

**THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

IN THE MATTER OF THE TELECOMMUNICATIONS ACT, 2006

AND

**IN THE MATTER OF RULE 56.7 OF THE EASTERN CARIBBEAN SUPREME COURT CIVIL
PROCEDURE RULES, 2000**

CLAIM NO. BVIHCV 2020/0136

BETWEEN:

[1] CARIBBEAN CELLULAR TELEPHONE LIMITED

[2] BVI CABLE TV LIMITED

CLAIMANTS

- AND -

**TELECOMMUNICATIONS REGULATORY AUTHORITY
DEFENDANT**

CLAIM NO. BVIHCV 2020/0153

BETWEEN:

DIGICEL (BVI) LIMITED

CLAIMANT

- AND -

**TELECOMMUNICATIONS REGULATORY AUTHORITY
DEFENDANT**

CLAIM NO. BVIHCV 2020/0160

BETWEEN:

CABLE AND WIRELESS (BVI) LIMITED

CLAIMANT

- AND -

**TELECOMMUNICATIONS REGULATORY AUTHORITY
DEFENDANT**

Appearances:

Mr. Sydney Bennet Q.C. for the Claimants, Caribbean Cellular Telephone Limited and BVI Cable TV Limited

Mr. Nigel Pleming Q.C., Mr. Paul B Dennis Q.C., Ms. Asha Johnson Willins, Mr. Jarleth Burke of O'Neal Webster for the Claimant, Digicel

Mr. Brian Child, Laura Gunn, of Campbells for Cable and Wireless

Mr. Terrence B Neale, Nelcia St. John instructed by Mc W. Todman & Co. for the Defendant Commission.

2021: March 10, 26;

June 16, 18;

July 12 - 20;

2022: April 4.

Judicial Review – Challenge to decisions of the BVI Telecommunications Regulatory Commission (the Commission) – Illegality – Ultra Vires - Industry Levy - Whether the Commission failed to comply with legislation in fixing levy – Whether the Commission failed to conduct proper consultations for the purpose of fixing and apportioning the levy – Whether the Commission applied royalty payments for improper purposes – Legitimate Expectation – Whether the Commission's statements and conduct gave rise to an enforceable legitimate expectation – Commission acted illegally and ultra vires the Act in calculating the fixing the Industry Levy – Commission failed to adequately consult with the licensees – Commission's statements and conduct not giving rise to an enforceable legitimate expectation for a substantive right - Commission's statements and conduct not giving rise to an enforceable legitimate expectation for a procedural right – Costs on a Judicial Review Claim – Award of Costs

The telecommunications sector in the British Virgin Islands (BVI) is presently regulated by the BVI Telecommunications Regulatory Commission (the Commission) under the BVI Telecommunications Act of 2006 (the Act). The Act imposes various obligations on all licensed telecommunications service providers including the obligation to make annual royalty payments of not less than three percent of the gross earnings or such percentage as may be prescribed. The Act also speaks to the payment of an industry levy to be paid by each of the licensees.

Since 2007, these licensees have been making the annual royalty payments. No industry levy has been paid to date. In fact, no earnest demand for any industry levy was made by the Commission until 2016, when the Commission began discussions with the several licensees about such payments. At this point, the Commission informed the licensees that the royalty payments belong to the Government and should be paid into the Consolidated Fund, and that royalty payments should not have been used to fund the Commission's expenditure. The several licensees resisted the introduction of the industry levy raising a number of objections. High on the list of such objections were that (a) the Commission had acted in breach of the Act by seeking to divert royalty payments to government, and (b) that it had incorrectly calculated the industry levy. Questions were also raised about the absence of audited financial statements from previous years which the licensees argued were critical to the calculation of the industry levy. No industry levy was implemented and collected that year, but the Commission in 2016, outlined the process it would adopt to calculate and fix the levy and in particular stated that each licensee's share of any levy would be that percentage that its revenue represented in relation to the overall combined revenue of all licensees. Between 2016 and 2018, the Commission presented Draft Work Plans and Budget for the 2017/2018 and the 2018/2019 financial years, with allocations being made in each for the

payment of an Industry Levy. Notwithstanding that such a figure for a levy payment was in each of these years budget document, the Commission did not enforce collection of any such payments. In relation to the 2016/2017 industry levy, the Commission waived this payment because of the devastation caused to the Telecommunications' Industry by the hurricanes Irma and Marie. The Commission made it clear that in the upcoming year, the industry levy would have to be paid.

In 2019, following its statutory obligations under the Act, the Commission began the consultation process aimed at collecting an industry levy for the 2019/2020 period from each of the Licensees. The Commission circulated the 2019/2020 Draft Work Plan and Budget (2019/2020 Budget) which reflected operating expenses for that period' to inform and guide the consultations process. Several things became apparent from this 2019/2020 Budget. First, it was clear that the Commission intended to treat royalty payments as belonging to Government, to be paid into the Government's Consolidated Fund. Second, it was also clear that the Commission expected that all of the Commission's operating expenses as well as capital expenditure would be funded by the Industry Levy. At the end of the period set for consultations, the Commission's 2019/2020 Budget was approved by the Minister and the Commission sent out invoices to each of the licensees demanding the payment of each licensee's prorated share of the industry levy

The licensees each objected to the imposition and payment of the Industry Levy which was fixed and apportioned among them. Each of the licensees commenced a judicial review claim. By an order of the Court, it was agreed that these claims would be heard together.

The main objection of the licensees was that the Commission had acted ultra vires and illegally in calculating and fixing the industry levy. The first basis for this contention was that the Act required that the industry levy is to be calculated with reference to audited financial statements from the previous financial year and that there no such audited financial statement. The second basis for this contention was that the Commission had failed to properly interpret sections 59 and 63, and as a result had misrepresented what the Commission's 'net estimated expenditure' which was to be used as a base for calculating the Industry Levy. The third basis for this contention was that the Act required adequate public consultations to be held on the Commission's 2019/2020 Budget as well as with respect to apportionment of the industry levy between the various licensees. They argued that any consultations done fell short of the required standard.

The licensees also objected to the Commission's treatment and diversion of the royalty payments and the possibility that the Commission intended to even divert the industry levy it was seeking to collect, to the Government, for the latter's operating expenses. The licensees contended that the Act made it clear that royalty payments had to be treated as part of the Commission's 'funds and resources' to be applied to meet its permitted expenditure; diverting these payments to the government's Consolidated Fund was impermissible under the Act. It was argued that monies which were part of the 'funds and recourses' of the Commission was only required to be paid over to the Government where it fell to be considered 'surplus' in that all the expenditure of the Commission was met, and there was still monies remaining in the hands of the Commission. The argument was that once royalty payments remained with the Commission as part of funds and resources to be applied towards permitted expenditure, then any 'net expenditure' which was required to be funded by an industry levy would be significantly reduced or might disappear altogether.

Complaints were made that the decisions of the Commission to impose and demand an Industry Levy from each of the licensees was irrational and unreasonable. It was argued that the Commission acted irrationally when sought to demand that the industry levy fund all of the expenses of the Commission without seeking to apply any of its income to offset any amount of this levy and in failing to follow the clear provisions of the Act.

The licensees also contended that they had an enforceable legitimate expectation that the Industry Levy would not be imposed for the 2019/2020 financial year particularly without prior consultation, notice or without compliance with the Act. The licensees relied on the Commission own position stated in 2010, that it would not seek to collect the Industry Levy without being in compliance with the Act; its non-compliance continues. Even though there had been discussions of an industry levy and its inclusions in historical budgets, the Commission has never followed through on a demand that the industry levy be paid until it did for the 2019/2020 period.

The Commission contended that the licensees' arguments were a meritless attempt to avoid their respective statutory and contractual obligation to pay an industry levy. The Commission first argues the Act does not require audited financial statements from the previous financial year to calculate the industry levy; it is only required for the purposes of making any adjustment if there was a surplus or deficit from the previous year. In circumstances where the licensees has never paid any industry levy, there can be no question of a surplus, only a deficit. Since the Commission has waived the payment of all previous industry levies, the absence of audited financial statements therefore benefits the Licensees, which in the adjustment process would have had the effect of increasing the industry levy to be paid by each licensee. The Commission states that it had notified the licensees for a number of years that because of the delayed implementation of the payment of the industry levy, there would be no adding or subtracting of surpluses or deficits and since there had been no objection to this, the licensees were also estopped from raising that the absence of audited statements affects the validity of the process or that it has caused them any prejudice.

On the issue of public consultations, the Commission contended that it had complied with its duty under section 63 to consult on the calculation and fixing of the industry levy. It had sent put public notices to all the licensees and that the 2019/2020 Draft Work Plan and Budget had been shared for public consultations in a timely manner. The Commission pointed out that the 2019/2020 Budget had contained a specific allocation for the Industry Levy and that that several of the licensees had provided feedback. These had been taken into consideration in fixing the industry levy. The Commission contended that it was not required to consult again when it was seeking to apportion the Industry Levy among the licensees.

As far as royalty payments are concerned, the Commission contends that a proper interpretation of the relevant provisions makes it clear that the operating expenses of the Commission must be paid for by an industry levy, which has to be retained by the Commission for its own use (except where the Minister otherwise directs), and that all surplus by way of income must be paid over to government. This would therefore mean that royalty payment would always fall to be considered a surplus and therefore the Act makes it clear that it must be handed over to the government for the latter's operating expenses. The Commission also contends it is a regulatory body as defined by the Act and therefore not the owner of the telecommunications rights which are vested in the Government consequently any collection of Royalty fees must be presumed to be monies held on behalf of the Government. The Commission relied on a 2007 Policy Document issued by the Government which stated that royalty payments are to be regarded as a 'direct contribution to the public finances' as corporation tax had been abolished. It contended that the Court should have regard to several aids to construction including this Policy Document when determining this issue as to whether royalty payments belonged to the government.

As far as arguments or irrationality are concerned, the Commission relied on its constant position that it has acted properly as a reasonable Commission would.

As far as the licensee's' legitimate expectation argument is concerned, the Commission argued that the licensees have not presented any evidence upon which they can base this contention. The Commission relied on statements it made in its 2017/2018 Draft Annual Work Plan and Budget which was shared with the licensees that the Commission was on its way to collecting the industry levy for the 2017/2018 period and all subsequent years.

HELD: Granting certiorari quashing the respective decisions of the Commission to impose an industry levy on the respective claimants, that:

1. The question of whether royalty payments are to be retained by the Commission as part of the funds and resources of the Commission to be applied to its permitted expenditure or whether it is monies collected on behalf of the government is one of statutory interpretation. Section 58(1) and (2), on a literal interpretation, makes it clear that royalty payments are part of the 'funds' of the Commission and that such 'funds' shall be applied to those permitted expenditure. It would therefore mean that in the calculation of any budget by the Commission under sections 63 and 59 of the Act, royalty payments are to be recorded on the income side of the budget. This interpretation is confirmed by section 102 of the BVI Constitution, which, speaking to revenue or money raised or received by and for the purpose of the Government of the BVI, expressly recognizes that moneys collected by any Public Authority may be retained by that authority to fund its expenses, if that is prescribed for by any law. For the BVI Telecommunications Commission, that law is section 58(1) and (2) of the Act. Having regard to the literal meaning of the various provisions which showed without ambiguity what royalty payments are, there is no need nor any basis for the Court to consider extraneous aids to statutory interpretation to discover what are 'royalty payments'.

Further a proper construction of the relevant provisions of the Act shows that there are no gateways through which 'royalty payments' clothed with this status, may be diverted and paid over to the Government for the latter's operational expenses. A power given to the Commission to retain monies paid by way of industry levy (unless the Minister, with the approval of council otherwise directs), cannot be read to mean, that 'royalty payments' are to be handed over to Government. That would lead to an absurdity in that it would mean that all forms of income received by the Commission, other than the industry levy, are to be handed over to the Government for the government's operating expenses.

Section 65 of the Act requires the Commission to hand over to the Consolidated Fund, monies considered to be 'surplus' on a budget approved by the Minister for any financial year, but this cannot be read to mean that therefore, royalty payments may be considered 'surplus'. For the avoidance of doubt, 'royalty' payments are part of the normal income of the Commission to fund its permitted expenditure, and once paid over to the Commission it does not enjoy any special status that separates it from other sources of income. 'Surplus' in the section 65 context, simply means any sum remaining with the Commission after there has been approval for Commission's expenditure for any financial year, and there is sufficient income (excluding the industry levy) to fund that expenditure. Once any monies are properly paid over to the Government's Consolidated Fund, it belongs to the Government to be applied in the normal way to government spending. The Commission has no right to have this money returned by the Government, but the Government may exercise powers under section 58 to provide funding to the Commission for permitted expenses through an appropriation by the Legislative Council.

2. The Commission's statutory power to calculate, fix and apportion any Industry Levy must be done in accordance with sections 59 and 63 of the Act. Section 59(2) requires that an Industry levy must be calculated with reference to the 'net estimated expenditure' of the Commission which is approved by the Minister under section 63. A purposive reading of these two provisions, together with section 58(1) and (2) of the Act shows clearly that the income of the Commission shall be applied to fund its 'permitted expenditure' which has to be properly approved by the Minister under section 63. Therefore, once the Minister approved what is the expected expenditure for any financial year, the income of the commission from all sources (including the royalty payments but excluding any Industry Levy) is to be applied to that expenditure. If there is any expenditure which cannot be funded by the Commission's normal sources of income, that expenditure would be regarded as the 'net estimated expenditure' for the purposes of section 59(2) to commence a calculation of a possible industry levy. To this sum, a contingency of ten per cent must be added and this would represent a notional Industry Levy, which has to be then adjusted under section 59(2) of the Act to get to an actual industry levy. Section 59(2) requires that estimated net expenditure and the ten per cent contingency, is to be adjusted by an increase or a reduction from any deficit or surplus which is respectively shown from the audited statements of the previous financial year. It is possible that a surplus from the previous year may have the effect of reducing the figure to zero, in which case no industry levy may be recoverable from any of the licensees.
3. 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 legislators were 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'. 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 of the Commission's permitted expenditure. The importance of audited statements must now be apparent. 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 financial 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. 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.

4. A statutory body imposed with a statutory duty to consult must not only comply with the common law duty of procedural fairness in the treatment of persons whose legally protected interests may be adversely affected but must also ensure meaningful public participation in the local authority's decision-making process. The degree of specificity with which, in fairness, the statutory authority should conduct its consultations exercise may be informed by the statutory context 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.
5. As far as whether there should be separate consultations under Sections 63 and then under section 59, the legislation can be construed to requiring only one such process. A purposive construction of this section requires that before the Commission assesses the industry levy which it intends to impose on each licensee or authorization holder it is obliged to provide an opportunity for adequate consultations. Such adequate consultations would require that each of these entitles 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.

Since the 2016/2017 Budget process, all of the licensees were informed of the approach that the Commission would take and the method which it would use to apportion each Licensee's share of the Industry Levy. Everyone was told from the inception how each of their share of the industry levy would be calculated, and in sufficiently clear terms, to enable them to make an intelligent response'. When the 2019/2020 Budget consultations began, it was surely open to the licensees to provide relevant responses on this issue of apportionment. Each of them could have objected to this method. Any of them could have asked the Commission to consider their own expenditures and intended expenditure on capital projects and perhaps on monies spent on rebuilding. Any of them could have asked the Commission to consider that it had spent considerable sums on improved technological advances and that should affect their share of the overall industry levy. There could be many reasons why the Commission could legitimately decide to adjust an individual licensee's share of industry levy payment. This process would have to be a transparent one so that other licensees would understand why a prorated approach would not work. 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. It is enough that the Commission remains flexible on its 'pro-rata' formula for calculating the industry levy during the consultation period.

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 finalising any decision'. In this case, and on this aspect of the Consultation process, that is, the method of apportioning the share each licensee would bear with regards the Industry Levy, the Commission did act fairly.

