within 3 months after the end of each financial year, that is by 31st December, to prepare and approve accounts containing, inter alia, a statements of its assets and liabilities as at the end of the financial year, a statement of revenue and expenditure during said financial year, together with proper and adequate explanatory notes. These approved accounts of the Commission must then be audited within 6 months after the end of the financial year, the subject of the accounts and audit.

**Section 65 – Surplus to be paid into Consolidated Fund**

[252] Section 65 of the Act is of some significance. It expressly provides for or requires the Commission to pay any 'surplus' into the Consolidated Fund, hence, over to the Government. It states:

> "65. Where there is a **surplus on the budget approved for the Commission's expenditure for any financial year**, such surplus **shall**, subject to this Act, be paid into the Consolidated Fund, **unless otherwise agreed upon with the Minister** responsible for finance." (Emphasis added)

[253] This is the only provision in the Act which requires the Commission, in clearly defined accounting or budgetary circumstances, to pay monies properly accounted for as a 'surplus', into the Consolidated Fund, subject to a contrary or different agreement by the Minister of Finance which would not require the Commission to pay the surplus or all of it into the Consolidated Fund. A surplus on the approved expenditure of the Commission would arise in circumstances where the income received by the Commission from all sources identified in section 58(1) during the applicable financial year exceeds the expenditure approved in that year's budget. It is by and through the operation of section 65, that some indeterminate amount of funds of the Commission, from all sources, for a particular financial year, can end up in the coffers of the Government via the Consolidated Fund. However, it is notable that section 65 does not stipulate any timeframe or period within or by which the Commission is required to pay any such 'surplus' into the Consolidated Fund. Also, section 65 does not differentiate between the various sources of the 'funds' of the Commission identified in section 58(1) of the Act, be it 'industry levy' or 'royalty payments' or otherwise. It simply provides for any 'surplus' on the approved budget for the Commission's expenditure to be paid over to the Government, unless the Government through the Minister of Finance agrees that they should not be paid into the Consolidated Fund.

[254] In my considered view, any decision on whether the section 65's mandatory requirement is engaged and when the Commission ought to comply by making the payment into the Consolidated Fund would, most likely be made by the

Commission in consultation with the Minister of Finance, with whom the power to require the Commission to either not pay the money into the Consolidated Fund and to use it (or some of it) for the capital works or expenditure of the Commission or to offset, for example its approved borrowing(s) under section 61, rests. Further, such a decision as to the timing of the payment of surplus into the Consolidated Fund is likely to be made not only at the end of the financial year to which the operative approved budget relates, but after the full account of the Commission for that year has been prepared by the Commission, submitted to the auditor for auditing, and a complete and final audit for that year produced to the Commission under section 64(4) of the Act. It is only at that stage that the final and verified financial position of the Commission for the applicable year would be known with certainty. I so opine, perhaps gratuitously, notwithstanding that section 65 does not refer to 'audited accounts' or a 'surplus' determined after the accounts of the Commission for the operative financial year has been audited.

[255] An interesting question arising from the section 65 treatment of any 'surplus' on the budget approved for the Commission's expenditure for a financial year, is how would such a requirement, which is mandatory subject only to a different decision by the Minister of Finance, operate in light of the requirements of section 59(2)(b) of the Act for any 'surplus shown in the audited accounts of the Commission for the previous year is to be <u>subtracted</u> when calculating an industry levy.

[256] In my view, the answer to this question is three-fold. First, a 'surplus' under section 65 is any surplus on the 'budget' approved for the Commission's expenditure for a financial year; whereas section 59(2)(b) is concerned with any 'surplus' shown in the <u>audited accounts</u> of the Commission for the year immediately before the year for which the Commission is calculating and fixing an industry levy. Second, while it is possible that the 'surplus' in the approved estimates and the actual surplus in the audited accounts of the Commission for the same financial year may end up being of an identical or close sums, it is not inconceivable that a surplus on the approved budget or estimates of expenditures would be a different sum to a

surplus shown in the actual audited accounts of the Commission for that year, such audit coming after the said financial year has ended as contemplated by section 64(4) of the Act. This is so because audited accounts generally show a more accurate picture as far as the extent of any realized surplus is concerned. Third, the operation of section 59(2)(b) by way of a subtraction of surplus from the sum total of the net estimates of expenditure plus 10 percent contingency, is not dependent on whether the Commission retains that surplus in its accounts or has paid it over to the Government into the Consolidated Fund in compliance with its section 65 mandate. The simple fact is that a 'surplus' which exists must be accounted for and deducted from the sum total of those two elements, in order to calculate the liability of the licensees to pay, proportionately, an industry levy for that new financial year.

