IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION

CICA (Civil) APPEAL No. 0031 of 2023
(Formerly Cause No. G 0154 of 2023 (IKJ))

BETWEEN

THE KING

ON THE APPLICATION OF INFINITY BROADBAND LIMITED

(TRADING AS C3 PURE FIBRE)

APPELLANT

-AND-

THE UTILITY REGULATION AND COMPETITION OFFICE

RESPONDENT

Before:	**The Hon John Martin KC, JA** **The Hon Sir Michael Birt, JA** **The Hon Clare Montgomery KC, JA**
Appearances:	**Mr Chris Buttler KC of Counsel and Ms Sally Bowler of McGrath Tonner for the Appellant** **Mr Sam Grodzinski KC of Counsel and Ms Anna Peccarino of Travers Thorp Alberga for the Respondent**
Heard:	**10 September 2024**
Draft circulated:	**25 November 2024**
Judgment delivered:	**29 November 2024**

JUDGMENT

Birt, JA

1. On 1 December 2023, for the reasons set out in a judgment of the same date ("the Judgment"), Kawaley J sitting in the Grand Court refused the Appellant leave to apply for judicial review of the lawfulness of the licence fee which the Respondent has charged the Appellant for the issue of a licence to provide internet and communication technology ("ICT") services in the Cayman Islands.

2. On 10 September 2024, at the conclusion of the hearing, this court allowed the appeal against Kawaley J's decision and granted the Appellant leave to apply for judicial review. What follows constitutes our reasons for that decision.

Factual background

3. The relevant factual background, as the court understands it, can be summarised as follows.

4. Following the liberalisation of the ICT marketplace in 2002 and the ending of the monopoly previously held by Cable and Wireless (Cayman Islands) Limited, a number of licences were issued by the ICT Authority (the predecessor to the Respondent) to several companies under section 23 of the Information and Communications Technology Act ("the ICT Act") to establish, operate and maintain ICT networks and services in the Cayman Islands. The court has been provided with the 2019 Revision of the ICT Act but understands there have been no relevant amendments for present purposes since the original enactment in 2002.

5. In July 2003, the ICT Authority agreed that licence fees to licence holders should comprise two elements; an element to cover the cost of regulation, set by the ICT Authority; and a coercive element which would be approved by the Cabinet. In August 2003, the Cabinet duly approved the setting of a coercive licence fee, based on 6% of the gross turnover of the licence holder.

6. On 13 December 2004, the ICT Authority granted a licence to the Appellant under section 23 of the ICT Act ("the 2004 Licence"). The 2004 Licence stated that the Appellant was required to pay

an annual fee, payable on a quarterly basis, as specified in the licence. The fee as specified in the licence comprised in broad terms (i) a 'Royalty Fee' of 6% of the Appellant's quarterly revenues, as defined in the licence and (ii) a 'Regulatory Fee' based on the ICT Authority's quarterly expenditure for regulating the ICT industry, multiplied by the Appellant's quarterly defined revenues, divided by all licensees' defined revenues for the same quarter; in other words a pro-rata share of the ICT Authority's expenditure calculated by reference to the turnover of all the entities holding such a licence.

7. The basis of licence fees under the ICT Act was also set out in guidelines that were first issued by the ICT Authority in 2003 ("the Guidelines"). A further version of the Guidelines was issued in January 2013, and a further version in March 2021. The Guidelines explained the basis of calculating the Royalty Fee and the Regulatory Fee as mentioned above.

8. It was common ground before the judge and before this court that the Royalty Fee of 6% forms part of the revenue of the government and is applied by the government towards its expenditure.

9. The Appellant did not in fact begin providing ICT networks and services in the island until 2015 and accordingly it was not until that year that the Appellant started generating revenues and paying the licence fee.

10. On 1 April 2021, the Respondent (as the successor to the ICT Authority) granted the Appellant a further licence under section 23 of the ICT Act ("the 2021 Licence"). The licence again set out the Royalty Fee and the Regulatory Fee payable by the Appellant calculated on the same basis as in the 2004 Licence and in accordance with the Guidelines.

11. The Appellant stopped paying its Royalty Fee from the fourth quarter of 2019 although it continued to pay some of its Regulatory Fee until the second quarter of 2022.

12. On 6 July 2022, the Respondent issued a notice to the Appellant under section 91 of the Utility Regulation and Competition Act ("the URC Act") stating that there were reasonable grounds for believing the Appellant had failed to comply with the obligations in its licence to pay the Royalty Fee and the Regulatory Fee, together with other matters.

13. On 18 August 2023, the Respondent issued notices to the Appellant under section 91 of the URC Act comprising:

(i) An Enforcement Notice determining that the Appellant had failed to pay outstanding Royalty Fees and Regulatory Fees in specified amounts; and

(ii) A proposed Fine Notice indicating its intention to issue fines in respect of the above matters.