6. Such adequate consultations under its section 59 obligations, would also require that the Commission fairly and proper consult on the timing and approach it would take on payment of the industry levy that it sought to implement. Fairness would have required in the historical

context, and the Commission's continuous waiver of fees, and the objections being raised by the licensees of hardship from the COVID 19 pandemic, as well as the Commission's own indication that it expected discussions on this issue, to have held those consultations in a meaningful way. On this aspect the consultations were not legally adequate.

7. For a body such as this Commission, in carrying out its duty under section 63 of the Act, it was obliged 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. The Commission must therefore approach these consultations in a manner that allows the operators a real opportunity to properly participate in the decision-making process by way of legally adequate consultations. This would, at minimum, require that the Commission prepare and keep audited financial statements of the previous year. The Commission must also bring all of the financial record keeping up to date. The Act requires this. The availability of such financial records would allow all consultees to be able to respond intelligently on estimates for expenditure as they would have proper financial documents to make comparisons with. This would in turn provide two levels of scrutiny for the Commission's financial obligation.

First, the consultees would be well placed to screen budget items for inflation and to even check to see how previous years budgeted proposals compared to actual spending. Whether there is inflation, unintended or otherwise? Whether the Commission is spending on matters which are relevant to the industry's needs? These are matters which could properly be interrogated. While licensees in the sector may not direct the Commission on its spending, the consultation process would surely entitle the operators to participate and to point out areas of spending and offer comments which might influence the Commission and the Minister in their own decision-making. Each of these licensees brings their expertise to the table and the structure of the Act provides the opportunity for these skills to be brought into the process. The explanatory notes of audited statements and other public financial documents, therefore, are documents relevant to providing intelligent feedback on any budget. As it is, the 2019/2020 budget listed broad categories of expenditure such as 'special project' and 'capital expenditure' without providing any details of what the special project is, or how the final sum for capital expenditure was arrived at.

Second, a transparent accounting system complete with audited statements with their explanatory notes and reports, may benefit both the Commission and the Minister from informed responses from the consultees on relevant matters related to budget estimates. In a conscientious approach to decision-making, the Commission might revise its own position before it sends its draft work plan and budget to the Minister for approval. Such meaningful and 'intelligent' feedback may also affect the mind of the Minister when he is deciding whether to approve of the Commission's Budget with or without modifications.

In these circumstances, the Commission failed to properly consult in relation to both its section 59 and 63 obligations.

8. Complaints were made that the decisions of the Commission to impose and demand an Industry Levy from each of the licensees was irrational and unreasonable. First, a Commission cannot be held to be acting unreasonably or irrational simply because it seeks to carry out its duties as required by the Act. The Commission has a statutory duty to engage the process with a view of imposing and demanding the payment of an industry levy where such a levy is warranted under the Act. 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. The Court's role is limited to screening the procedure and the decisions made to determine first (a) whether the proper procedures were followed and (b) whether it falls outside the range of reasonable responses of the statutory decision-making body. When this Commission failed to provide its audited financial statements, it would have affected the consultees' ability to provide intelligent responses. A reasonable Commission must have realized that a consultee would not be properly placed to make an intelligent response to a proposed budget when there were generalized line items related to expenditure and there were no audited statements to make comparisons with and to use as context for the consultations. In the circumstance of this case, no reasonable Commission, having regards to the statutory context of this Act could have decided to engage the consultation process without completing its audited financial statements.
9. This Commission also acted unreasonably when in construing clear and unambiguous provisions of the Act and section 102 of the BVI Constitution, it concluded that 'royalty' payments belong to the Government in the sense that they should be diverted to the Government's Consolidated Fund. The Commission acted irrationally when it sought to demand that the industry levy fund all of the expenses of the Commission without seeking to apply any of its income to offset any amount of this levy. In approaching its statutory mandate in this manner, the Commission seriously misdirected itself on several points of law. These mis-directions were so grave and inexplicable that they fell outside the range of reasonable responses that any Commission would make.
10. A claimant for judicial review may be entitled to relief on the basis of a legitimate expectation even though he has no other basis for claiming such relief. 'The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice or policy. In all instances the expectation arises by reason of the conduct of the decision-maker and is protected by the courts on the basis that principles of fairness, predictability and certainty in administration should not be disregarded and that a legitimate expectation should not be disappointed.' Having regards to the statutory mandate given to the Commission to impose and demand the payment of an Industry Levy in accordance with the Act, a licensee could not rely on any statement or conduct of the Commission to ground any legitimate expectation, that it would not demand and collect any industry levy lawfully due. 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 the Commission has 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.

11. In a case where the statutory authority, in this case the Commission, cannot promise away its substantive duty to collect a levy, a clear and unambiguous promise 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. In its 2017/2018 Budget document the Commission made it clear that in the future, it would be adopting 'an amended approach' for the collection of the industry levy', and that the Commission will not only introduce 'a path for payment of the Industry Levy' but will also credit measurable, reasonable and objectively verifiable investment by each operator in its Network and Services to the payment of the Industry Levy and allow operators to establish a plan for payment.' In the 2019/2020 Work Plan and Budget, the Commission stated that it 'anticipate[d] discussions with 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.' In the context of the historical dealing between the parties on the collection of an industry levy, the previous stance of the Commission in waiving payments on the basis of industry hardships and the contention of hardships arising from the COVID 19 pandemic, it was reasonable for the licensees to rely on the Commission's statements and conduct to engage the licensees on the 'timing and approach to collection' before sending out its final demand for payment. The statements and conduct of the Commission in this regard has risen to an enforceable legitimate expectation. The licensees who asserted this legitimate expectation are entitled to rely on this expectation and this Court will enforce it.

Explaining: Sections 58, 59, 65 of the Virgin Islands Telecommunications Act 2006
Section 102 of the Virgin Islands Constitution

Considered:

Cases:

Agricultural Training Board v Aylesbury Mushrooms [1972] AER 280
Althea Maynard and another v Eastern Caribbean Asset Management Corporation (as receiver of ABI BANK LTD) (Anguilla) Civil Appeal No. 47 of 2018
Birmingham City Council and Others v H (a minor) [1994] Vol 1 All ER 12
Bolton Metropolitan District Council and others v The Secretary of State for the Environment [1995] Vol 1 WLR
Birkdale District Electric Supply Co Ltd v Southport Corpn [1926] AC 355
Chefette Restaurants Ltd v Harris (2020) 98 WIR 79
Council of Civil Service Unions and others v Minister for the Civil Service 1985] AC 374
Carnwath in Lambeth LBC v SSHCLG [2019] 1 WLR 4317
Corocraft Ltd v Pan American Airways Inc. [1968] 3 WLR 714 at 732.
Demerara Distillers Ltd v Guyana Revenue Authority (2008) 73 WIR 244
Deon Davis v Commissioner of Police SVG Magisterial Appeal No. 34 of 2004
Douglas and Others v Pindling (1996) 48 WIR 1
Dobie v Burns International Security Services (UK) Ltd [1984] ICR 812
Eastern Caribbean Court of Appeal in Re Blake - (1994) 47 WIR
Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496

Friar Truck Ltd. and Quiver Inc v International Tax Authority BVIHCAP2017/0003
 International Rights in Europe intervening) [2018] 4 WLR 168
 In Re Sutherland District Council [1987] Lexis Citation 150
 Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) 2016 UKSC Para 48-51
 Midland Bank Trust Co. Ltd. and another v Hett, Stubbs & Kemps (A Firm) [1979] Vol 1 CH 384
 National Justice Compania Naviera SA v Prudential Assurance Co. Ltd ("The Ikarian Reefer") [1993] Vol 2 Lloyd's Rep. 68
 Rank Xerox Ltd. V Lane (Inspector of Taxes) [1978] Vol 2 WER 1124, 1128
 Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472
 Rollo and another v Minister of Town and Country Planning [1948] Vol 1 All ER 13
 R. v Broadcasting Compliance [1975] Vol 2 All ER 522
 R v Devon County Council, ex parte Baker [1995] 1 All ER 73
 R. v Hammersmith and Fulham London Borough Council, ex parte Beddowes [1987] 1 All ER 369
 R (Miller) v Prime Minister [2019] UKSC 41
 R (Help Refugees Ltd) v Secretary of State for the Home Department (Centre for Advice on R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213
 R (Mosely) v Haringey LBC [2014] 1 WLR 3947
 R (Nettleship) v NHS South Tyneside Clinical Commissioning Group [2020] EWCA Civ 46
 R (A) v South Kent Coastal CCG [2020] EWHC 372
 R v (on the Application of Moseley) v Haringey London Borough Council 2014 UKSC 56
 R v Lord President of the Privy Council ex parte Page [1993] AC 682
 R. v Secretary of State for the Home Department, ex parte Khan [1985] Vol 1 AELR 40
 Sylvester Spencer et al v Regino Nicholas Civil Appeal No. 22 of 2019 (OECS) (unreported)
 Strict (Inspector of Taxes) v Regent Oil Co. Ltd. [1964] 1 W.L.R. 309
 Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited. Civil Appeal No. 13 of 2016 (delivered 30th May 2018 (OECS) (unreported).
 Universal Caribbean v James Harrison [1997] ECSCJ No. 29
 United Policyholders Group and others v Attorney General [2016] 4 LRC 433
 Woolwich Equitable Building Society v Inland Revenue Commissioner [1993] A.C. 70

Texts:

Bennion Statutory Interpretation 3rd Edition Pg. 14 – 16
 Concise Oxford Dictionary of Current English
 De Smith's Judicial Review (8th Edn., Sweet & Maxwell), paragraph 5-058 (as amended by paragraph 5-058 in De Smith's Judicial Review – Third Supplement to the Eight Edition (Sweet & Maxwell))
 Eastern Caribbean Supreme Court Civil Procedure Rules 56.13 (3)
 Encyclopedia of Forms and Precedents 5th Edition Para 1372 – 1430 & 170 – 1476
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 23
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 26
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 33
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 77
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 78
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 83
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 86
 Halsbury's Laws of England 4th Edition Vol.1 (1) Para 92

Halsbury's Laws of England 4th Edition Vol.1 (1) Para 93 – 94
Halsbury's Laws of England 4th Edition Vol.1 (1) Para 117 & 122
Halsbury's Laws of England 4th Edition Vol.1 (1) Para 1475
Halsbury's Laws of England 4th Edition Vol. 4 at para 50
Halsbury's Laws of England 4th Edition Vol.44 (1) Para 1371
Halsbury's Laws of England 4th Edition Vol.44 (1) Para 1369 – 1379
Judicial Review Handbook 7th Edn. (2020) Sir Michael Fordham at pp 793.
UK Civil Procedure Rules 2014 Para 54.16

JUDGMENT

- [1] **RAMDHANI J [AG.]**: These are three separate claims for judicial review of decisions made by the Virgin Islands' Telecommunications Regulatory Authority. Though not consolidated, these matters were, with the agreement of all the parties, heard together. There was also agreement that a single judgment would be issued for all three matters.
- [2] The claimants in all the matters are successful in terms of the reliefs granted in this judgment and for the reasons that are now set out.

The Parties

- [3] The three claims were filed by three entities providing telecommunication services under the Telecommunications Act of the British Virgin Islands ('the Act') and who have all been granted licenses to granted under section 15 of the Act for '*The Operation of a Telecommunications Network and for the Provision of Telecommunications Services in the British Virgin Islands*'.
- [4] All of the claims were filed on 5th October 2020. The first fixed date claim filed in time, was filed by two companies incorporated under the laws of the BVI, namely the Caribbean Cellular Telephone Limited ('CCT') and BVI Cable TV Limited ('BVI Cable TV') are both companies incorporated under the laws of the BVI. CCT's address is at 333 Geneva Place, Road Town, Tortola, BVI and BVI Cable TV's address is at Fish Lock Road, Road Town, Tortola BVI.
- [5] The second claim filed in time was filed by Digicel (BVI) Limited ('Digicel') which is a company incorporated under the laws of the BVI, with its registered office at Road Town, Tortola, carrying on business as 'Digicel'.

- [6] The third claim filed in time was filed by Cable and Wireless Limited (BVI) Limited with its registered office at Craigmuir Chambers, P.O. Box 71, Road Town, Tortola, BVI VG1110, and is a company incorporated in the Territory of the Virgin Islands (the “BVI”), carrying on business as ‘FLOW’.
- [7] The defendant, the Telecommunications Regulatory Commission, is a statutory regulatory body, established by section 5 of the Act and is responsible for regulating the telecommunications sector in the BVI and for carrying out the functions contemplated by section 6 of the Act. Section 15 of the Act gives the Commission the power to grant licenses and prescribes the terms of those licences. The Commission is also given a statutory power to collect royalty payments and industry levies from licensees.
- [8] At the trial, the claimants relied on all of the affidavit evidence together with the exhibits filed with respect to each claim¹. FLOW relied on the expert report of Ms. Schellon Horn and Mr. Luke Steadman. Digicel relied on the expert report of Michel Griffen. The experts gave evidence at the trial and were cross examined.

The Factual Context of the Claims

- [9] The Act came into force in 2006. It established the Commission and gave it *inter alia*, a mandate to regulate the telecommunications industry and to issue licensee to suitable services providers within the sector. Under the Act, licensees are required to make royalty payment. The Act also speaks to the imposition of an industry levy to be paid by licensees. Such levy is to be paid with reference to the Commissions operating ‘financial year’ which begins on 1st October and ends on 31st September in the following year.²
- [10] Just a few months after, on 10th January 2007, the BVI Government published a policy document (‘the 2007 policy document’) entitled “Telecommunications Liberalisation in the British Virgin Islands”. The 2007 policy document states that the percentage of gross annual revenue collected

¹ For CCT and BVI Cable TV, the affidavit of Averad Penn dated 5th October 2020, For Digicel, the affidavits of Kevon Smith dated 12th August 2020, Marcia Lyght-Robin dated 25th September 2020. For FLOW, the second and third affidavits of Ravindra Maywahlall dated 5th October and 30th November 2020. The Commission relied on several affidavits of Guy Lester Malone to answer each of the claims – each dated 16th November 2020.

² Section 62 of the Act.

from the licensees by way of the industry levy should be “subject to a maximum of 2% of the licensees’ turnover”.³

- [11] In 2007, the Commission granted telecommunication licences under section 15 of the Act to these four service providers, the claimants in these claims. Each of the licensees was required to make annual royalty payments to the Commission in accordance with section 60 of the Act. From the inception, no industry levy was demanded or collected. The Commission had been using royalty payments and other income to fund its operating expenses.
- [12] In 2010, the Commission confirmed in writing through its then Chief Executive Officer, that no industry levy would be collected for ‘the past two years’ as the industry levy ‘was not previously established in accordance with section 59 of the Telecommunications Act’.
- [13] The issue of an industry Levy was revived in 2016 when the Commission gave notice of a public consultations on a draft work plan and budget for the 2016/2017 financial year. The operators were given notice that the Commission intended to introduce the implementation and collection of the Industry Levy. The published work plan stated:

“On 10 January 2007, the Government of the Virgin Islands produced the Telecommunication Liberalisation in the Virgin Islands Document as the passageway to close the telecommunications monopoly and introduce competition in the telecommunications industry in the BVI.

It has been nine years since the Act has been enacted. Under this Act, the Commission is intended to have two revenue streams from the Licensees, namely the Annual Industry Levy and the Annual Royalty Fees.

The Annual Industry Levy is a charge on the Licensed Operators intended to financially maintain the Commission in the performance of its duties pursuant to section 6 of the Act, as the regulators of telecommunications in the British Virgin Islands.

The Royalty fee is a fee charged by the Commission to each licensee equal to the amount of 3% of its gross revenues derived from services provided under the Licensee collected by the Licensee. The Licensee are required to provide the Commission with audited accounts each year on which the Commission bases the calculation of Royalty fees. Royalty fees are due to be paid by the Licensees no later than 5 April each year.