**Section 66 - Audited Account to be laid before House of Assembly**

[257] Section 66 provides for the Minister of Finance to be provided by the Commission with a copy of its audited accounts within 3 months of completion of the audit and requires the said Minister to cause them to be laid in the House of Assembly within 3 months of him/her having received them. It is these audited accounts which will inform and convey to the Minister for Finance, and by extension the Government, and ultimately the Legislature and the public, the true and accurate financial operation and position of the Commission in any given financial year, and which will accurately convey whether there is a surplus for that year and if so the exact amount which by section 65 must be paid by the Commission into the Consolidated Fund.

**Section 67 – Commission exempted from payment of taxes etc**.

[258] Section 67 completes the financial and reporting provisions under Part XI of the Act. However, nothing in these appeals turns on its provisions, albeit this section was alluded to by counsel for the appellant in its oral submissions in pointing out

that the Act provides for the Commission to be exempted from the payment of taxes, levies and fees on its income and property. Section 67 provides:

> "67. The Commission is exempt from the payment of all taxes, levies and licence fees on its income and operations and from the payment of all taxes, duties and rates on its property and documents."

**Paragraph (f) of section 58(2) – 'any other expenditure authorized by the Commission and properly chargeable to revenue'**

[259] The appellant has grounded the success of its appeals entirely on the meaning and effect of the permitted expenditure by the Commission under paragraph (f) of section 58(2). The competing interpretations, arguments and contentions in relation to this issue which is central to the principal vires issue have been set out in some detail above. I do not therefore need to repeat them at this juncture. Paragraph (f) has three elements. The first is that it is concerned with an 'expenditure'. The second is that such expenditure must be one which is 'authorized by the Commission'; and the third is that the expenditure must be one which is 'properly chargeable to revenue'.

[260] Is the payment over by the Commission of royalties paid to it by the licensees, whether classified in the Budget as a 'regulatory contribution' or otherwise, an 'expenditure' of the Commission in the true sense and meaning of that term? In my view it is not and could never be so considered as a matter of definition and as a matter of the application of the statutory framework, in particular sections 58(1) and section 60, when considered also in the context of section 65 of the Act which is the only provision by which the Commission is required or mandated to pay part of its revenues, therein shown as a surplus in the approved budget, into the Consolidated Fund.

[261] The nature of royalty payments under section 60 is income or revenue or funds of the Commission as stipulated by section 58(1), which meaning is now not in dispute in these appeals. An item of income, of revenue or 'funds' owned by the

Commission cannot become by some magical transformation a debt owed by the Commission which must be paid over to the Government. The word 'expenditure' in its ordinary meaning is 'money spent on or for something', as submitted by the respondents. The transfer over of part of the Commission's 'funds' to be used for its operational and other expenses permitted under section 58(2) of the Act, is not an expenditure in the true and ordinary meaning and essence of that word. Further, the phrase 'regulatory contribution' is not suggestive of a 'debt' owed or monetary obligation (whether arising by contract or by legislation or by judicial decree) which must be paid or satisfied by the Commission. Put simply, it is what it says, a 'contribution' made voluntarily by an ultra vires resolution of the Board of the Commission to the Government, one which does not arise under, nor is it contemplated by the Act. Furthermore, the expression 'regulatory contribution' does not appear in the Act and is not sanctioned by any provision thereof.

[262] There has been much debate among the appellant and the respondents as to the meaning of the expression in paragraph (f) 'properly chargeable to revenue'. Suffice it to be said that I find no merit whatsoever in the meaning sought to be given to that expression by the appellant. Indeed, I find more substance in the meaning accorded to it by the respondents (cumulatively). This term is not defined in the Act. However, it appears three times in subsection (2) of section 58 – at paragraphs (c), (e) and (f). At paragraph (e) it is expressed slightly differently to the other two paragraphs, viz, 'as the Commission may determine to be properly chargeable to revenue'. At (c) and (f) the determination of the Commission as to whether the expenditure is 'properly chargeable to revenue' is not in play. I accept that the proper meaning of expenditure 'properly chargeable to revenue' in paragraph (f) is an expenditure normally chargeable to income.[72]

[263] Some learning and guidance of importance can be gained from the relevant authorities. However, in this instance it is, in my judgment, only necessary to set out the guidance provided in **ECC Quarries Ltd v Watkis (Inspector of Taxes)**[73]

[72] See Strick (Inspector of Taxes) v Regent Oil Co. Ltd [1964] WLR 309.
[73] [1975] 3 All ER 843.