For the past nine years the Commission has been collecting and using the Royalty fees alone to carry out the functions of the Commission. The Commission has so far not implemented or collected the Industry Levy. The Commission collected revenue from the

³ Second Affidavit of Ravindra Maywahlall dated 5th October 2020. The factual narrative outlined here is substantially taken from this affidavit. This narrative has not been disputed and even the Commission has made reference to this affidavit as setting out the historical context of the claims.

Licensee, as if the licensees were still only accountable for Royalties as applied under the former Telecommunications Act Cap. 171, as amended.

The industry regulated by the Commission has become more complex based upon new technologies, products and services, as have the issues that have come before the Commission. Consequently, the costs of fulfilling its duties have increased substantially. It has now become necessary for the Commission to begin collecting the Industry Levy from each of the Licensees to fund the work of the Commission going forward. The Royalties in the past have been used to support the work of the Commission. In the future, a portion of the Royalties will be paid to the Government of the Virgin Islands.

The Commission intends to begin collecting the Industry Levy on 1 October 2016, for the financial year 2016/2017 following this consultation. The Commission does not intend to collect the industry levy for the prior years. The Commission gave notice to the licensees on the 23 February 2016 of its intent to implement the industry levy for the Commission's 2016/2017 financial year.

The Commission has given the Licensees more than enough time to recoup their capital investment, pay their shareholders and stakeholders in the industry. The Commission thanks the Licensees for the investment that they have made in the telecommunications industry in the BVI."

- [14] In that same Work Plan, the Commission set out the process it would adopt to calculate, fix and implement the industry levy. The document outlined the process thus:

Process for the Implementation 2016 – 2017

Step 1

Approval of the Commission Work Plan and Budget by the Commission board Members (Completed on May 30, 2016)

Step 2

Notice of Consultations published at least 14 days prior to the Consultations (Completed on June 2, 2016) and conduct a 28 days' public consultations on the Work Plan and Budget 2016/2017 and introduction of the Industry Levy and publishing of responses received and reporting on the results of the Consultations.

Step 3

Approved Work Plan and Budget sent to the Minister responsible for finance to be approved by the House of Assembly.

Step 4

Assess the proportion of the Industry Levy to be paid by each of the licensees and authorization holder. Each licensee shall be issued an invoice for the Industry Levy for which they have four weeks to pay the assessment.

Please note that for this first-time implementation the Commission will not be adding or subtracting the previous financial years, because it is nine years delayed in its implementation.”

- [15] The Work Plan and Budget document then outlined the formula by which the industry levy would be calculated. It explained it this way:

“...the formula calculation is as follows: (Total revenue of Company A / Total Applicable Revenue of all Operators x Total Applicable Expenditure Budget of the Commission...”

The industry Levy would be prorated among all the licensees in proportion to their respective percentage share of the combined revenue of all of them.

- [16] Several of the licensees objected to this attempt to introduce the industry levy and provided extensive responses on the two documents and the proposed implementation of the industry levy which they labelled as being sudden and not in keeping with the Commission’s previous stance. The expressed concerns of the licensees being the impact which such an industry levy would have on the industry, that is the licensees, authorization holders, and ultimately on the consumer and the general public. In particular, complaints were made that (a) the Commission had misapplied the Act and that its method of calculating the levy was contrary to the Act; (b) that the Commission had no legal power to give away the Commission’s royalty payments to the Government; and (c) that audited financial statements were a pre-requisite for calculating the industry levy. Questions were also raised about the nature and quantum of certain items of expenditure.
- [17] The Commission in turn, published on 27th September 2016, a statement in reply to the responses received. In this statement the Commissions sought to address the various matters raised by the licensees.
- [18] A communication from three licensees (CCT, FLOW and Digicel), dated 5th October 2016 seeking a meeting with the relevant Minister was overtaken by a demand from the Commission, being made in February 2017 for payment of an industry levy from the licensees.
- [19] This in turn triggered the licensees, on 2nd March 2017, to collectively communicate with the Commission complaining that the Commission had failed to comply with several provisions of the Act in seeking to implement the industry levy.

- [20] On 26th May 2017, the Commission wrote to FLOW indicating that it was postponing the deadline for the payment of the industry levy 'until further notice'. The Commission also confirmed that it would meet with FLOW alone and set out six points of discussions that would be addressed. The licensees insisted that a collective meeting should be held, and one was scheduled to take place on 14th August 2017 but did not take place because of some adverse weather conditions.
- [21] On 4th September 2017, the Commission published a consultation document relating to the annual Work Plan and Budget for the 2017/2018 period ('the 2017/2018 budget'). On 6th September 2017, Hurricane Irma devastated the BVI, followed by Hurricane Maria on 12th September 2017. The claimants contend that the hurricanes largely destroyed the telecommunications network in the BVI.
- [22] All discussions on the 2017/2018 budget were postponed.
- [23] On 27th September 2017, FLOW submitted a response to the 2017/2018 budget opposing the implementation of the 2017/2018 budget, stating that it had not been implemented in accordance with section 59 of the Act. FLOW specifically made reference to the Commission's lack of audited financial statements for every year since 2006.
- [24] The Commission appeared to have taken no other relevant step in relation to the 2017/2018 budget, but on 3rd October 2018, the Commission published a consultation document related to the 'Annual Work Plan and Budget 2018/2019' ('the 2018/2019 budget'). The Commission expressly noted that it would 'anticipate discussions with the industry on the industry levy with a view of collection during the 2018/2019 financial year'.
- [25] Several of the licenses sent in responses to the 2018/2019 budget consultations process. FLOW in particular cited (i) lost revenue and costs associated with the hurricanes, and (ii) the Commission's failure to comply with the Act, and in particular its failure to have audited accounts.
- [26] On 15th November 2018, the Commission published a statement in respect of the 2018/2019 Budget stating that 'the Commission remains particularly cognizant of the concerns surrounding the collection of the industry levy... the Commission also desires to come into compliance as a regulatory and accountable regulatory body'. The Commission did not seek to collect the industry levy pursuant to its 2018/2019 Budget.

- [27] On 8th May 2019, the Commission published a notice for the commencement of a process for consultations for the 2019/2020 Budget ('the 2019/2020 Budget') and an updated 'Notice' on 27th May 2019. The 2019/2020 Budget made it clear that audited statements for any previous financial year had not yet been completed. The 2019/2020 Budget itself stated: '[W]ork is currently underway for the completion of audited financial statements for 2016, 2017 and 2018 during the 2018/2019 year. Audited financial statements for 2019 are projected for completion during the second quarter of the financial year.'
- [28] On 24th June 2019, FLOW submitted its own responses to the request for consultations. FLOW expressed the view that the overall budget was 'excessive' and requested that the Commission reconsider its position. It did not repeat its earlier objections.
- [29] On the same day, 24th June 2019, Digicel also submitted a detailed response to the 2019/2020 Budget Consultations. It addressed *inter alia* 'the encouragement of investment and legislative reform and made specific submissions in relation to spectrum related matters'.
- [30] On 30th June 2019, the Commission published a statement in reply to the responses received from the licensees stating that 'collection of the levy will follow'.
- [31] On 6th April 2020, the Commission sent out separate letters to each of the licensees indicating the Minister of Finance had approved its 2019/2020 Work Plan and Budget and demanding payment of the industry levy within four weeks of the date of the letter.
- [32] On 8th April 2020, Digicel wrote a letter to the Commission again objecting to the imposition of the Industry Levy and repeated the complaint that there should be separate consultations under section 59 of the Act.
- [33] On 9th April 2020, the licensees collectively wrote to the Commission stating *inter alia* that the industry levy had not been calculated or implemented in accordance with section 59 of the Act. In this joint letter, the licensees asserted they had relied on 'previous assurances of the Commission and that they were led to 'believe' that the demand for the industry levy would be put 'on hold' pending the rehabilitation of their operations and the Commission addressing the concerns that they had raised. The licensee also stated in this letter that compliance with the demand was practically impossible given the short notice and that no licensee had budgeted for

this payment without the Commission's audited financial statements to project individual licensee's allocations.⁴

- [34] On 20th April 2020, the Commission responded and sought to refute the matters raised by the licensees. It pointed out that the licensees were statutorily obliged to pay the industry levy and they must have been aware of this and should have budgeted for this. The Commission pointed that it had never represented that it would indefinitely refrain from complying with its statutory obligation to collect the industry levy. Nonetheless, the Commission deferred action on the collection of the industry levy pending further inquiry into assertions that the levy had been set by a procedure not in compliance with section 59 and that there were no audited accounts upon which the levy could be calculated.
- [35] Then, by separate letters dated 19th June 2020, the Commission 'finally rejected the assertion of the licensees that the imposition of the levy had been carried out in a procedurally irregular way, contending that there was no requirement that the levy be calculated from audited accounts. The Commission demanded that respective Industry Levy payment be made within 21 days of the letter.
- [36] On 8th July 2020, Digicel again wrote to the Commission inviting a further stay of the collection of the Industry Levy pending the hearing and determination of a contemplated application for Judicial Review.
- [37] On 14th July 2020, the Commission responded maintaining that it was in compliance with the Act but granted a further 14 days stay on collection for all licensees to reflect on the matter further.
- [38] On 21st July 2020, the Premier and Minister of Finance had made statements at the Tenth Sitting of the Second Session of the Fourth House of Assembly relating to the use of the funds collected by way of the Levy. These statements indicated that the funds collected by the Industry Levy would have to be deposited into the Consolidated Fund and utilized in commencing the East End Sewage Project.
- [39] The licensees continued to protest the imposition of the industry levy, On 7th July 2020, FLOW in particular, responded to the Commission's demand for payment of the Industry Levy again

⁴ Paragraph 36 of Averad Penn's Affidavit dated 5th October 2020, in support of Digicel's Claim

outlining all those areas in which the Commission had not been compliant and this time expressing concern of the Commission's diversion of the Levy payments to government.

- [40] The Commission in turn continued to assert that due to historical non-collection of the Industry Levy, the Commission had accumulated a large deficit and had had to rely on the royalty payments over the years to fund its operating expenses. The Commission in correspondence made its position clear that *'all royalty payments collected from licensees are in fact revenue collected by the Commission on behalf of Government.'*⁵ *It's public stance was that it did not need to have audited statements to calculate the industry levy.*

The Three Claims and the Reliefs Sought

- [41] The three separate claims are challenges to the respective 'industry levy' which was set by the Commission pursuant to section 59 of the Act and imposed on the claimants as service providers when the Commission sent out separate notices advising each of the imposition of the industry levy and demanding payment.

- [42] By separate letters dated 6th April 2020, and then again on 19th June 2020, the Commission demanded an industry Levy be paid by each of the licensees for the 2019/2020 Budget, namely

- (a) the sum of US\$825,087.58 to be paid by Caribbean Cellular Telephone Limited*
- (b) the sum of US\$20,475.07 to be paid by BVI Cable TV Limited*
- (c) the sum of US\$1,680,202.17 to be paid by Digicel*
- (d) the sum of US\$1,696,244.32 to be paid by FLOW*

- [43] Whilst the amounts claimed from of the claimants were different from that claimed from the others, each claimant sought certiorari to quash the decisions related to imposition of the industry levy and the grounds upon which each claimant sought relief were substantially the same.

- [44] Digicel also sought the following declarations, namely:

"2. A declaration that, in respect of the Commission's financial year 1st October 2020 to 30th September 2021, the Commission is in breach of section 63 of the Act, in that there has been a failure to undertake and complete a public consultation (in the form required

⁵ Letter dated 20th July 2020.

by Part II of the Telecommunications Code (Part 1) (Public Consultations and Public Hearings) Guidelines 2010, or at all) together with a failure to submit to the Minister responsible under the Act estimates of expected expenditure and expected income, no later than three months before 30th September 2020 (or 1st October 2020).

3. A declaration, consequent upon granting of the declaration referred to in Paragraph 2 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 year 1st October 2020 to 30th September 2021.

[45] FLOW too sought certain declarations. These are in addition to or in the alternative of the order of certiorari to quash the decisions to impose the Industry Levy and are as follows:

“2. A declaration that in calculating the levy, the TRC failed to comply with [the Act], including without limiting the foregoing, section 59 thereof, and its attempt to impose the Levy is therefore unlawful.

3. A declaration that, in calculating the budgetary estimates and Financial requirements, the TRC has erred in seeking to include as expenditure matters which are not contemplated by the Act, falls out outside of its mandate, and with the result that such expenditure erroneously and improperly give rise to an illusory shortfall in the TRC’s budget which are not in keeping with applicable accounting standards and the provisions and intentions of the Act and which are therefore unlawful.

4. A declaration that in seeking to make extraordinary expenditures unrelated to the provision of telecommunications services not contemplated by the Act and in turn seeking to impose the costs of those expenditures on FLOW, by imposition of the Levy, the TRC has failed to seek public input and take into account, properly or at all, the interests of the public regarding the provision of telecommunications services in the BVI affected by a proposed imposition of the Levy and has therefore failed to comply with the provisions of the Act and is therefore unlawful.

Each of the claimants sought costs.

[46] At the hearing, each of the claimants adopted the arguments of the others.

[47] First, the claimants have all argued that the Commission has acted illegally and ultra vires the Act in that it breached the mandatory procedure set out under section 59 of the Act when calculating the industry levy. It is argued that ‘[i]t is a clear requirement of the Act that the industry levy for each financial year must be calculated with reference to the audited financial statements of the TRC.’ There are no such audited financial statements and therefore the process was fatally flawed. It is also argued that the Commission failed to recognize that the industry levy must be charged to the ‘net estimated expenditure’ which means the amount by which the gross estimated expenditure exceeds income from all usual sources excluding the industry levy. The

Commission used the gross estimated expenditure plus a 10 per cent contingency to calculate the industry levy. It was argued that this was ultra vires the Act.

- [48] Second, it was argued that the Commission acted ultra vires the Act when it failed to comply with section 58, subsection 59(6) and section 65 of the Act with regard to the Commission's intended use of its funds under the Act and the Commission's intended diversion of the royalty payments to the Government's Consolidated Fund.
- [49] Third, it was contended that the Commission acted ultra vires/committed a 'procedural impropriety' when it failed to conduct public consultation or adequate public consultations in calculating and apportioning the industry levy, in breach of its statutory duty to consult imposed by section 59 and 63 of the Act.
- [50] Fourth, it was contended that the Commission acted 'irrationally and or unreasonably' by suddenly imposing and seeking to impose the 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.
- [51] Fifth, it was also contended that the Commission breached the 'legitimate expectation' of the licensees as it had acted in a manner which led the licensees to believe 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 ISSUES

- [52] The grounds upon which the claims are founded have informed the issues. This Court intends to approach these issues in a particular sequential manner.
- [53] The first issue for the Court is whether the Commission act illegally and ultra vires the Act when it calculated, fixed and apportioned the 2019/2020 Industry Levy. Questions which arise here include:

(1) 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.

(2) 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.

(3) Whether the Commission was wrong to charge the industry levy to the estimated expenditure approved by the Minister under section 63 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?'

(4) 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 59 and 63 of the Act.

[54] The second issue for the Court is whether the Commission acted 'irrationally and or unreasonably' by suddenly imposing and seeking to impose the 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.

[55] The third issue for the Court is 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.

ISSUE NO. 1 – WHETHER THE COMMISSION ACTED ILLEGALLY AND ULTRA VIRES THE ACT

The First Question – The Royalty Payments' – Does it belong to the Government to be paid over to the Consolidated Fund?

[56] The first question which has arisen (and it is useful to start here) is whether ‘royalty payments’ belong to the Commission for its own use, or whether it belongs to the Government for the latter’s operational expenses. A finding on this issue would clearly have consequences on the larger discussion of whether the Commission has acted illegally or ultra vires the Act. An affirmative answer to the first part of this question may mean that royalty payments ought to be counted as money belonging to the Commission when calculating an industry levy. An affirmative answer to the obverse part of the question would of course mean that royalty should simply be paid over to Government and ought not to be factored into the setting of an industry levy.

The Claimants’ Arguments

[57] The Claimants have a simple argument. They have all argued the royalty payments must fall to be regarded as part of the funds and resources of the Commission and should be applied to fund its expenditure.

[58] The Claimants contend that on a true interpretation of the relevant statutory provisions, royalty fees are part of the funds of the Commission and shall be applied in accordance with the Act’ in the payment of the lawful expenditure of the Commission. there is nothing in the Act which prevents the Commission from using royalty payments for the payment of its expenditure, and in fact the Commission has to use it for that purpose and may not divert same to the Government.

The Commission’s Response

[59] The Commission has argued that the industry levy payable under section 59 of the Act is to be used for the operating expenses of the Commission whilst under section 60 of the Act ‘royalty payments’ are collected on behalf of the Government and is to be sent to the Consolidated fund.⁶ The Commission’s arguments are now set out in full:

- a. *Firstly, section 59 of the Act provides that the Industry Levy is to be calculated based on the Commission’s estimated expenditure for the financial year which is in the Commission’s view a clear indication that the legislature contemplated that the Industry Levy would be used to fund the Commission’s expenses. This contention is supported by section 59(6) of the Act which makes it abundantly clear that “Monies received by the Commission by way of 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.”*

⁶ Relying on evidence contained in Guy Malone First Affidavit, para.19(b) that ‘the Royalty funds... are meant to be paid to Government’, and at para, 51, ‘the Royalty payments are funds collected on behalf of the Government.

- b. *By contrast section 60 of the Act provides that 'A license or authorization holder shall, in accordance with the provisions of its license or frequency authorization, pay to the Commission a royalty at the rate of three percent of its gross revenue or such other prescribed rate' without making any reference to the Commission being able to retain the Royalty collected for its own use.*
- c. *Further, section 65 of the Act provides that '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'. It is important to note that the surplus is to be paid into the Consolidated Fund and by extension to the Government once there is a 'surplus on the budget approved for the Commission's expenditure' by the Minister and not 'at the end of each financial year, once audited accounts have been prepared' as contended by FLOW. The wording of the Act would seem to indicate that once the budget has been approved by the Minister that the Commission would be obliged to pay over any surplus funds to the Government. This would of course include royalty payments. Upon a strict interpretation of section 65 this would mean that there really would not be any surplus from the previous financial year to make any adjustment to the Industry Levy under section 65 (2) as all surplus would be required to be paid to the Government once the budget has been approved.*
- d. *Secondly, section 58 of the Act which defines the funds and resources of the Commission must be read in conjunction with section 59 of the Act which stipulates the purpose for which the Industry Levy should be applied namely, to fund the expenses of the Commission as evidenced by the fact that the Industry Levy is calculated on the basis of the Commission's annual expenses for a particular year and is expressly declared under section 59 (6) to be funds to [be] 'retained by the Commission for its own use'.*
- e. *Thirdly, the very definition of 'Royalty payment' is inconsistent with the contention advanced by the Licensees namely, that such payments should be used to offset the operating expenses of the Commission. There can be little dispute that a 'royalty payment' is in essence a payment made by one party to another who owns a particular asset for the ongoing right to use that asset and is typically based on a percentage of gross or net revenues derived from the use of the asset as set out in the License agreements which permits usage of this asset.*
- f. *The Telecommunications Regulatory Commission is of course a regulatory body as defined under sections 5 – 7 of the Act and therefore not the owners of the telecommunications rights which are vested in the Government. Consequently any collection of Royalty fees must be presumed to be monies held on behalf of the government.*
- g. *Finally, and perhaps most importantly, the January 10, 2007, Policy Document of the Government on the Act, which it should be noted is a public document and was issued prior to the distribution of telecommunication licenses clearly sets out the intention of the Government with respect to the payment of Royalty as follows:*

'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 [sector] should make a direct contribution to the public finances, comparable to that made in other administration 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.'

- h. The Government policy position on the payment of Royalties is quite logical and understandable when one considers that corporation tax in the BVI was abolished in 2005 so that the only revenue the Government is able to derive from the Licensees for the privilege of being granted a telecommunications licence to operate in the territory would be the Royalty payments.*
- i. The BVI position can be contrasted to that of other jurisdictions where some of the same licensees who operate in the BVI (for example FLOW and Digicel) also provide telecommunications services in those other jurisdictions and pay exorbitant license fees to these governments for the privilege of being granted a telecommunications license.*
- j. By way of example, Digicel paid US\$85 million to the Jamaica Government in 2014 for the privilege of the renewal of its telecommunications license for a further 15 years while FLOW paid US\$30 million for the same privilege. ... It should also be noted that the payment of these license fees was in addition was in addition to the payment of (1) regulatory fees under section 16 of the Telecommunications Act of Jamaica to cover the expenses of Telecommunications Regulatory Office in the same way that Industry Levy is required and (2) Corporation tax. In this regard section 16 of the Jamaica Telecommunications Act provides as follows: '16(1) The Office may impose an annual regulatory fee in accordance with this section in relation to all carrier licenses and services providers licences issues under the Act. (2) The amount of the regulatory fee shall be such sum as, in the opinion of the Office, is a reasonable estimate of the costs which will be incurred by the Office in relation to the regulation of the specified services to which the licences relate (...referred to as regulation costs'). (3) In determining the amount of the regulatory fee payable by a licensee, the Office shall apportion regulation costs reasonably and equitably among licensees.' ...*
- k. The position of the BVI Government in relation to the payment of the Industry Levy is set out at para 8.6.4. of its Policy Document as follows: '8.6.4 The TRC 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 fulltime staff of the TRC will be very few. For more complex issues, the TRC will be able to call on advice of outside experts 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 licensees. It is quite clear from the above,*

the intention of the Government under the Act was that the operational expenses of the TRC would be funded from the industry levy.

- I. The Licensees have never paid the Industry Levy consequently the Government has borne the entire costs of funding the Commission operational expenses during the period 2007 to 2021 as the Commission has had to utilize the Royalty Payments to meet its operating expenses. This clearly was not the intention of the Government when it enacted the Act.'*

[60] In essence, the Commission is relying on what is the general and accepted use of the 'royalty concept' and the 2007 Policy Document issued by the BVI Government. The Commission argues that section 60 of the Act is ambiguous, and that this ambiguity can only be resolved by an informed and purposive approach which takes into account the following matters, namely (a) pre-enacting and post enacting history, (b) Official statements published by the Government and other relevant authority, (c) relevant Government white papers. The Commission asked the Court to consider the legislation in a purposive manner to avoid evasion of taxes as well as the mischief rule.

The Court's Analysis and Conclusions

The Statutory Context

[61] On a claim for judicial review where the complaint is that a statutory authority has acted illegally and ultra vires the Act, the Court's role is to examine the scope and extent of the relevant statutory power given to the authority and to determine whether in the instant case, it has acted outside of those powers. Whether the authority, in this case the Commission, possesses certain powers to collect, retain and use monies in a particular way and even to divert such money to the Government is a question of law for the Court to determine.

[62] This task requires the interpretation of various provisions of the BVI Telecommunications Act to find what those provisions mean, and whether the Commission has acted in accordance with those particular legislative provisions. If the Commission has made decisions which are not authorized by the Act, whether or not under a misapprehension of its powers, the Court will have a power to intervene and may quash those decisions.

[63] As Lord Browne-Wilkinson stated in **R v Lord President of the Privy Council, ex p Page**⁷, the Court is ultimately,

"concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful."

[64] Further, Lord Diplock reaffirmed in **Council of Civil Service Unions v Minister for Civil Service**⁸, the decision maker 'must understand correctly the law that regulates his decision-making power and must give effect to it.'⁹

[65] Did this Commission approach its duties as it was required to do? Did it properly apply the legislation provisions to its tasks? It appears not.

[66] Notwithstanding their seeming clarity, it is the construction of the relevant provisions relating to the 'funds and resources', 'the industry levy' and the 'royalty' payments which are the subject of debate and dispute between these parties.

[67] The fact that the opposing sides in either case present differing interpretation of a particular legislative provision, and a technical expert may express an opinion about his uncertainty about what a section means are no bases upon which a court should consider that there is an ambiguity. The task of interpretation is for the court and involves an examination of the clear language of the various provisions to find their true meaning. I do agree that if this examination reveals uncertainty to the extent that the obvious meaning is not discernible then resort may be had to the aids of construction so that an absurd meaning may be avoided, and purposive construction given to those provisions.

[68] Our own Court of Appeal has reaffirmed these well-established principles only recently when that court held¹⁰:

"The court, in interpreting statutes, has to give regard to the intention of Parliament when the specific act was passed. Where the words, read in their plain and literal sense and in the full legislative context, accord with the ordinary meaning then there is no need to

⁷ [1993] AC 682, 701

⁸ [1985] AC 374

⁹ See *Cable and Wireless (BVI) Limited v The Telecommunications Regulatory Commission* (22nd July 2016)

¹⁰ *(Althea Maynard and another v Eastern Caribbean Asset Management Corporation (as receiver of ABI BANK LTD) (Anguilla) Civil Appeal No. 47 of 2018. Note also Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited. 5BVIHCVAP2016/0013 (delivered 30th May 2018, unreported).*

go beyond their ordinary meaning. However, where applying the strict and literal approach, would produce an absurd and undesirable result, the court is permitted to apply a purposive construction to enable the object and purpose of the legislation to be fulfilled.”

In interpreting statutes, the court must consider the words in their immediate context, the legislative context and the legislation’s object and purpose in order to give effect to parliament’s intention.”

[69] Our own Court of Appeal has also reminded that:

When construing and applying legislation, the court must first give effect to the natural and ordinary meaning of the words used by the drafter. 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 drafter.¹¹

[70] As Lord Carnwath in **Lambeth LBC v SSHCLG**¹² stated at paragraph 19:

“In summary, whatever the legal character of the document in question, the starting point – and usually the end point – is to find the ‘natural and ordinary meaning’ of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.”

[71] I also note the Byron CJ in **Universal Caribbean v James Harrison**¹³ regards to construing statutes when he stated:

“The first principle to affirm is to recognise the separation of power between the Legislature and the Judiciary. It is the province of Parliament to make the law and for the Court to interpret, without basing its construction of the Statute on a perception of its wisdom or propriety or a view of what Parliament ought to have done.”

The dominant purpose in construing a Statute is to ascertain the intention of the legislature as expressed in the Statute, considering it as a whole and in its context. It is only where the words of the Statute are not clear and unambiguous [sic] that it is necessary to enlist aids for interpretation....”¹⁴

¹¹ See the case of *Sylvester Spencer et al v Regino Nicholas* Civil Appeal No. 22 of 2019 (OECS) (unreported)

¹² [2019] 1 WLR 4317

¹³ [1997] ECSCJ No. 29

¹⁴ “The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing”. See the case of *Corocraft Ltd v Pan American Airways Inc.* [1968] 3 WLR 714 at 732.

- [72] Further, where a law seeks to exact a tax, the rules of construction requires that the legislation which imposes a tax or levy is required to strictly construed and ambiguities resolved in favour of the taxpayer.¹⁵
- [73] With these principles in mind, I turn to this Act and the relevant provisions which create the Commission and those provisions that deal with monies received, in particular royalty payments, and expenditure.
- [74] An examination of the Act shows that the Commission, a body corporate with juridical standing has been given the mandate, subject to general policy established by the Minister with responsibility over the sector, to regulate the telecommunications sector. The Act gives it power *inter alia* to (a) make recommendations on matters of telecommunications policy, (b) establish and implement national telecommunications standards, (c) grant licences and frequency authorisations (d) monitor licence holders and ensure compliance, (e) manage the spectrum, (f) enforce the provisions of the Act, (g) collect all fees and charges payable to the Commission.
- [75] The Act establishes a Board of the Commission which shall comprise of a minimum of three and a maximum of five members to be appointed by the Minister with the approval of Council.
- [76] The appointment of the Chairman and the Deputy Chairman requires the approval of the Legislative Council by resolution. It is necessary that the Minister consult with the Leader of the Opposition before seeking approval of the Legislative Council on these two appointments.
- [77] Commissioners are to be appointed from among persons who are 'considered fit and proper and have relevant knowledge, experiences and expertise in telecommunications services, business consumer affairs or such other area as may aid the Commission in the performance of its functions'.
- [78] The Act prescribes that a certain category of persons are not eligible to be appointed Commissioners. These would include anyone who is a member of the Legislative Council, is conflicted out, is credit unworthy, or has been convicted on indictment of an offence of dishonesty. Commissioners may be equally removed for these reasons as well if they are not attending to meetings of the Board.

¹⁵ Dewar v IRC (1935) 2 KB 351 cited with approval in Deon Davis v The Commission of Police Magisterial Appeal No. 34 of 2004 (SVG) (unreported).

- [79] Whist the tenure of the Commissioners and the terms of their appointment are to be dictated by the Minister with the approval of Council, the Act directs by section 10(5), that they shall not act as delegates on any government, commercial or other interests and shall not accept the directions from any persons or authority in carrying out their functions. It is of note that any Commissioner will be held personally responsible for his actions if he acts under the direction of any person or authority in carrying out his functions.
- [80] The Board itself is given the general mandate to do all things which are necessary, reasonably ancillary or incidental to carrying on the functions of the Commission, including maintaining bank accounts for the purposes of the Commission, and investing its funds that are not immediately required for the discharge of its functions in such manner as it considers prudent.
- [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 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.
- [84] I now turn to those specific provisions which treat with Commission's income and expenditure and the collection of royalty payments.
- [85] First, there is section 58 speaks to the 'Fund and Resources of the Commission'. This section states:

58. (1) The funds and resources of the Commission shall comprise

- (a) such monies as may be appropriated by the Legislative Council 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 supplied

[86] The Royalty payments which are expressly stipulated to be part of the Commission's 'fund and resources' are dealt with by section 60. It states:

"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 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 per cent 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."

[87] The Act does not define 'royalty payment. Black's Law Dictionary defines 'royalty' 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. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is share of product or profit reserved by owner for permitting another for use of the property.

[88] The Commission has sought to make the argument that since the telecommunications rights belong to the Government, royalty payments rightfully belong to the Government.

[89] This argument however, flies in the face of the clear provisions of the section 58(1) which states 'royalties' are part of the **funds and resources** of the Commission. There is no ambiguity here as to whether or not the royalties must be regarded as funds of the Commission. How then, shall the 'funds' of the Commission be dealt with?

[90] The answer to this question begins with section 58(2) which states that '**funds of the Commission shall be applied in accordance with the Act**' and it sets out the various items that monies may be expended on; these being permitted expenditure. It states:

(2) 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 benefit of the officers and staff employed in or in connection with the activities carried on by the Commission;*
- (c) the working an establishment expenses of the Commission, including expenses related 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 future removal, replacement or renewal of property or installations due to obsolescence and depreciation;*
- (e) the costs, or any portion thereof, or any new works, property or installations, not being a replacement or renewal of property or installations, as the Commission may determine to be properly charged to revenue;*
- (f) any other expenditure authorised by the Commission and properly chargeable to revenue.*

[91] Again, there is no ambiguity. This subsection is rather clear and straightforward. Nowhere in the Act are there any provisions which allow the Commission to use its 'funds' for purposes other than that which is provided for in section 58. One will recall that section 10(5) of the Act prescribes that members of the Commission may not 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 and to carry out their respective duties.

[92] Section 102 of the **BVI Constitution** is to be noted. It reads:

102. All revenues or other moneys raised or received by or for the purposes of the Government of the Virgin Islands (not being revenues or other moneys that are payable by or under any law into some other fund established for any specific purpose or that may, by or under any law, be retained by the authority that received them for the purpose of defraying the expenses of that authority) shall be paid into and form a Consolidated Fund.