(cited by the respondents). In that case, Brightman J, at first instance, underscored the 'valuable assistance' to be gained from the decision of the learned Lords of Appeal in two authoritative decisions at the highest levels, one each from the House of Lords and Privy Council, in **Regent Oil Co Ltd v Strick and BP**;[74] and **BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia**,[75] where this passage from the judgment of Megarry J (as he then was) in **Pitt v Castle Hill Warehousing Co Ltd**[76] was adopted and endorsed by their Lordships:

> "It seems to me that these authorities establish that in determining whether expenditure is incurred on revenue account or on capital account, one must consider at least three elements. First, what is the nature of the payment? Is there a single non-recurrent lump sum, paid once-for-all, on the one hand, or are there to be current payments made, for example, for periods commensurate with those payments? Second, what is to be obtained by the payment? Is it some **asset** with lasting or enduring qualities, or is it merely ephemeral, or, indeed, something which cannot be described as an asset, whether tangible or intangible? Third, **in what manner is what is obtained to be used, relied on or enjoyed**? Will it have a quality of recurrence **which will point to an income nature**, as by providing a flow of **orders for goods**, or will it bear a static aspect which points to a capital nature? In considering all these elements, and in looking at the case as a whole, **it is the practical and business point of view that counts for more than the juristic classification of the legal rights employed or exhausted in the process**. As Lord Upjohn said in the Regent Oil case: "It is a question of fact and degree and **above all judicial common sense in all the circumstances of the case**." In other judgments there are references to "common sense" simpliciter, but the adjective "judicial" may be useful as indicating that **the kind of common sense needed is one that is not at large**, **but is guided and tutored by the authorities**." (Emphasis added)

[264] In my judgment, it is clear that royalty payments is not an 'expenditure' much less one 'properly chargeable to revenue' of the Commission. By their very nature, royalties are a statutory charge imposed on licensees and authorization holders by section 60 of the Act, to be paid to the Commission, which once paid, become part of the income or 'funds' of the Commission pursuant to section 58(1). Moreover,

[74] [1964] 3 All ER 23.
[75] [1965] 3 All ER 209.
[76] [1974] 3 All ER 146 at 152.

royalties are not a 'working expense' or operational costs of the Commission. They are not, as the appellant argued, 'a recurring payment to the Government not chargeable to a capital account'. First of all, as the scheme under the Act clearly requires, royalties are a recurring payment to the Commission, not the Government. Second, and of equal significance, in no sense whatsoever does the Act provide or stipulate that royalty payments are payments to the Government or to the Commission for and on behalf of the Government, to be passed on to the Government by transfer into the Consolidated Fund. To the contrary royalties may be considered to be a working or operational expense or costs of the licensees and authorization holders, to be treated as such by them in their annual accounts. It is therefore not an 'expenditure properly chargeable to revenue' in the sense in which these terms are used and to be understood at paragraph (f) of section 58(1).[77]

[265] Based on the guidance in the above extract and related cases, the expression 'expenditure… properly chargeable to revenue' in paragraph (f) means 'expenditure not being capital expenditure and normally chargeable against the income or revenue of the Commission in arriving at its profit and loss', as submitted by the respondents. Royalties are not, therefore, an expense incurred by the Commission to enable it to earn its income, its funds.

[266] In this regard, it is also of significance that the only way by which the Act permits monies being part of the income, revenue or 'funds' of the Commission to be paid over to the Government by the Commission is where the circumstances contemplated by section 65 are applicable, that is, as a 'surplus on the budget approved for the Commission's expenditure for any financial year'. It is notable that there is no evidence to suggest that the Commission has realized or declared such a 'surplus' and has acted in fulfillment of its statutory obligation and duty prescribed by section 65.

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[77] Anglo-Persian Oil Company Limited v Dale (Inspector of Taxes) [1932] 1 KB 124 at 140A.

[267] I agree, therefore, with the learned judge's conclusion that royalties are income or funds of the Commission to be used by it in defraying its operational expenses as permitted by section 58(2). For all these reasons, the Commission has no power or authority under paragraph (f) of section 58(2) to transfer any of its income or funds to the Government, including royalty payments received by it under section 60 of the Act. Absent no other provision in the Act by which the Commission is required or permitted to transfer royalty payments (in whole or in part) to the Government, it follows that the learned judge was correct to find that by so doing, the Commission was acting ultra vires the Act and illegally. It also follows that the learned judge was correct to hold that by excluding royalties from the Commission's estimates of income in the 2019/2020 Draft Budget to be applied in defraying or in meeting the approved expenditures of the Commission in the 2019/2020 Budget and thereby excluding such sums from its calculation of the 2019/2020 industry levy, the Commission acted ultra vires the Act, and its calculation and fixing of an industry levy for 2019/2020 is null and void and of no effect.

[268] In my view, the finding above is dispositive of the three appeals. I say this because, as Mr. Herberg KC accepted during argument, a finding that the paragraph (f) of section 58(2) does not avail the Commission in what it did or purported to do with the royalty payments which were paid over to the Government and not factored into the income of the Commission for the 2019/2020 financial year and therefore not in its calculation of the industry levy for that financial year, that is the end of the matter, except, perhaps to the ground of appeal challenging the judge's quashing of the Commission's decision to impose the industry levy for 2019/2020 year as opposed to simply ordering that the Commission conducts a correct and intra vires recalculation of the said industry levy based on the finding and guidance of the court - grounds (i) and (j).