[93] This Constitutional provision, speaking to revenue or money raised or received by and for the purpose of the Government of the BVI, expressly recognizes that moneys collected by any Government Authority may be retained by that authority to fund its expenses if that is prescribed for by any law. For the BVI Telecommunications Commission, that law is section 58(1) and (2)

of the Act. Section 58(1) and (2) states clearly without any doubt that royalty payments are part of the 'funds' of the Commission and that such 'funds' shall be applied to those permitted expenditure. I therefore respectfully disagree with learned Counsel Mr. Neale 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'.¹⁶

- [94] How then, can it be argued, that royalties may not be considered part of the funds and resources available to the Commission for the funding of its operational and capital expenditure? How does one get to any policy documents and other extraneous material to find what royalties are to be used for? 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.
- [95] If it still remains unclear, I will now examine that issue whether, notwithstanding that 'royalty' payments fall to be included in the 'funds and resources' available to the Commission, there any circumstances in which it is required to be paid over to the Government for the latter's operational expenses?
- [96] One way this question may be posed is to is whether, notwithstanding section 58(2) of the Act, there are any gateways in 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 the expenses of the Commission?
- [97] Section 58(2) has instructed the Commission how its funds are to be used, and there are only several other provisions which speak to the government's involvement with the 'funds' of the Commission.
- [98] First, there is section 58 which itself states that the Commission may be funded by 'such monies as may be appropriated by the Legislative Council for the purposes of the Commission'. This provision does not assist the Commission's position in this case.
- [99] Second, there is section 59(6) which states that:

¹⁶ Para. 21 of the 'Defendant's Supplemental Submissions' dated 19th July 2015.

(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.

[100] Again, this provision does not assist the Commission. First, it does not deal with 'royalty' payments. Second, a provision giving the Minister a power to decide whether the Commission shall retain the industry levy for its own use or to direct that it be used for some other purpose, cannot be read to mean that other payments (including royalty) must be handed over to the government. That would be absurd, 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 funds or for the operational expenses of the government.

[101] Third, there is section 65. This section 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.

[102] This section obliges the Commission to pay over surplus on any budget approved for the Commission's expenditure unless the Minister otherwise agrees. There appeared to have been some struggle by the Commission in seeking to use this provision to support aspects of its arguments. Even the experts pondered the logic of whether surpluses, as an accounting concept could ever be available in a proposed spending budget for an upcoming year.

[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 65 context, and which shall, subject to the Act, be paid over to the Consolidated Fund unless agreed by the Minister. By way of an example: If at the end of 2018/2019 period, the Commission had \$10 million available after all expenditure for that period, and the properly adjusted budget for the 2020/2021 period under section 59(2) amounted to \$8 million, this would mean that there would be a \$2 million surplus in the section 65 sense. It is this section 65 \$2 million surplus which shall be paid into the Consolidated fund unless otherwise agreed upon by the Minister of Finance.

- [104] Practically, if during the 2020/2021 period, the budget for any upcoming period has to be adjusted for some new expense, whether unforeseen or deliberate, a power would always be available to the Council, through the section 58 discretion, if necessary, to 'revert' any such surplus payments to the Commission for such use.
- [105] An issue might arise as to whether any such surplus paid over to the Consolidated fund under section 65 would have to be factored into the audited accounts of the next upcoming year, that is, in the example, the 2021/2022 period, would this \$2 million fall to be considered the 'funds' of the Commission when deciding on the 2021/2022 budget? Did it lose that status because it was paid over to the consolidated fund?
- [106] By the very nature of the Consolidated Fund, I would think that any surplus paid over to the Consolidated Fund loses its status as 'funds and resources' belonging to the Commission. Received by the Commission and paid into the Consolidated Fund it is Government money to be used for any and all the purposes of government. The Government may only provide additional funding to the Commission in the exercise of the Council's section 58 discretion to fund the Commission.
- [107] I am of the view that section 65 does not help the Commission's position that royalty payments belong to the government; nothing in the Act can lead to any view that 'royalty payments' may be regarded as surpluses; the section 65 surpluses may arise from monies collected from any and all sources.
- [108] I have carefully considered the Commission's views on and reliance on the literature which speaks to the meaning what is a 'royalty' payment. I cannot see how, even if this Court were to consider that there was any ambiguity, and there is none, how this could be resolved to mean that royalty payments could be separated to be considered the property of the government in the face of the clear words of section 58; all other income from other sources would have to be so regarded.
- [109] I also do not consider that references to other jurisdictions and the Jamaican legislation is relevant or helpful in this process.

- [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.
- [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 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 the Consolidated Fund in an unauthorized manner.
- [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 these views by making it clear that this regulatory Commission is expected to operate with 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.¹⁷
- [114] The legislators considered that one source of such funding would be the royalty payments.

¹⁷ See the case of *R (Miller) v Prime Minister* [2019] UKSC 41.

The Second and Third Questions – What is meant by ‘net estimated expenditure’? Whether the absence of Audited Financial Statement for the previous year fatal to the calculation and fixing of the Industry Levy

The Claimants’ Arguments

- [115] The claimants all argued that the Commission failed to follow the mandatory prescriptions of the Act in setting the Industry Levy. The claimants all effectively took the common position that the possibility of an industry levy can only arise if there is a remaining ‘net estimated expenditure’ (to which a 10 per cent is to be added) after all revenue for the relevant sources has been applied to its gross expenditure and there is sum expenditure left to funded.
- [116] The claimants have all adopted the common position that the Commission breached section 59 which required that an industry levy could only be calculated on the basis of a ‘net estimated expenditure’ together with a ten per cent contingency, in that the Commission used instead its gross ‘expected expenditure’ which was approved for overall spending by the Minister under section 63 of the Act. The argument is that the Commission acted illegally when called upon the licensee to pay an industry levy to fund all its expenditure without seeking to apply of the incoming income to its gross expected expenditure for that financial year.
- [117] The claimants also argued that the Commission acted illegally and *ultra vires* the Act when it failed to adjust the sum of the net estimated expenditure and contingency by the deficit or surplus shown (or which ought to have been shown) in the audited accounts of the Commission for the previous financial year. The argument is that when there is a net estimated expenditure plus ten per cent contingency to be funded by an industry levy, section 59(2) then mandates that this figure must then be adjusted either to be respectively reduced or increased by any existing surplus or deficit which is shown from the audited financial statement from the previous year. FLOW in particular submits:

‘The intention of the legislature, expressed by the Act, is to require adjustments to be made to the calculation of the industry levy with reference to shortfalls or surpluses reflected in the TRC’s audited financial statements for each financial year. Reference to the shortfall or surplus in the audited financial statements is a fundamental component of the calculation of the industry levy. The intent of the legislature must be that the TRC’s audited accounts (which it also provided the TRC must prepare annually) are necessary to calculate the industry levy. Had the legislature not cared about audited financial

statements or otherwise wished to permit the TRC to make its own calculations on its own numbers, such a requirement would not have been included within the Act.

- [118] The claimant argued that Commission did not have any audited statements, this also being in breach of a statutory duty to maintain such accounts,¹⁸ and so there were no adjustments. It was contended that this was unlawful as the Commission had no discretion to act in this manner; the levy was required to comply with the mandatory provisions of section 59(2). The result was that any industry levy so fixed exceeded the statutory power of the Commission to collect monies from anyone. The Commission thus acted ultra vires by demanding the Levy without having complied with the mandatory, statutory prerequisites for the calculation of the Levy and has neither complied with the intention of the legislature nor its statutory duties. Since this breach is substantive rather than trivial, there are no grounds to displace the inference that the Levy is invalid, and therefore the Levy should be quashed.

The Commission's Response

- [119] The Commission does not dispute that at the relevant time when the industry levy was being set, it did not have the audited statements of the previous financial year but goes on to contend that in the circumstances of this case, the lack of such audited statements did not prevent an accurate calculation of the industry levy.
- [120] The Commission firstly say that audited accounts are not required to make the actual calculation of the industry levy; it is only required to make adjustments where there has been a deficit or a surplus in the previous year.' In developing this point, the Commission state that

"There is no dispute that since the implementation of the Act in 2006 and despite the requirements of section 59(1) of the Act (statutory) and section 5.1 of their respective licences (contractual) for the payment of their respective Industry Levy and requests from the Commission from at least 2016 that none of the licences have paid their levy. In those circumstances there can be no issue of any surplus but only a deficit which the Commission which because of the time which has lapsed has chosen to waive collection accordingly the licensees suffer absolutely no prejudice from the absence of audited statements but have instead benefited from its absence."

In the absence of the payment of the Industry Levy to fund its expenses, the Commission has had to utilize the Royalty payments which by law was intended for the Government to fund its operational expenses. The failure of the licensees to comply with their statutory and contractual obligations to pay the Industry Levy has therefore resulted in

¹⁸ Section 64(4) of the Act.

the Commission accumulating the huge deficit over the years. the result is that any adjustment in the calculation of the Industry Levy under section 59(2) based on audited accounts can only result in a huge deficit and consequently an increase in the obligations of the licensees. The Licensees have therefore suffered no prejudice in the matter of the failure of the Commission to rely on audited accounts in the calculation of the Industry Levy as the outstanding payments have been waived and on the contrary have benefited from the omission.

Secondly, the Commission were advised as far back as June 2016 when the Commission published its draft budget for 2016-2017 to 'Please note that for the first-time implementation, the Commission will not be adding or subtracting the previous financial years because it is nine years delayed in its implementation.' The Licensees clearly understood and accepted that for the first-time implementation of the Industry Levy that there would be no addition or subtracting of any deficit or surplus. The 2019/2020 Industry Levy is the very first industry levy to be collected by the Commission as such the Licensees are estopped from contending that the Commission's proposed method for the calculation of the Industry Levy is incorrect or has caused them any prejudice.

We contend that the position adopted by the Commission is quite consistent with section 59(2) of the Act, specifically '(a) the addition of the deficit if any, shown in the audited accounts of the Commission for the previous financial year.' It is implicit in the Act that in the calculation of the first Industry Levy there would not have been any audited accounts from the previous year to use as a basis for such calculation. The Commission's decision to waive previous deficits due to the failure to pay outstanding industry levies and calculate the Industry Levy for the first time without relying on audited accounts is therefore consistent and in keeping with section 59(2) of the Act.

Further, the Court is entitled to adopt a purposive approach to statutory construction and hold that a statutory provision applies to given situation when it was clearly intended to do so, even though it would not apply when a strict legal interpretation were to be adopted. The obvious intention of section 59(2) (a) and (b) was to provide a form of credit in circumstances where the licensees may have overpaid Industry Levy for the previous year. In a situation as the present case where there have been absolutely no payment of the Industry Levy by the Licensees there really is no question of a surplus or adjustment in the Licensees' favour. The situation is therefore similar to the introduction of the Industry Levy for the first time when there would not have been any previous payments and so no addition or subtraction of a deficit or surplus from the previous year.

Finally, the Commission in calculating the Industry Levy has relied on financial statements prepared in accordance with section 64 of the Act. In this regard it should be noted that there has generally not been any challenge by the Licensees to the accuracy of the financial statements. The Licensees have instead focused their attention on specific items of expenditure which they contend are excessive and/or not justified in the circumstances. This is of course a different matter since it is not the accuracy of the financial statements which are being challenged but whether certain items of expenditure are justified in the circumstances.

- [121] As far as the 'net estimated expenditure' is concerned, the Commission's essential point is that this is the same estimate of the expected expenditure approved by the Minister under section 63. It is 'net' because it is that figure before the 'contingency' is applied to it.

The Court's Analysis on the Calculation of the Industry Levy

- [122] The Commission contends that it has calculated the 2019/2020 Budget in accordance with and within the confines of its legislative mandate. This is the budget that it presented.

Budget for the 2019/2020 Financial Year

<i>FY 2020 Budget - Income</i>	<i>FY 2019 Budget</i>	<i>FY – 2020 Budget</i>
<i>Domain Registration fees</i>	32,000.00	30,000.00
<i>Industry Levy Fees</i>	4,265,066.60	4,249,009.13
<i>Radio License Fees</i>	45,000.00	50,000.00
<i>Royalty Fees</i>	2,220,629.00	2,050,104.74
<i>Spectrum Fees</i>	516,650.00	516,650.00
<i>Submarine Cable Fees</i>	500,000.00	500,000.00
<i>Finance Income</i>	10,000.00	10,000.00
<i>Estimates Income</i>	7,589,346.33	7,405,763.87

Estimated Expenditure

<i>FY 2020 Budget Expenditure</i>	<i>FY 2019 Budget</i>	<i>FY 2020 Budget</i>
<i>Non- Executive Members Honoraria and Expenses</i>	40,800.00	40,800.00
<i>Employee Compensation</i>	1,242,445.01	1,342,822.48
<i>Government Fees and Staff Benefits</i>	591,036.99	634,283.44
<i>Professional Services</i>	801,950.00	689,745.00
<i>Conferences, Training and Travel</i>	244,822.86	261,834.58

<i>Rent and Utilities</i>	415,222.88	433,720.88
<i>Maintenance Expenses</i>	47,113.44	66,003.45
<i>Consumer Education and Public Relations</i>	48,000.00	55,000.00
<i>General and Administration</i>	217,622.20	205,007.94
<i>Special Project</i>	100,000.00	100,000.00
<i>Estimated Operating Expenditure</i>	3,749,013.38	3,829,217.77
<i>Contingency Amount</i>	516,053.22	419,791.36
<i>Total Estimated Expenditure</i>	4,265,066.60	4,249,009.13
<i>Net Income before Regulatory Contribution</i>	3,324,279.73	3,156,754.74
<i>Less Regulatory Contribution</i>	(2,220,629.73)	(2,050,104.74)
<i>Estimated Net Income (Loss) after Regulatory Contribution</i>	1,103,650.00	1,106,650.00
<i>Capital Expenditure</i>	1,411,518.83	368,695.85

- [123] A number of things become apparent from an examination of this budget.
- [124] First, the Industry Levy is calculated as equivalent to be all of the Commission's 'Estimated Operating Expenditure' added to the 'Capital Expenditure' and ten percent of this total to derive the 'Contingency Amount'.
- [125] Second, a simple arithmetic exercise shows that the total estimated income for 2019 excluding the figure allocated for 'Industry Levy' for that year, and including the royalty fee, is \$3,324,279.73. Similarly, that arithmetic exercise also shows that that the total estimated income for 2020 excluding the figure allocated for 'Industry Levy' for that year, and including the royalty fee, is \$3,156,754.74.
- [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)?
- [127] Section 59 (2) has generated considerable discussion in this case. The subsection speaks to the method by which the industry levy is calculated.

[128] For ease of reference, it is now set out:

59. (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 authorisation 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 authorisation 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 payable under subsection (4) may be recovered by the Commission as a civil debt in summary proceedings.

[129] The provision makes it clear that 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'.

[130] The second step in this 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 financial year; or (b) the subtraction of the surplus, if any, shown in the audited accounts of the Commission for the previous financial year'.

- [131] Considerable debate arose with regards to what exactly was to be considered 'net estimated expenditure'.
- [132] The Claimants have all contended that the Commission has misdirected itself on what is to be regarded the 'net estimated expenditure' in the section 59(2) context.
- [133] The Commission's position is that 'as section 59(2) of the Act provides that 'The industry levy for a financial year shall be calculated by adding the 'net expenditure' of the Commission as set out in the estimates approved by the Minister responsible for finance' that in the absence of any definition or guidance in the Act 'net expenditure' in this context refers to the expenditure which has been approved by the Minister under section 63 of the Act.
- [134] So, what is 'net estimated expenditure'? Is it what is approved by the Minister under section 63? Or is it what the claimants contend that it is that figure one gets to after deducting the proper income of the Commission for that particular year? The answer to these questions is again a question of statutory interpretation.
- [135] The phrase 'net estimated expenditure' is not defined by the Act. The Jowitt's Dictionary of English Law, 5th edn. defines 'net' as:
- "the weight of a pure commodity alone, without the container cask, bag, dross, packing, etc. opposed to gross weight, tare as opposed to brut; also undiluted; in accounts, a sum of money after deduction of all stated outgoings of expenses or deduction.*
- [136] Whilst this definition does offer some insight on the use of the word 'net', in my view the meaning of 'net estimated expenditure' is to be found from the '*immediate context*' as well as *the legislative context and the legislation's object and purpose.*'
- [137] There is no doubt that the true interpretation of the several sections at play on this issue has to be premised on the understanding that the income of the Commissions must be applied to its permitted expenditure. Section 58(1) makes it very clear that the 'funds and recourses' of the Commission shall be applied to those permitted expenses.
- [138] This must therefore mean that 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. It is startling to me that if the Act required that the Commission's income should fund its operating expenses, that the

income of the Commission would be completely ignored when a budget of the Commission is to be prepared.

[139] Section 63 of the Act requires that the Commission shall prepare in respect of the financial year, 'estimates of (a) expected expenditure, and (b) its expected income if any, arising from any source'. This section does not speak to the concept of 'net estimated expenditure', it simply speaks to expected expenditure. Where these estimates are approved, the Commission is then tasked with functions under section 59(2).

[140] It is here for the first time that the concept of 'net estimated expenditure' arises. This must mean something different to the estimate of 'expected expenditure' under section 63. 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**¹⁹, 'Parliament is expected to say what it means and mean what it says'.

[141] 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.

[142] I have noted a similar accounting structure in the Housing (Financial Provisions) (Scotland) Act 1978 which was amended by section 21 of the Local Government (Miscellaneous Provisions) (Scotland) Act 1981 and then re-enacted in section 191 of the Housing (Scotland) Act 1987. The relevant provisions were discussed in the case of **In Re Sutherland District Council**²⁰. The legislation:

"...required the Secretary of State to make grants to local authorities to be known as "Housing Support Grants". for the purpose of assisting local authorities in Scotland to meet reasonable housing needs in their areas." Section 1(2), as re-enacted in section 191(2) of the Act of 1987, provides as follows:-

"(2) Subject to sub- section (5), for the purpose of fixing the aggregate amount of the Housing Support Grants for any year, the Secretary of State shall, in respect of all Local Authorities, estimate the following amounts –

(a) the aggregate amount of eligible expenditure which it is reasonable for Local Authorities to incur for that year; and

¹⁹ (30th May 2018

²⁰ [1987] Lexis Citation 150

(b) the aggregate amount of relevant income (other than Housing Support Grants) which could reasonably be expected to be credited to the Local Authorities' housing revenue accounts for that year,

and the amount remaining after deducting the amount mentioned in paragraph (b) from the amount mentioned in paragraph (a) shall, subject to sub-section (4) and section 193, be the aggregate amount of the Housing Support Grants for that year."

- [143] The legislation intended to provide assistance to the local authorities to meet reasonable housing needs in their respective areas. Housing Support Grants were only given when the normal income of the relevant local authority could not pay all of its 'eligible expenditure'. Lord Clyde in describing the amount of eligible expenditure which remained to be funded after all relevant income had been exhausted, stated:

*"...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.*

- [144] The Scottish legislative structure effectively recognizes the concept of 'net expenditure' and intended that the relevant income of local authorities would be applied to pay their eligible expenditure, and only if there was still remaining expenditure to be paid for, would there be a call on the Secretary of State for 'grants' to be given to be applied to that what is termed 'net expenditure'.

- [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 per cent 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 exercise.

- [146] Whilst I did not consider the experts' reports and evidence necessary to determine what is essentially a statutory interpretation point, the experts' opinions were sound in logic and well-grounded in their considerable experience in the accounting world. Their conclusions are

consistent with the Court's views, and it would be useful to set these out. FLOW's experts are Schellion Horn and Luke Steadman.

[147] Ms. Horn is a well-qualified Professional Economist with strong accounting credentials with over 20 years of experience in telecommunications regulations. She has prepared and implemented regulatory financial reporting systems and produced regulatory financial statements, which have been subject to independent audit.

[148] Mr. Steadman is equally impressive. He is a *Fellow of the Institute of Chartered Accountants in England and Wales and a Partner of A&M with more than 25 years' experience as a Chartered Accountant in matters of accounting, forensic accounting and financial reporting*.

[149] FLOW's two experts opined in their joint report filed on 26th May 2021 as follows.

"3.1.4 Section 59(2) refers to 'net estimated expenditure' in the calculation of the Industry Levy. This term is not defined by the Act. However, as noted in section 2 above, the Act refers to the funds of the Commission being applied only to certain category of expenditure, i.e. the finds of the Commission being applied only to certain categories of expenditure, i.e. the Permitted Expenditure.

3.1.5 In accounting terms 'net' refers to either:

a) the quantity of a measure after deduction of any contra items or reversals etc; and/or deduction of incidental amounts, the effects of which is to reduce the quantity being measured, for instance; sales, net of refunds or returns (net income) or net interest (being both credit and debit interest);

b) a measure or result, deducting accounting debits (expenses) from accounting credits (income) for instance net profit; or

c) a measurement which excludes the quantity being measured.

3.1.6 Accordingly, there are three valid accounting interpretation of 'net estimated expenditure', being estimates of:

a) Permitted Expenditure, less any contra amounts, credits, refunds or reversals and deduction of any incidental amounts of income relating to this expenditure;

b) Permitted Expenditure, less income of the Commission (items included under S. 58(1) of the Act, excluding loans); and

c) Permitted Expenditure, less income of the Commission, excluding Industry Levy.

3.17 A review of the Commission's draft annual work plan and budget 2019/20 Consultations Documents (the '2019/20 Work Plan') indicates that it has set the

Industry Levy equal to the budgeted operating expenses of the Commission plus a contingency. In essence this assumes a) above, i.e. that 'net estimated expenditure' should be an estimate of Permitted Expenditure. This approach ignores the use of the word 'net'. Net implies a deduction of one thing from another to arrive at a net positive or a net negative total. In accounting terms where expenditure exceeds income the position is one of net expenditure, where income exceeds expenditure, the position is one of net income. Since the industry levy is part of the income of the Commission, this means that b) above, Permitted Expenditure less Income, cannot be a valid accounting interpretation of net estimated expenditure in the context of the calculation of the Industry Levy.

3.1.8 This leaves c) as the only accounting interpretation of net estimated expenditure in the context of the calculation of the Industry Levy – i.e. that, for the purpose of calculating the Industry Levy, net estimated expenditure means the budgeted funds of the Commission excluding the Industry Levy, less Permitted Expenditure. This is consistent with S. 58(1) of the Act [which] states that the Commission's income includes the Industry Levy. Royalty, and other sources of fees and income, and S. 58(2) states that the income of the Commission can be used for payment of expenditures of the Commission:

- a) S.58(1) of the Act states that: *The Funds and recourses of the Commission shall comprise... industry levies, royalties, fees...'*; and
- b) S. 58(2) of the Act states that: *'The funds of the Commission shall be applied... in payment of the following...'*

3.1.9 Under this application, the industry levy would be expressed as:

Industry Levy

= (Estimated Expenditure + contingency) – Royalty – Other sources of funds set out in section 58(1) of the Act.

3.1.10 Put Simply, the Industry Levy is the difference between the estimated Permitted Expenditure for a given year, and the other funds available to meet that expenditure, subject to a contingency of 10 per cent.

[150] Digicel's expert was Mr. Michel Griffen. He is a Chartered Accountant and a Fellow Chartered Accountant Ireland with over 30 years on relevant experience in the accounting world. He has been a financial and regulatory consultant for over 20 years and has held senior relevant positions in the Irish Telecommunications Regulatory Body. He opines as follows:

"Gross and Net Expenditure. The calculation methodology used by the TRC is fundamentally flawed because it is based on the gross expenditure instead of the net expenditure of the TRC as is set out in the Act. With respect to 2019/2020, the TRC has not used a 'net expenditure' approach as required by section 59 of the Act in particular. Instead, the TRC appears to have used the gross expenditure approach. The effect has resulted in a very significant overestimate of the amount of the industry levy.'

The calculation methodology does not include the adjustments for a surplus or a deficit as required by the Act. the methodology for the 2019/2020 levy does not appear to be in accordance with the because no allowance for an adjustment based on a previous surplus or deficit has been made...'

- [151] I have noted the Commission's concern about the use and weight this Court should make of the opinions of these experts. I have not relied on them to construe the provisions. For what it is worth, the experts' opinions are consistent with the Court's own conclusions arrived at from construing the relevant provisions in accordance with established principles.
- [152] I am therefore of the view a *'review of the Commission's draft annual work plan and budget 2019/20 Consultations Documents (the '2019/20 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.
- [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 2019²¹ 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

²¹ Excluding the figure allocated for 'Industry Levy' for that year and including the royalty fee.

that is the sum of \$3,156,754.74²² 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 a ten per cent of their total is then to be adjusted in accordance with section 59(2) with reference to audited statements of the previous financial year.
- [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'.
- [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 of the Commission's permitted expenditure.
- [160] The importance of audited statements must now be apparent. 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 financial 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.
- [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

²² Excluding the figure allocated for 'Industry Levy' for that year and including the royalty fee.

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 the industry levy?

Question No. 4 – Did the Commission fail in its duty to carry out legally adequate Public Consultations?

The Claimants Arguments

- [162] The claimants contended that there was a failure to consult or to adequately act in accordance with sections 59 and section 63 of the Act. All contended that this failure should have the effect of invalidating the levy.
- [163] Arguments were made that 'the requirement for a public consultation prior to the implementation of the industry levy within subsection 59(1) of the Act is clear and unambiguous, "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."²³
- [164] Noting that the Commission had only conducted a public consultation in respect of the Annual Work Plan and Budget 2019/2020 (the "2019/2020 Budget") and that no separate public consultation was conducted in respect of the Levy, it was contended that 'this requirement for a public consultation pursuant to subsection 59(1) of the Act' cannot 'be satisfied by that public consultation [which is to take place] pursuant to subsection 63(1) of the Act. The requirements for implementing the industry levy and establishing the Annual Work Plan and Budget of the TRC have separate statutorily prescribed timelines. The industry levy cannot be implemented or calculated pursuant to the Act unless and until the Annual Work Plan and Budget has been approved by the Minister for Finance and laid before the Legislative Council.'

²³ FLOW's written submissions.

[165] In drilling down on the consultations issue, FLOW argues that:

6.10 '...on 21 July 202018, Premier Fahie stated that the approval of the 2019/2020 Budget was given on 23 March 202019. According to subsection 59(1) of the Act, within four weeks of this approval (i.e. by 20 April 2020), and following a public consultation, the [Commission] shall set an industry levy for that financial year and assess the proportion to be paid by each licensee. Instead, the [Commission] had already calculated the industry levy payable by the licensees for Financial Year 2019/2020 as this figure was included within the 2019/2020 Budget as published on 27 May 2019...'

6.11 Regardless of the requirement for a separate consultation for the industry levy and the Annual Work Plan and Budget and the requirement for the approval of the 2019/2020 Budget prior to the calculation of the Levy, the requirements of the public consultation conducted by the [Commission] did not comply with subsection 6(5) of the Guidelines, which requires the [Commission] to publish a notice of public consultation at least fourteen days before the commencement of a public consultation on the [Commission's] website and in a newspaper published and circulated in the BVI.

6.12 Subsection 6(5) of the Guidelines states,

"The Commission shall, pursuant to sections 26(6J, 73(1J(fJ and (3J of the Telecommunications Act, 2006 and in accordance with section 6(1J of these Guidelines, publish a notice of public consultation at least fourteen days before the commencement of a public consultation, in the following media:

- (a) on the Commission's website;
- (b) in a newspaper published and circulated in the Virgin Islands; and
- (c) in the Gazette, in the case of a public consultation to be held under section 26(6) of the Telecommunications Act, 2006."

6.13 Subsection 6(5) of the Guidelines is applicable to this case as whether or not to implement an industry levy (which is not properly addressed within the 2019/2020 Budget) is an "issues] relating to the operation of the telecommunications network or the provision of the telecommunications service, as the case maybe, by the licensee or authorisation holder".

6.14 The Original Notice, entitled "Notice of Public Consultation on Draft Annual Work Plan and Budget 2019/2020", was published on 8 May 201922, with the Updated Notice published on 27 May 201923. The Original Notice was published within the fourteen day time limit prior to the commencement of the public consultation. The Updated Notice, which changed the date of commencement of the consultation from 22 May 2019 to 27 May 2019, was dated 27 May 2019 and therefore does not comply with the fourteen day time limit and is not in accordance with subsection 6(5) of the Guidelines.

6.15 The purpose of a public consultation is to ensure meaningful participation by stakeholders (including the Licensees and the general public). FLOW was, therefore, precluded from any opportunity to provide meaningful responses directly on the imposition of the industry levy.

[166] It was contended that the Commission's failure to conduct proper consultations resulted in the claimants not having any 'opportunity to provide meaningful responses directly on the imposition of the industry levy.'

[167] CCT and BVI Cable also brought another element to the consultation issue. It was argued that the Commission failed to have meaningful consultations on the 2020 Budget when it failed to provide audited financial statements. The absence of such statements directly impacted on the licensees' ability to engage in meaningful consultations on the work plan and the budgeted estimates.

[168] These claimants argued that:

"The purpose of the statutory requirement for consultations with regards to the proposed work program (sic) and estimates of expected income and expenditure is to give interested persons such as licensees the opportunity to participate in the decision making process concerning the formulation of the Commission's proposed work program and estimated expenditure of the relevant year, particularly in view of the fact that those licensees are to bear the burden of funding any excess of expenditure over income.

"In order for the consultees to make meaningful representations sufficient information in the form of financial records and information as to comparable operations would have had to be made available to them. In the absence of financial records and information as to actual expenditure in past periods it would be difficult if not impossible for licensees to gauge whether or not the estimates are inflated . it will also be possible for the Commission to produce a budget showing a high level of net estimated expenditure which is to be funded by industry sources. The two controls on the process are the requirement for public consultations and the requirement for approval by the Minister of Finance.

Further, in reviewing the Commission's proposed work program for any relevant financial year the Minister would have the benefit of the understanding that the proposed work program and estimates for income and expenditure have been arrived at after consultations with industry participants who may have contributed their views to the viability of the proposed work programme and as to the soundness of the estimates provided. These matters would be a factor considered by the Minister in deciding to approve the Commission programme and estimates with or without modifications.

The Commission's Response on the Consultation Issue

[169] The Commission contends that the facts show that it did engage in a proper consultation process. It contends that it began the consultations process in accordance with Part II, section 7(2) of the **Telecommunications Code (Part 1) (Public Consultations and Public Hearings) Guidelines, 2010**. The Commission made public its Draft Annual Work Plan and Budget for the 2019/2020 Financial Year (the Draft Budget 2020). The Draft Budget 2020 contained a specific allocation for the industry levy sum ('the Commission's operating costs assessed by the

Commission on all licensees') to be collected from all licensees. A specific allocation of \$4,249,009.13 representing this industry levy was placed in the 'Income Statement' of the budget.

[170] The Commission asked the Court to consider that the Commission had, in the 2016/2017 Budget set out the procedure that it intended to implement for the collection of the industry levy and that there had been no objection. The Commission stated: 'Whilst the Commission received objections to the payment of the Industry Levy from the licensees no objections were raised with respect to the procedure to be adopted and the Commission consistently applied this procedure to all subsequent budgets.'