[269] However, before considering the appropriateness of the remedies imposed by the learned judge in all three judicial review claims, I will deal with the issue posited at

paragraphs [195] and [243] above. Next I will say something, however briefly, concerning the grounds of appeal challenging the judge's findings as to the adequacy of the Commission's 'public consultation' concerning its estimates of expenditure and of income for the financial year 2019/2020 and its calculation and imposition of an industry levy for the said year - grounds (f) and (g); and its conduct and statements giving rise to a procedural legitimate expectation that the respondents would be consulted prior to the final demand for payment of the industry levy for the 2019/2020 financial year – ground (h).

**Whether the operational expenses of the Commission are to be funded first from royalty payments and income from fees, charges and other sources, and only where there is a shortfall, can an industry levy be imposed?**

[270] I must first point out that this issue, as important as it is to the vires of the Commission's calculation of an industry levy for 2019/2020 financial year, it would be, if correct, but yet another major reason or plank upon which the learned judge was justified in quashing the 2019/2020 industry levy. If the judge got it wrong, the said industry levy cannot stand, in any event, for all of the bases and reasons given above.

[271] The judge reached his conclusion on this at paragraph [145] of the judgment when he remarked: 'This has to be also why the industry levy cannot be factored into the income of the Commission for the purpose of preparing the estimates of income under section 63; only the other sources of income relevant for this exercise.' The judge also averted to the expert reports put into evidence by the respondents, in particular, C&W BVI's (FLOW's) two experts, Ms. Schellion Horn and Mr. Luke Steadman, and Digicel BVI's expert Mr. Michael Griffen. He remarked that the experts' opinions 'were sound and logical and well-grounded in their considerable experience in the accounting world, and are 'consistent with the Court's views'.[78] He cited extracts from each of these reports dealing with the proper meaning and

[78] Paragraph [146] of the Judgment in the court below dated 4th April 2022.

effect of the expression 'net estimated expenditure' in section 59(2) of the Act, when determining an industry levy.

[272] While stressing that he was not relying on the evidence of these experts in construing the said expression as this was simpliciter a matter of statutory interpretation, the learned judge reasoned, opined and concluded at paragraphs [152], [153] and [154] as follows:

> "[152] I am therefore of the view [that] a '*review of the Commission's draft annual work plan and budget 2019/2020 Consultations Documents (the '2019/2020 Work Plan') indicates that it has set the Industry Levy equal to the budgeted operating expenses of the Commission plus a contingency.*' This means that the Commission has used the expected expenditure which has been approved by the Minister pursuant to section 63 as what is meant by 'net estimated expenditure'. This is wrong.
>
> [153] Out of my earlier findings that royalty payments comprised the funds of the Commission to be used for the operating expenses of the Commission and not to be automatically sent on to the Consolidated Fund for the government's operating expenses, any budget which disregards any such royalty payments as money to be applied to expenses for the upcoming year is flawed and ultra vires the Act. A proper audited statement must consider royalty payment as part of the income of the Commission which is to be used for the purposes of the permitted expenses of the Commission.
>
> [154] The Commission was duty bound to arrive at a 'net estimated expenditure' after balancing out the estimated income (excluding any notions of an industry levy) of the financial year 2019/2020 against the expected expenditure for that period. Expenditure which cannot be funded by the normal sources of income, is to be regarded as the 'net estimated expenditure' to which a contingency of ten per cent must be added. This sum when adjusted under section 59(2)(a) or (b) represents the industry levy which is to be then apportioned among the licensees."

[273] At first blush I retained some uncertainty as to the correctness of this line of reasoning by the learned judge. This was for two reasons. The first is that both royalties and industry levies are included expressly in the definition and ambit of

‘funds’ of the Commission at section 58(1). Why then would ‘royalty payments’ be considered part of the ‘normal’ sources of the funds of the Commission and not industry levies, the latter being treated, in the judge’s view and conclusions, as almost an extraordinary levy to be imposed only where there is a shortfall in the approved estimates of expenditures and of income ‘arising from any source’. Surely, industry levy is one such source to be counted as ‘income’ of the Commission for the purposes of such estimates. My second concern as to the veracity and logic of the judge’s reasoning and conclusion on this aspect, is that, in any event, by section 59(1) the Commission must annually embark upon a calculation of an industry levy once the estimates have been approved by the Minister of Finance pursuant to his powers under section 63(3) of the Act.

[274] On a strict interpretation of the provisions of section 59, the learned judge was correct in his conclusion that the Commission was wrong in using the ‘expected expenditure’ in the estimates approved by the Minister of Finance pursuant to section 63(3) of the Act, as the ‘net estimated expenditure’ to be used under section 59(2) when calculating the industry levy. The calculation of an industry levy under section 59(2), involves as a starting point or precursor to embarking upon such an exercise, that there be a ‘net estimated expenditure’ of the Commission set out in the estimates approved by the Minister responsible for finance. To this is then added a contingency of ten per cent of the net estimated expenditure. The resulting total is then adjusted upwards or downwards depending on whether the audited accounts of the Commission for the previous financial year show as ‘deficit’ or a ‘surplus’. If there is no ‘net estimated expenditure’ arising from the approved estimates there is nothing to which can be calculated and added the 10 per cent contingency, as the sum total or base sum for calculating an industry levy. Absent any ‘net estimated expenditure’ from the estimates for the financial year under consideration, it follows, that the entire exercise of calculating an industry levy by adding a ‘deficit’ to or subtracting a ‘surplus’, pursuant to paragraph (a) or (b) of section 59(2), from the total of the net estimated expenditure and the 10%

contingency, falls away or is rendered unnecessary and cannot be proceeded with for that new financial year.