[171] The Commission therefore argues that the licensees cannot be heard to argue about the lack of proper consultations, and they were in fact given a proper opportunity. They were invited to provide comments on the Annual Work Plan, the draft budget and the industry levy with details on how it was proposed to calculate same. The licensees did provide detailed comments, and these were considered; they offered no objections to the procedure when after the apportionment was done and separate invoices sent. The Commission submits that: 'The essence of consultations is the communication of a genuine invitation, extended with a receptive mind to give advice. If the invitation is once received, it matters not that it is not accepted, and no advice is proffered.'²⁴

The Court's analysis and Findings

[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 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 and then feed into the decision-making process. It is a matter of good governance that all public bodies approach consultations in this manner.

²⁴ The Commission relied on *Agricultural Training Board v Aylesbury Mushrooms* [1972] AER 280 and *Halsbury Laws of England* 4th edn. Vol. 1(1) Paras. 93 – 94.

[173] The English and Wales Court of Appeal in the case of **R (Help Refugees Ltd) v Secretary of State for the Home Department (Centre for Advice on International Rights in Europe intervening)**²⁵, distilled the authorities and summarized the principles which are to guide a public authority's common law duty to consult, as follows:

(i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (R (Moseley) v Haringey London Borough Council at para 23 per Lord Wilson JSC).

(ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough—and in sufficiently clear terms—to enable them to make an intelligent response (R v North and East Devon Health Authority, Ex p Coughlan[2001] QB 213, para 112, per Lord Woolf MR, and Royal Brompton and Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at [9] per Arden LJ). Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal (Coughlan at para 108); or where the consultation paper is materially misleading (R v Secretary of State for Transport, Ex p Richmond upon Thames London Borough Council (No 2)[1995] Env LR 390, 405 per Latham J) or so confused that it does not reasonably allow a proper and effective response.

(iii) As I have indicated (see para 87 above), the content of the duty—what the duty requires of the consultation—is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose. Citing the judgment of the Privy Council in Port Louis Corp v Attorney-General of Mauritius[1965] AC 1111, 1124 (“the nature and the object of consultation must be related to the circumstances which call for it”), Lord Reed JSC in Moseley said, at para 36: “[Statutory duties of consultation] vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out”. Lord Wilson, at para 23 also referred to the requirements being linked particularly to the purpose of the consultation.

(iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed (Moseley at paras 37–43 per Lord Reed).

(v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, “clear unfairness must be shown” (Royal Brompton at para 13); or, as Sullivan LJ said in R (Baird) v Environment Agency[2011] EWHC 939 (Admin) at [51], a conclusion by the court that: “a consultation process has been so unfair as to be unlawful

²⁵ [2018] 4 WLR 168 at para 90

is likely to be based on a factual finding that something has gone clearly and radically wrong.”

(vi) The product of the consultation must be conscientiously taken into account before finalising any decision (Coughlan at para 108).

[174] The Courts have made it very clear that the consultations are to be guided by a prescription of fairness²⁶ to be legally adequate. The timing of such consultations is therefore critical. As was stated by Lord Woolf MR in **R v North and East Devon Health Authority, Ex p Coughlan**²⁷:

“To be proper, consultations must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”

[175] In this case the duty to consult is grounded in expressed statutory provisions. Both Sections 59 and 63 impose an obligation on the Commission to conduct public consultations.

[176] The fact that the duty to consult is statutory imposed as in the case of the Commission, brings an additional element into the process.

[177] As Lord Wilson noted in **R v North and East Devon Health Authority ex parte Coughlan**²⁸:

“Two of the purposes of procedural fairness ... underlie the requirement that consultations should be fair. First, the requirement ‘is liable to result in better decisions, by ensuring that the decision-maker receives all the relevant information that is properly tested’ ... Second, it avoids the sense of injustice which the person who is the subject of the decision would otherwise feel.”

[178] These purposes are ‘two valuable practical consequences of fair consultations’. Explaining the scope of this third purpose, Lord Wilson in **ex parte Coughlan** stated at para. 24:

“...But underlying is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not ‘yes or no, should we close this particular care home, this particular school etc.’ ‘It was Required, as we are, to make a taxation related scheme for application to all inhabitants of our Borough, should we make one in the terms which we here propose?’”

²⁶ R (Mosely) v Haringey LBC [2014] 1 WLR 3947 at para. 25; See also Judicial Review Handbook 7th Edn. (2020) Sir Michael Fordham at pp 793.

²⁷ [2001] QB 213 at para 108

²⁸ [2001] QB 213

- [179] This principle is applied in the case of **R (Nettleship) v NHS South Tyneside Clinical Commissioning Group**²⁹, where Lord Reid describing the rationale of the statutory duty of public consultations stated:

*“The purpose of public consultations in that context is ... not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority’s decision-making process.”*³⁰

- [180] The scope of such participation was further discussed in **ex parte Coughlan**. As Lord Woolf MR stated at para 112:

“It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it might be quite onerous, goes no further than this.”

- [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.³¹

- [182] 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 sets out a process which guides the Commission in the conduct of public consultations. Essentially, it informs that the Commission is to start any public consultation process by a proper notice on its website together with a full document on the matter for consultation. The Commission may generally allow a 28 days’ period for responses which are required to be made in writing. In the interests of transparency, but subject to affording protection for confidential

²⁹ [2020] EWCA Civ 46

³⁰ See also **R (A) v South Kent Coastal CCG** [2020] EWHC 372 at paras 59 to 60.

³¹ See the case of **R v (on the Application of Moseley) v Haringey London Borough Council** 2014 UKSC 56 at para 26 citing without approval **Fletcher v Minister of Town and Country Planning** [1947] 2 All ER 496 at p. 501 and **R v Devon County Council, ex parte Baker** [1995] 1 All ER 73 at p. 91.

information, the Commission shall publish all responses in the consultation process on its website.

[183] The Commission is clearly under a duty to conduct its public consultations in a legally adequate manner. It is to be guided by the 2011 Guidelines and it must act fairly in accordance with common law principles and that additional element which the imposition of a statutory duty brings to the process. With these principles in mind, I now turn to the scope of the Commission's duty to consult.

[184] The statutory duty to consult is expressed in both sections 59 and 63 of the Act. Section 59(1) which is set out above makes it clear that *'[f]ollowing 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.'*

[185] Right at the beginning of this section there is a chronological prescription that section 63 of the Act must have been complied with. Section 63 states as follows:

'(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.*

(4) Where the Minister for finance remits the estimates back to the Commission for non-approval of the estimates, he shall provide the Commission with reasons for his non-approval, including any specific recommendations for modification.

(5) Where the estimates are approved, the Minister responsible for finance shall, within three months of the approval cause them and the workplan to be laid before the legislative council.”

- [186] There can be no doubt that the section 63 process must first be complied with before one gets to the section 59 process. Do these sections notwithstanding require two separate public consultation processes to be undertaken? Was the consultations undertaken, in any event, in this case legally adequate?
- [187] The factual context of how this present consultation was conducted have been set out above in factual findings of the Court. Some of it will be traversed again.
- [188] ‘Notice’ of public consultations were first given on 8th May 2019 when the Commission ‘*published on its website a Notice of the Publication of its Draft Annual Work Plan and Budget for the Financial Year 2019/2020. ...The Notice stipulated that it was being published pursuant to section 63 of the Act and indicated that the Commission ‘shall commence a public consultation on the Commission Draft Annual Work Plan and Budget 2019/2020 on 22 May 2019.’* The Commission followed the Telecommunications Code on such consultations and required responses to be sent in within 28 days from the publication of the consultation documents; the consultations were set to close on 19 June 2019.
- [189] The 2019/2020 Budget contained ‘a specific allocation for the receipt of the Industry Levy in the Income Part of the Budget and stipulated that ‘Industry Levy Fees: As per section 59 of the Telecommunications Act, 2006, the Industry Levy represents the Commission’s operating cost assessed by the Commission on all licensees.’
- [190] Digicel was first to respond to the Notice with a letter dated 8 April 2020. This was shortly followed by a joint letter of objection from all the licensees. The CEO stated that the Commission stayed the implementation of the Industry Levy and after giving due consideration of the objections, notified the licensees by letters dated 19th June 2020 demanding that the levy payments be made by each operator.
- [191] The Commission’s 2019/2020 budget contained a line item on the income side which reads: “Industry Levy Fees” and the sum is listed as US\$4,265,066.60 for the 2019 period, and US\$4,249,009.13 for the 2020 period. Based on the Commission’s historical approach all of the

licensees must have been aware that what the Commission intended to do was to apportion this in accordance with prorated calculation set out in the 2016 Budget document.

- [192] The 2016 Work Plan and Budget document then outlined the formula by which the industry levy would be calculated. It explained it this way:

“...the formula calculation is as follows: (Total revenue of Company A / Total Applicable Revenue of all Operators x Total Applicable Expenditure Budget of the Commission...”

As I noted above this formula advised that the industry Levy would be prorated among all the licensees in proportion to their respective percentage share of their combined revenue.

- [193] Every licensee ought to reasonably understand that its own contribution to the Industry Levy would be equivalent to the percentage of its own revenue against total combined revenue of all of the licensees in the industry.

- [194] There is some basis for the view that the Commission may have adopted a fixed and inflexible approach to apportionment. The Commission’s anticipation³²that 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’ was clearly only in relation to ‘timing and approach for collection’ and not relevant to how the industry levy was to be apportioned.³³

- [195] It may be considered that the Commission have given enough to the licensees in the consultation process, in relation to the apportionment of the industry levy for each licensee. Everyone was told from the inception how each of their share of the industry levy would be calculated. In my view they were ‘told enough—and in sufficiently clear terms—to enable them to make an intelligent response’. It was surely open to the licensees to provide relevant responses on this issue of apportionment. Each of them could have objected to this method. Any of them could have asked the Commission to consider their own expenditures and intended expenditure on capital projects and perhaps on monies spent on rebuilding. Any of them could have asked the Commission to consider that it had spent considerable sums on improved technological

³² Para. 3.15 of 2019/2020 ‘work plan’ contained in the Commission’s consultation document

³³ This raises another aspect to the consultations issue and this will be addressed below.

advances and that should affect their share of the overall industry levy. There could be many reasons why the Commission could legitimately decide to adjust an individual licensee's share of industry levy payment. This process would have to be a transparent one so that other licensee would understand why a prorated approach would not work. (Perhaps, they chose deliberately not to give such responses since they were still contesting the issue as to whether a levy should be implemented; who would want to start discussions about what portion should be paid by any of them.)

- [196] In any event, this is a matter of policy. The Court could not very well the Commission how much weight to put to relevant matters and whether this would in the end oblige the Commission to make adjustment. What a 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 finalising any decision'.
- [197] There is another aspect to the Commission's obligation to consult in the section 59 sense. The Commission's statement that it expected 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'* was clearly only in relation to 'timing and approach for collection' and not relevant to how the industry levy was to be apportioned.
- [198] That said, and notwithstanding all the above, 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 has been a history with the Commission forgoing 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 therefore fell short of its duty to have legally adequate consultations on this matter.

[201] As far as whether there should be separate consultations under Sections 63 of the Act and then under section 59, the legislation can be construed to requiring only one such process. 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 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.

[202] As far as the section 63 component of the public consultations process is concerned, I also find that the Commission failed to have adequate consultations .Section 63 imposes that statutory obligation on the Commission to consult before it submits its work plan and budget to the Minister for his approval. Consultations must mean something, and they must serve a purpose. As was stated in the 7th edition of the Judicial Review Handbook at page 189:

*"Public consultations is a virtue and discipline of certain aspects of decision-making, rule-making and policy making. It is governed by well-established public law principles. Legally adequate consultations is linked to procedural fairness being concerned with procedure and apply Court-identified objective standards. **It is also linked to sufficient inquiry. In each of these respects it then feeds into informed decision-making, allowing relevant considerations to be identified and taken into account.**"*

Emphasis added.

[203] For a body such as this Commission, in carrying out its duty under section 63, it was obliged 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.

[204] The Commission must approach these consultations in a manner that allows the operators a real opportunity to properly participate in the decision-making process by way of legally adequate consultations. This would, at a minimum, require that the Commission prepares and keeps audited financial statement. The Act requires this. Section 64 of the Act requires that the Commission to prepare within three months after the end of each financial year, accounts including *inter alia*:

- (a) *A statement of assets and liabilities of the Commission at the end of the financial year;*
- (b) *A statement of revenue and expenditure of the Commission during the financial year;*
- (c) *Such other financial statements for the financial year as may be prescribed by the Minister responsible for finance; and*
- (d) *Proper and adequate explanatory notes to the financial statements.*

[205] The Commission is mandated to 'ensure that all monies which are collected are brought to account'.³⁴

[206] Section 66 of the Act requires the Commission, 'within three months of the completion of the audit of the Commission's accounts in respect of any financial year, the Commission shall submit to the Minister responsible for finance:

- (a) *A copy of its audited accounts;*
- (b) *A written report of its operation and activities for that financial year together with a copy of the audited financial statements.'*

[207] Within three months of receiving these documents, the Minister is obliged to lay these in Legislative Council.

³⁴ Section 64(a)(b)(i) of the Act.

- [208] I consider that all of this plays a crucial role in the section 63 consultation process. Those consultations must be viewed as being framed within the context a transparent accounting system where are things are available for scrutiny.
- [209] The availability of such financial records would allow all consultees to be able to respond intelligently on estimates for expenditure as they would have proper financial documents to make comparisons with.
- [210] I agree that the Act provides two levels of scrutiny over this aspect of the Commissions work.³⁵
- [211] First, the consultees would be well placed to screen budget items for inflation and to even check to see how previous years budgeted proposals compared to actual spending. Is there inflation, unintended or otherwise? Is the Commission spending on matters which are relevant to the requirements of the Industry? It is important to note that the operators in the sector may not direct the Commission on its spending, that is the task of the Commission in keeping with their statutory obligations. However, the consultations process would surely entitle the operators to participate and to point out areas of what they may consider to be proper spending and offer comments which might influence the Commission and the Minister in their own decision-making. Each of these licensees brings their expertise to the table and the structure of the Act provides the opportunity for these skills to be brought into the process. The explanatory notes of the audited statements and other public financial documents, therefore, are relevant to providing intelligent feedback on any budget. As it is, the 2019/2020 budget listed broad categories of expenditure such as 'special project' and 'capital expenditure' without providing any details of what the special project is, or how the final sum for capital expenditure was arrived at.
- [212] Second, a transparent accounting system complete with audited statements with their explanatory and reports, may benefit both the Commission and the Minister from informed responses from the consultees on relevant matters related to budget estimates. In a conscientious approach to decision-making, the Commission might revise its own position before it sends it draft work plan and budget to the Minister for approval. Such intelligent feedback may also affect the mind of the Minister when he is deciding whether to approve of the Commissions Budget with or without modifications.

³⁵ Submissions on behalf of CCT and BVI Cable TV.

[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.

[214] The Commission being imposed with a statutory duty to consult, is not only required to put these licensees (other operators and the public) in a position properly to consider and respond to the consultation request,³⁶ but should also do so in a manner which allows the consultees an opportunity, framed in the consultation context, to participate in a meaningful way in the decision-making process. The Commission in this case, having regards to the statutory construct of the Act relevant to financial transparency and accountability, did not provide those to be consulted, all of the relevant information for those persons and entitles 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.

[215]

ISSUE NO. 2 – IRRATIONALITY/UNREASONABLENESS

The Claimants' Arguments

[216] An argument was taken that the Commission acted irrationally and unreasonably when it decided to calculate, fix and demand the payment of the Industry Levy for the 2019/2020 financial year having regards to the circumstances of the Commission's approach to the Industry Levy and the unresolved concerns of the licensees.

[217] The licensees have asked the Court to consider the history of the Commission's approach and its own historical decision not to impose the Industry Levy. In particular, the licensees contended that the Commission should have considered the issues faced by all the licensees, including what it terms the extraordinary expenditure necessary to rebuild the telecommunications' network after the devastation caused by Hurricane Irma and Maria and the difficulties faced by the industry with the challenges presented by COVID 19 pandemic.

³⁶ (R v North and East Devon Health Authority, Ex p Coughlan[2001] QB 213, para 112, per Lord Woolf MR, and Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at [9] per Arden LJ).

[218] FLOW makes the arguments this way:

“Taking into account all the circumstances, the imposition of an Industry Levy at this time, in the amount demanded, which has not been calculated according to statute and without consultation is manifestly unreasonable. No regulator, aware of the relevant law, taking into account all relevant considerations and ensuring procedural fairness, could have concluded that it was appropriate to implement the levy.”

[219] Digicel considered that the Commission should have additionally sought the agreement of the licensee to now embark on collecting the Industry Levy. This licensee pointed to the Commission own statement in the 2018/2019 Budget consultations process when it stated that it intended to provide a ‘stable and objective environment, allowing all those affected by our regulation to anticipate the basis for further decisions and make long term investment decisions with confidence.’

[220] It was further argued that the Commission itself was aware that the imposition of a levy was a significant adverse event for the licensee. This was acknowledged by the Commission in these very consultations when it stated that it ‘anticipated discussions with stakeholders ‘with a view to determining a mutually agreeable plan concerning the timing and approach for collection.’ Despite this indication no meetings were held, nor discussions had on this matter.

[221] Digicel developed this point in its written submissions arguing:

“44. The Commissions acted peremptorily when it simply notified the Claimant on 6 April 2020 that ‘the Ministry of Finance had approved our 2019/2020 Work Plan and Budget and attached an invoice for \$1.680,202.17 ‘reflecting the Levy that is payable by Digicel. ... That was despite prior efforts by Digicel and other operators to engage with the Commission following the publication of its Annual Work Plan and Budget 2019/2020 on 30 July 2020.

45. It is clearly unreasonable for a regulator, having undertaken to engage with operators so as to arrive at a mutually agreeable plan, then unilaterally to proceed to issue invoices, which required full payment within a calendar month.

The Commission’s Response

[222] The Commission, on the other hand, argues that the decisions which are involved in the introduction and demand for the payment of the Industry Levy are rational and reasonable.

[223] The Commission points out that the licensees have from the inception, had the benefit of not paying any industry levy. The Commission points out that since July 2016, the licensees were advised that the Commission would be implementing and collecting the industry levy payments.

It was only because of the devastation caused by the two hurricanes in 2017 that the Commission stated that:

‘.. the Commission acceded the Licensees’ request for a forbearance on the implementation of the industry levy. This forbearance was clearly intended to be temporary as evidenced by the fact that the Industry Levy was included in subsequent budgets and attempts were made to collect same with similar objections from the Licensees which ultimately resulted in no payments being made.’

[224] The Commission argues that it is the licensees who are acting in an unconscionable manner by refusing to pay the levy. It was submitted that:

“The unconscionable nature of the Licensees’ approach to their fulfilment of their statutory obligations can be seen from the fact that not having ever paid the Industry levy which they are fully aware was needed to fund the operational expenses of the Commission, the Licensees nevertheless sought to defer payment of the Royalty for the 2019 fiscal year on the ground of the economic hardship caused by COVID 19 pandemic made it difficult for them to do so. The Commission refused this request pointing out that this mean that the entire burden of meeting the expenses of the Commission would fall on the Government without even the benefit of the Royalty payment in a time when the Government was in an extremely difficult position because of the COVID 19 pandemic. Further, that as a Royalty payment was in respect of the previous year i.e. 2019 it was expected that any reasonable licensee would have made appropriate financial provision for this contractual and statutory obligation.

[225] The Commission submits as a ‘public authority entrusted with the statutory duty of collecting industry payments from licensees required to fund the expenses of the public authority’, it acted in all the circumstances, reasonably and rationally.

The Court’s Analysis and Conclusions

[226] A court is entitled to review and quash a decision of a statutory body for ‘irrationality’ or ‘unreasonableness’.³⁷

[227] In **Council of Civil Service Unions & Ors. v Minister for the Civil Services** Lord Diplock defined ‘irrationality’³⁸ as:

By “irrationality” I mean what can by now be succinctly referred to as “Wednesburyunreasonableness” (Associated Provincial Picture Houses Ltd v WednesburyCorporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

³⁷ See the case of *Chefette Restaurants Ltd v Harris* (2020) 98 WIR 79

³⁸ Cited with approval in the Eastern Caribbean Court of Appeal in *Claude Gerald v The Governor of Montserrat and others* - [2004] ECSCJ No. 47

*Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.'*³⁹

[228] This power of review, however, given to the courts must be exercised judicially. 'In particular, the decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at.'⁴⁰

[229] In this case, the complaints are that no reasonable Commission could have made these decisions to impose and demand an industry levy from each of the licensees and in such quantum without first complying with the statutory prescriptions of the Act.

[230] First, it needs to be stated clearly that Commission cannot be held to be acting unreasonably or irrational because it seeks to carry out its duties as required by the Act. The Commissions has a statutory duty to engage the process with a view of imposing and demanding the payment of an industry levy where such a levy is warranted under the Act. 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.

[231] The Court's role is limited to screening the procedure and the decisions made to determine first (a) whether the proper procedures were followed and (b) whether it falls outside the range of reasonable responses of the statutory decision-making body.⁴¹

[232] I remind myself that:

*"...the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision."*⁴²

³⁹ Applied by the Eastern Caribbean Court of Appeal in *Re Blake* - (1994) 47 WIR 174

⁴⁰ *Douglas and Others v Pindling* - (1996) 48 WIR 1

⁴¹ See the BVI high Court decision in *Digicel (BVI) Limited v The Telecommunications Regulatory Commission* Civil Case No. 214 of 2012

⁴² In *R (Balajigari) v Home Secretary* [2019] EWCA Civ 673; see also *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] All ER 261

[233] This is one of the guiding principles of the Tameside⁴³ duty to make inquiries. I consider it relevant to the Commission's statutory obligation to consult in a meaningful way. When this Commission failed to provide its audited financial statements, it would have affected the consultees' ability to provide intelligent responses. A reasonable Commission must have realized that a consultee would not be properly placed to make an intelligent response to a proposed budget when there were generalized line items related to expenditure and there were no audited statements to make comparisons with and to use as context for the consultations.

[234] I find 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.

[235] It is also difficult to understand how a reasonable Commission looking at the provisions of this Act and section 102 of the BVI Constitution could conclude that 'royalty' payments belong to the Government in the sense that they should be diverted to the Government's Consolidated Fund. It is also difficult to understand why the Commission sought to demand that the industry levy fund all of the expenses of the Commission without seeking to apply any of its income to offset any amount of this levy. In approaching its tasks in this manner, the Commission seriously misdirected itself on several points of law.

[236] I note the decision of the Caribbean Court of Justice in the case of **Chefette Restaurants Ltd v Harris** (2020) 98 WIR 79, where that Court accepted that a misdirection on a point of law can amount to an act of Wednesbury unreasonableness. There, the Court speaking through Justice Anderson accepted the view of Sir John Donaldson MR in **Dobie v Burns International Security Services (UK) Ltd**⁴⁴ where he stated that:

"All that this court or the appeal tribunal can do is to consider whether there has been an error of law. They may reach the conclusion that there has been an error of law on one of two alternative bases. The first basis is that the industrial tribunal have given themselves a direction on law and it is wrong: that is this case. The alternative basis, which is almost a Wednesbury basis (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223), is that no reasonable tribunal could have reached that conclusion on the evidence and, since all industrial tribunals are ex hypothesi reasonable tribunals, it must follow that, although we cannot detect what it is, there has been a misdirection in law."

⁴³ Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665

⁴⁴ 1984] ICR 812

[237] In this case the misdirection of law is identifiable and so the assessment of unreasonableness can easily be made. I therefore find that the Commission acted irrationally in its approach to calculating and fixing the industry levy for the 2019/2020 financial period.

ISSUE NO. 3 – LEGITIMATE EXPECTATION

The Claimants Arguments

[238] Several of the licensees have argued that they had a legitimate expectation that the Industry Levy would not be imposed for the 2019/2020 financial year.

[239] FLOW's basis for this ground was that having regards to the history of the interactions between the Commission and the licensees, it legitimately expected that the Industry Levy would not be demanded without prior consultations and without compliance with the Act (the failure to produce audited accounts).

[240] FLOW also contended that that it was established practice that even though the Commission had included an industry levy in previous budgets (beginning 2016), it would not seek to implement it.

[241] Digicel was in part, similar. This claimant contended that there was a history of the Commission forgoing the collection of the levy. With regards to the 2017/2018 Budget, it was expressly stated to be because of hardships faced by the licensees from natural disasters. The Industry Levy for the two subsequent financial periods were also not demanded and so Digicel contended that the 'default position' heading into 2019/2020 was that no levy was being recovered'.

[242] Digicel also sought to rely on the Commissions own statement made in the 2019/2020 Work Plan and Budget that '[w]e anticipate discussions with 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.' It contends that this 'may be understood only as a commitment to meaningful consultations with each of the operators on a bilateral basis, it being explicit that mutual agreement was the objective.'

[243] Digicel submits that: "the failure to follow through on this commitment to direct engagement with the operators is significant in light of the Commission having previously indicated that it was

prepared to consider the concept of investment credits. As set out in Part II, paragraph 4.8 of the 2017/2018 Budget Consultation Paper, that is a mechanism whereby an operator may reduce its levy payment obligations in return for improving its network through further investment. Whilst that was not consulted upon in the 2019/2020 Draft Work Plan and Budget, because the Commission failed to engage in the dialogue that it committed to ahead of the imposition of the levy, the operators were denied the opportunity of ascertaining whether investment credits might be also feasible.”

- [244] Digicel argues that notwithstanding that the Commission has a statutory duty to demand and collect a levy, a legitimate expectation may still arise in circumstances where the Commission could give rise to such an expectation that the statutory power would not be exercised except through an agreed upon process. This is such a case, Digicel argues.

The Commission’s Response

- [245] The Commission has not agreed that such a legitimate expectation could arise in this case. There is no evidence to support such a finding the Commission argues. The Commission relies on statements made in the 2017/2018 Budget document which, it contends, makes it clear that whilst it was willing to forego collection for that financial year because of hardships caused by the hurricanes, in the future it would be adopting

‘...an amended approach to the implementation of the industry levy in the initial years of its implementation. The Commission will introduce a path for payment of the Industry Levy, will credit measurable, reasonable and objectively verifiable investment by each operator in its Network and Services to the payment of the Industry Levy and allow operators to establish a plan for payment. The Industry Levy from each of the licensee will fund a portion of the work of the Commission going forward.”

- [246] The Commission contends that correspondence from at least two of the licensees in 2017, makes it clear that they were aware that the levy was going to be imposed in coming years. The Commission contends that the licensees were never contending that the Commission could not

demand or collect the levy, the 'dispute whether the Commission was entitled to impose the industry levy'.

The Court's Analysis and Conclusions on the Legitimate Expectation Issue.

- [247] A claimant for judicial review may be entitled to relief on the basis of a legitimate expectation even though he has no other basis for claiming such relief. The relevant principles are set out in the current edition of the **Halsbury Laws of England** Volume 4 at para 50:

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice or policy. In all instances the expectation arises by reason of the conduct of the decision-maker and is protected by the courts on the basis that principles of fairness, predictability and certainty in administration should not be disregarded and that a legitimate expectation should not be disappointed."

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must give notice, consult, or afford the person either an opportunity to make representations on the matter or the benefit of some other requirement of procedural fairness."

- [248] The statement or conduct relied on to ground an enforceable legitimate expectation must be 'clear, unambiguous and devoid of relevant qualification'⁴⁵. There may be circumstances in which the statutory body may be entitled to avoid its promises if there are good reasons to do so.
- [249] Was there such a representation in this case giving rise to an enforceable legitimate expectation that (a) the industry levy would not be collected for the 2019/2020 period and or (b) that certain pre-requisites had to be complied with before such demand and collection could be made?
- [250] As far as question (q) is concerned, having regards to the statutory mandate given to the Commission, it is clear that it could not promise, which promise would amount to a legitimate expectation, that it would not demand and collect any industry levy lawfully due.

⁴⁵ Bingham LJ in *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91 at 110 cited with approval cited with approval by Lord Hoffmann in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] 5 LRC 769 at para [60].

[251] This point was well made in **United Policyholders Group and others v Attorney General**⁴⁶ where, at paragraph 38 of the Judgment, the Privy Council stated clearly that the legitimate expectation principle:

“cannot be invoked if, or to the extent that, it would interfere with the public body’s statutory duty—see eg A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 at 351 per Lord Fraser of Tullybelton.

[252] In **Birkdale District Electric Supply Co Ltd v Southport Corp**⁴⁷ the Earl of Birkenhead said that it was

“a well-established 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. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.” But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it.’

[253] I note that the Guyana Court of Appeal in the case of **Demerara Distillers Ltd v Guyana Revenue Authority**⁴⁸ was called upon to decide whether ‘promises’ by the President of Guyana could give rise to an enforceable legitimate expectation. In this case, a certain taxpayer sought to rely on statements by the President of Guyana to the taxpayer when he expressed his views that certain taxes would be assessed and calculated by a certain method. The Tax Authority proceeded to make the assessment in accordance with the Act but contrary to the President’s statements. Chang JA of the Guyana Court of Appeal determined the issue as follows:

“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.

[254] These principles are relevant. 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,

⁴⁶ [2016] 4 LRC 433

⁴⁷ [1926] AC 355 at 364

⁴⁸ (2008) 73 WIR 244

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.

- [255] In any event, I do agree 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.
- [256] What the evidence indicates relates to the question (b) considerations. In a case where the Statutory Authority cannot promise away its substantive duty to collect a levy, 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.
- [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.
- [258] In its 2017/2018 Budget document the Commission made it clear in the future it would be adopting 'an amended approach' for the collection of the industry levy', and that the Commission will not only introduce 'a path for payment of the Industry Levy' but will also credit measurable, reasonable and objectively verifiable investment by each operator in its Network and Services to the payment of the Industry Levy and allow operators to establish a plan for payment.'
- [259] In the 2019/2020 Work Plan and Budget, the Commission stated that it 'anticipate[d] discussions with 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.'
- [260] In the context of the historical dealing between the parties on the collection of an industry levy, the previous stance of the Commission in waiving payments on the basis of industry hardships, the contention of hardships arising from the COVID 19 pandemic, it was reasonable to expect that the Commission would engage the licensees on the 'timing and approach to collection'

before sending out its final demand for payment. I find that the licensees who asserted this legitimate expectation are entitled to rely on this expectation and this Court will enforce it.

CONCLUSIONS AND REMEDIES

- [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 payment of an industry levy could only be properly and legitimately be 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 commission'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 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 impose.
- [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.⁴⁹ The decisions taken were effectively rendered meaningless.

⁴⁹ See De Smith's Judicial Review (8th Edn., Sweet & Maxwell), paragraph 5-058 (as amended by paragraph 5-058 in De Smith's Judicial Review – Third Supplement to the Eight Edition (Sweet & Maxwell); see also R v Lord President of the Privy Council ex parte Page [1993] AC 682 at page 702.

- [265] 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.
- [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 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.

Orders of the Court

[272] The Orders of the Court are as follows:

In the claim brought by CCT and BVI Cable 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 respectively 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 –

(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 for the Financial Year 2019/2020.

[273] The Court will grant the following declarations in favour of each of the claimants in the respective claims:

(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.

[274] The Court will grant costs to each of the claimants. If these are not agreed by the Parties within 28 days of this Judgement, the parties are to file and exchange written submission on or before 3rd May 2022, on the issue of costs.

[275] The Court wishes to express its gratitude to the parties for their patience.

Darshan Ramdhani QC

High Court Judge (Ag.)

By the Court

Registrar