**Public Consultation and Legitimate Expectation – grounds (f), (g) and (h)**

**Adequacy of the Public Consultation**

[275] The relevant requirement under the Act for there to be a public consultation is stipulated by section 63(1) in relation to the Commission discharging its duty to prepare for each new financial year estimates of its expected expenditure and expected income, if any, arising from any source; and by section 59(1) in relation to its duty and obligation, using the approved estimates under section 63, to set an industry levy for the same new financial year. I have above opined that the two requirements are really, in essence, one and the same and there is no need to have two separate and distinct public consultations.

[276] As to the issue of the adequacy of the Commission's public consultation, the learned judge dealt with this at paragraphs [172] to [204] of the judgment. There he set out at some length and considered the relevant case law and principles, none of which are controversial and do not necessitate being repeated here. He also averted to and considered the Commission's **Telecommunication Code (Part 1) (Public Consultations and Public Hearings) Guidelines 2010** published on 6th January 2011 under the authority of section 91(3) of the Act. He also considered the requirements for public consultation in sections 58(1) and 63(1) and concluded at paragraph [186]: 'there can be no doubt that the section 63 process must first be complied with before one gets to the section 59 process.' Having asked himself whether these sections require two separate public consultation processes be undertaken, the judge concluded at paragraph [201] that 'the legislation can be construed to requiring only one such process.'

[277] The learned judge also considered at some length from paragraphs [187] to [199] the actual documented public consultation in relation to the Commission's 2019/2020 Draft Annual Work Plan and Budget and the respondents' responses to

it and the Commission's responses to the issues raised by the respondents in their representations to the Commission as to the issues with and inadequacy of such consultation. With respect to the respondents complaint regarding a lack of consultation on the Commission's apportionment of the industry levy for 2019/2020, the judge held, at paragraph [196] of the judgment:

> "In any event this is a matter of policy. The Court could not very well [tell] the Commission how much weight to put to relevant matters and whether this would in the end oblige the Commission to make adjustment. What the court can say, and I will say in this case, is that the Commission must remain flexible on its pro-rata formula for calculating the industry levy. In my view, section 59(2) as is presently drafted, obliges the Commission to consult in a legally adequate manner on the issue of the apportionment of the industry levy. This would mean that whilst the Commission from the beginning of the consultations may properly indicate how it intends to approach the apportionment issue, it should not close its mind to the possibility of change. As the case have shown, 'the product of the consultation must be conscientiously taken into account before finalizing any decision'."

[278] And at paragraphs [198], [199] and [200], the judge reasoned to his conclusions on this aspect of the consultation issue:

> "[198] … I am of the view that having regards to the historical dealings between the Commission and the licensees, and having regards to that statement made by the Commission that it anticipated discussions *with the stakeholders on the* Industry Levy *during the 2019/2020 financial year with a view of determining a mutually agreeable plan concerning the timing and approach for collection*", fairness would have required that the Commission engage the licensees on such '*timing and approach for collection*'.
>
> [199] These discussions never took place. There is a history with the Commission foregoing collection when complaints are made about hardships arising from natural disasters. This has been happening since the 2016/2017 budget. The licensees were again complaining about hardships arising from the COVID 19 pandemic. What the Commission did on this occasion was to simply send out a demand that industry levies be paid within a month, without affording the licensees any opportunity to speak to the 'timing and approach' of the collection of these levies.
>
> [200] I consider that fairness would have required that the Commission engage in consultations with the licensees on this issue. It did not

> and it (sic) therefore fell short of its duty to have legally adequate consultations on this matter."

[279] The judge also considered the Commission's section 63 requirement to have a public consultation[79] in the context of its requirements under section 64 to prepare its annual accounts, to ensure that all monies collected by it are brought to account and under section 66 to have its accounts audited annually; and the degree of scrutiny provided for in the Act over the Commission's work in producing its estimates of expenditure and of income and its annual accounts. At paragraph [213], the judge held:

> "[213] I therefore find that the failure of the Commission to have a transparent accounting system and in particular audited financial statements affected its obligation to properly consult as far as its section 63 statutory obligation to consult was concerned."

[280] In my considered view, there are at least two main issues which the appellant has not surmounted in the appeals and in the court below, the effect in law of which, jointly or severally, render any challenge to the findings of the judge on the failure to adequately consult with the respondents, unsustainable with the result that these grounds of appeal must be dismissed. The first is the incorrect, ultra vires and illegal approach by the Commission in its treatment of royalty payments in its estimates of income and in its budget for the financial year 2019/2020, as dealt with above. This factor alone renders the public consultation process embarked upon by the Commission hopelessly inadequate and deficient to the point of being erroneous in that its accounts were based on a totally illegal premise. The second is the abject failure to have completed and included as an integral part of its public consultation process and by extension its calculation, fixing and imposition of an industry levy for 2019/2020 financial year, of an audited financial statement of the Commission for the financial year 2018/2019, in breach of its duty under section 64(4) and its obligations under section 59 of the Act.

[79] Paragraphs [202] to [214] of the Judgment in the court below dated 4th April 2022.

[281] These two major failures, render any public consultation process undertaken by the Commission for the year 2019/2020 woefully deficient, inadequate and not in keeping with its statutory and common law duty to conduct adequate consultations with the public, including, most importantly, the licensee/respondents. I therefore agree with the learned judge that the consultation undertaken by the Commission was deficient, inadequate and in breach of its statutory duties to have public consultations under sections 63(1) and 59(1) of the Act. Accordingly, and for these reasons grounds (f) and (g) fail.

**Legitimate Expectation**

[282] In considering the issue of 'legitimate expectation'[80], the learned judge, having reviewed the relevant authorities and guidance to be derived therefrom, concluded that the principles and guidance with regard to substantive and procedural legitimate expectation and whether a substantive expectation can arise against a statutory duty as addressed in the decision of the Court of Appeal of Guyana in **Demerara Distillers Ltd v Guyana Revenue Authority**[81] by Chang JA, were relevant:

> "A promise made by the President can give rise to a legitimate expectation -substantive or procedural. But legitimate expectation cannot arise against a statute. In this case, the methodology to be used by the Comptroller for arriving at the base value of the products on which consumption tax should be assessed is governed by s. 3 of the Consumption Tax Act and therefore any pronouncement or promise made by the President on the methodology to be used by the Comptroller cannot give rise to a legitimate expectation."

[283] In applying these principles, the learned judge concluded at paragraph [254] of the judgment, as follows:

> "…This Commission has a statutory duty to engage its annual budget process and in so doing, it is obliged to impose and collect any industry levy which is lawfully due. The Act does not allow this Commission to forego the collection of this levy payment; there is simply no discretion

[80] Paragraphs [247] to [260] of the Judgment in the court below dated 4th April 2022.
[81] [2008] 73 WIR 244 at 263.

> given to it to do so. The fact that they have done so in the past, that is, waived the collection of any levy which might have been lawfully due, cannot be the basis for it to avoid its statutory duty to collect any levy which must be paid. Where Parliament has imposed an obligation on a public body to collect monies lawfully due to it in accordance with law, that body is not entitled to promise that it would forego the collection of such sum, and where such a promise is in fact made, the promisee is not entitled to rely on any promise, whether expressed or implied that collection would be waived."

[284] I am entirely in agreement with the statements of principle and conclusions of law of the learned judge at paragraph [254] of the judgment of the court below. I would add, however, that where a statute imposes on a public body a duty or obligation to assess each year the amount, if any, of an industry levy to be imposed on licensees or others, the public body, in this case, the Commission, must embark upon all steps required under the provisions of the statute to conduct such assessment and calculation, with a view to imposing or charging such levy. This speaks directly to the obligations of the Commission in relation to its annual estimates under section 63(1) and to its obligations to use such approved estimates first to ascertain whether there is a 'net estimated expenditure' for the relevant year under consideration and, if so, to calculate an industry levy for the same financial year. Thus, where those circumstances do exist, the Commission must, following a public consultation and within 4 weeks of approval by the Minister of Finance of its estimates for a new financial year, embark upon a calculation and setting of an industry levy for the said new financial year. The Commission has no power or discretion, in such circumstances, to delay or to elect not to calculate and to set an industry levy, and any decision to do so is illegal and ultra vires the Act, in particular section 59.

[285] At paragraph [255], the learned judge also expressed his agreement with the Commission that 'the evidence does not show any promise by the Commission that it would not be seeking to demand and collect any 2019/2020 industry levy which is lawfully due'. From this finding, the respondents have not cross-appealed

or filed a respondents' notice. Accordingly, this finding remains and cannot be set aside in the appeals.

[286] The judge's focus then shifted to the question of a 'procedural right to be consulted' and whether this has been made out to his satisfaction on the evidence. At paragraph [257], the learned judge concluded on this issue as follows:

> "[257] In keeping with my earlier finding on the consultations issue, I do find that the Commission's conduct and its statement gives rise to a legitimate expectation that the licensees would be consulted prior to the final demand for payment of the industry levy."

[287] I have given careful and deliberate consideration to the reasoning of the learned judge at paragraphs [258] to [260] for so holding, and the various arguments and counter arguments of the appellant and the respondents on this point. Accepting, as I do, the correctness as a matter of principle of the dicta of Chang JA in **Demerara Distillers Ltd v Guyana Revenue Authority** case as to the existence of a 'procedural' legitimate expectation as distinct from a substantive legitimate expectation. I am, on margin, inclined to agree with the learned judge that while the Commission has a statutory obligation to calculate, fix, impose and collect an industry levy for each financial year and as a precursor to doing so to conduct a public consultation in relation to its estimates of expenditure and income under section 63 of the Act and to obtain from the Minister of Finance approval of such estimates, it nevertheless has sufficient latitude to adopt a certain approach to the collection of such industry levy from the licensees, taking into account the then prevailing circumstances within the Territory, the telecommunications industry and even, in some instances, the particular or individual financial position of a licensee.

[288] Therefore, it follows, as the judge found, that the clear representations made by the Commission to the licensees/respondents that it would be adopting an 'amended approach' for collection of the industry levy, it would introduce a 'path for payment of the industry levy', and it would engage in discussions with stakeholders on the 2019/2020 industry levy during that financial year 'with a view

of determining a mutually agreeable plan concerning the timing and approach for collection', were collectively capable of giving rise to an enforceable procedural legitimate expectation. Furthermore, any departure from or change to these representations ought to have been conveyed in writing and within a reasonable time to the licensees/respondents, so that they could prepare themselves to meet and to pay any lawful industry levy for 2019/2020.

[289] I must say, however, that I do not accept that any statement in the Commission's 2017/2018 Budget that it 'will also credit measurable, reasonable and objectively verifiable investment by each operator in its Network and Services to the payment of the Industry Levy', is capable of amounting to a procedural legitimate expectation. This is for the simple, but in my respectful opinion, telling reason that the Commission has no power under the Act to so forego payment of or to credit anything other than a debt by the Commission to a licensee, against the payment by that licensee of a lawfully imposed industry levy or royalty payment, for that matter.

[290] For these reason ground (h) also fails.

**Remedies – grounds (i) and (j)**

[291] This issue pertains to grounds (i) and (j) in the appellant's notice of appeal. By ground (i) the appellant contends that the learned trial judge erred in making a declaration in respect of the collection of the 2020/2021 industry levy. The sole reason being that no industry levy for that financial year had as yet been issued by the Commission.

[292] It is my view that the learned judge was correct in the way in which the declaration at paragraph [273] (b) of the judgment was framed. It was not framed as if to say that the Commission had in breach of the Act issued or imposed an industry levy for the financial year 2020/2021. Instead, it was framed to declare the public

consultation in relation to that financial year to be in breach of the Act. To the extent that the appellant argues that the judge was also incorrect in making that declaration as that financial year was not the subject of the judicial review claims, is not entirely correct as Digicel BVI did in its Claim Form, seek a declaration with respect to the 2020/2021 financial year as to the Commission's failure to undertake and complete a public consultation, and a failure to submit to the Minister of Finance estimates of expected expenditure and expected income not later than 3 months before 1st October 2020. Digicel BVI also sought a declaration that the Commission cannot lawfully submit finance estimates or a work plan under section 63 of the Act or set an industry levy under section 59 for the 2020/2021 financial year.

[293] By ground (j) the appellant contends that the learned judge failed to exercise or improperly exercised his discretion under rule 56.13(3) of the CPR 2000 with respect to the appropriate reliefs to be granted on the respondents' judicial review claims. The reason being advanced in support of this is that even if the judge held that there were 'procedural improprieties' in the collection of the industry levy and/or the consultation process, 'a proper exercise of discretion would have required that directions be issued by the court on the correct procedure to be followed rather than concluding that it was not possible (sic) that the Commission could (sic) collect the industry levy for the period 2019/2020 and 2020/2021'. In my view there is no merit in this ground of appeal.

[294] CPR 2000 rule 56.13(3) provides:

> "The judge may grant any relief that appears to be justified by the facts proved before the judge, whether or not such relief should have been sought by an application for an administrative order."

[295] First of all, rule 56.13(3) provides the court with a wide discretion to grant and to frame any relief 'justified' by the proven facts in the matter under consideration. This discretion extends to both interim relief as well as permanent relief and may

be exercised even in circumstances where such relief was not sought in the particular application for an administrative order.

[296] Second, this discretionary power to grant and to frame remedies to fit the particular circumstances of a matter and the end of justice in that matter, is not new or unusual. It is vested in the High Court and Court of Appeal by virtue of section 20 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**[82] ("the **Supreme Court Act**"), which provision states (in material part):

> "The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Ordinance shall in every cause or matter pending before the Court grant either absolutely or on such terms and conditions as the court thinks just, *all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter* so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided."

[297] Furthermore, similar powers are expressly granted or conferred upon the Court of Appeal when hearing appeals from decisions of the High Court in civil matters by section 31 of the said **Supreme Court A**ct. For present purposes, I need not set out in full section 31. Suffice it to be said that in hearing and determining such appeals, this Court is empowered thereby to 'make any order which ought to have been made, and to make such further or other order as the nature of the case may require'; and, these powers may be exercised 'notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court or by any particular party to the proceedings in that Court or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties.'[83]

[82] Cap. 80 of the Laws of the Virgin Islands.
[83] Sections 31(1) and 31(2).

[298] The learned judge considered the appropriate remedies in the concluding section of his judgment at paragraphs [261] to [274]. There the judge reiterated his finding or conclusion that the Commission has acted illegally and ultra vires the Act in calculating, fixing, apportioning and demanding from each of the respondents/licensees the industry levy for the financial year 2019/2020. He also underscored that the Commission has so acted in the face of the clear and unambiguous provisions of the Act that calculating and fixing an industry levy could only be properly and legitimately done taking all income from normal sources into account and charged in defraying the Commission's 'gross permitted expenditure' and there was a resulting 'net estimated expenditure' of the Commission for the particular financial year still to be funded. Moreover, it was not permissible under the Act for royalty payments to not be taken into account in the calculation of 'net estimated expenditure' still to be funded, but to 'divert royalty payments or any part of it to the Government Consolidated Fund to fund the Government's operating expenses or use it for any purpose not authorized by the Act.'[84]

[299] The judge also found that the Commission also breached the 'clear and unambiguous provisions of the Act' in failing to 'apply the Commission's income to meet its expected expenditure and instead sought to call upon the licensees to pay an industry levy'; and in failing to have audited statements of account 'for the purposes of making adjustments under section 59 of the Act', and, to the extent that, not having these audited statements 'affected its statutory obligation to consult on its 2019/2020 Draft Work Plan and Budget.'

[300] Having considered (in a summary way) these critical findings and conclusions, the learned judge addressed head on the seriousness of them, in considering and reasoning to his conclusion of the appropriate remedies to be granted to the respondents for judicial review. At paragraph [264] he surmised:

[84] Paragraph [262] of the Judgment in the court below dated 4th April 2022.

> "[264] These breaches were serious breaches, as these were critical matters connected as it were to the decisions to impose and collect a levy from these licensees. The decisions taken were effectively rendered meaningless."

[301] I must state here that I agree wholesale with the judge's classification of the seriousness of these breaches by the Commission and as to the meaningless outcome of each of these decisions, including, most importantly, the decision as to the calculation, fixing and imposition of the industry levy for 2019/2020 financial year. However, the judge did not stop there. At paragraph [265] he held that the decision to impose and implement the industry levy for 2019/2020 year was also 'irrational and Wednesbury unreasonable for the reasons which are set out above'. Likewise, the Commission's 'conduct and statements give (sic) rise to a procedural legitimate expectation that the Commission would consult with the licensees on the timing and approach to payments of the industry levy'.

[302] Accordingly, at paragraph [267] the learned judge reached his conclusion that 'the only remedy is to quash the several decisions to impose and demand an industry levy from each of the licensees in keeping with their respective claim for relief'.

[303] In my judgment, while the learned judge did not refer specifically to the discretion conferred on him by CPR 2000 rule 56.13(3), he clearly had in his mind that he was exercising a discretion as to the nature and extent of the remedy or remedies to be granted having due regard to the key or significant findings which he had made in the judgment as to the Commission acting illegally, ultra vires and in breach of the Act and irrationally. The judge gave due consideration to those findings and conclusions and, most importantly, as to how serious the breaches of the Act were particularly in the context of clear and unambiguous provisions of sections 58, 59 and 60 in particular. There can be no question that these breaches were serious, especially the decision of the Commission, without absolutely no statutory or other authority or power, to decide to transfer over to the Government by payment into the Consolidated Fund, royalty payments and not to factor such payments into the income of the Commission in its estimates, in the face of the

pellucid provisions of section 58(1), a matter which the Commission conceded on appeal. These decisions were clearly irrational and Wednesbury unreasonable, warranting their quashing, by writ of certiorari.

[304] For all these reasons, there is no merit in ground (j) in the appellant's notice of appeal which ground also fails. The declarations and orders made by the learned judge at, respectively, paragraphs [272] and [273] of the judgment in the court below are accordingly upheld.

**Disposition and Orders**

[305] The appellant has failed on all grounds of appeal in relation to each of these three appeals. Accordingly, I would make the following orders:

(1) the three appeals BVIHCVAP2022/0003, BVIHCVAP2022/0004, BVIHCVAP2022/0005 stand dismissed;

(2) the declarations and orders of the learned judge at paragraphs [272] and [273] of the judgment in the court below are affirmed;

(3) the respondents shall each have their costs of the particular appeal pertaining to them, such costs to be assessed by a judge of the Commercial Court or by a Master, if not agreed within 30 days from the date of delivery of this judgment.

I concur.
**Ingrid Mangatal**
Justice of Appeal [Ag.]

I concur.
**Dexter Theodore**
Justice of Appeal [Ag.]

**By The Court**

**Chief Registrar**