14. On 29 August 2023, the Appellant issued its application for leave to apply for judicial review. It also appealed under section 91(11) of the URC Act against the Enforcement Notice. In its application for judicial review, the Appellant sought a declaration that it was not liable to pay the licence fee, an order quashing the Enforcement Notice and an order for restitution of all licence fee payments which it had made.

15. Mr Grodzinski submitted that there was little factual merit behind the application in the sense that the basis of charging the Royalty Fee and the Regulatory Fee has been known to the Appellant and also generally well-known and well-publicised since 2003. Whilst this may be so, the licensing fee may only be lawfully charged if there is a proper legal basis for the charge in the relevant legislation and it is the duty of the courts to determine whether that is so.

The relevant statutory provisions

16. The power for the Respondent (defined in the Act as "the Office") to charge a licence fee for the grant of a licence is contained in section 30 of the ICT Act in the following terms:

> ***"Licence fees***
>
> ***30(1) A licence under this Law shall be subject to the prescribed licence fees which shall be determined by the Office.***

(2) The licence fees referred to in subsection (1) shall be payable directly by the applicant to the Office at such time or times as may be prescribed by the Office."

17. As can be seen, the licence fees have to be *'prescribed'*. This is defined in section 3 of the Interpretation Act (1995 Revision) in the following terms:

"'prescribed' means prescribed by the [Act] in which the word occurs or by any regulations made thereunder, …."

"Regulations" is defined in section 3 as follows:

"'regulations' include rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms."

18. Section 34 of the ICT Act provides that the Office shall keep a register of all licences, which may be kept in electronic form, and shall make available all applications and licences for public inspection during its business hours.

19. Section 97(3) of the ICT Act confers a power for the Respondent to make regulations in the following terms:

"Power to make regulations

97(1) …

(2) …

(3) The Office:

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

a. licence fees;

b. critical ICT infrastructure; and

c. radio and television content obligation; and

(b) may make regulations relating to:

(i) infrastructure sharing;

(ii) the numbering system;

(iii) quality standards; and

(iv) such other measures as the Office considers necessary for the carrying out of its duties under this Law."

[Emphasis added]

The Proceedings

20. In its statement of facts and grounds in support of its application for leave to apply for judicial review, the Appellant essentially raised two grounds. Ground 1 was that the Respondent had no power to charge the Royalty Fee or the Regulatory Fee unless and until it made regulations under section 97 of the ICT Act prescribing a licence fee in accordance with section 30. Having failed to make any regulations, the demand for payment of the Royalty or Regulatory Fee was of no legal effect.

21. Ground 2 was that the Respondent had no power to charge the Regulatory Fee unless or until it *'published'* the amount of the fee in accordance with the terms of the licence.

22. The judge decided Ground 2 against the Appellant and no appeal against his decision in this respect is brought. Accordingly, I say no more about it.

23. In its skeleton and oral argument before the judge, the Appellant elaborated Ground 1 by contending that the Royalty Fee amounted to a tax and that section 30 was not sufficiently clearly expressed to authorise the levying of a tax as opposed to a fee. In support, the Appellant referred to the well-known observations of Atkin LJ in *Attorney General v Wilts United Dairies Limited* (1921) 37 TLR 884 at 886 and Lord Wilberforce in *Vestey v Inland Revenue Commissioners* [1980] AC 1148 at 1172 emphasising the requirement of clear statutory authority for the levying of a tax. In any event, no regulations had been made and accordingly the licence fee had not been prescribed.

24. The Respondent disputed the need for the licence fee to be prescribed in regulations but asserted that, if regulations were required, the licences issued to the Appellant in 2004 and 2021 constituted regulations because of the wide definition of that term in section 3 of the Interpretation Act.

25. At an earlier stage in the proceedings, Walters J had directed that the application for leave should be heard on an inter partes basis. Although the judge indicated in the Judgment that, if he had been dealing with the application on an ex parte basis as normal he would have granted leave, he considered that the matter turned on a point of law where no evidence would be necessary and, having heard full inter partes argument he was in a position to decide whether the Appellant had an arguable case in the light of the submissions made to him.

26. The judge rejected the submission on behalf of the Respondent that section 30 did not require a licence fee to be prescribed in regulations, but he accepted its secondary argument that the licence issued to the Applicant itself constituted regulations. That was because the licence set out the terms of the Royalty Fee and the Regulatory Fee in detail, it was publicly available in accordance with section 34 and the wording of section 3 of the Interpretation Act was sufficiently wide to cover it. Accordingly, the relevant fees had been *'prescribed'* as required by section 30. He did not consider the contrary to be arguable.

The test for granting leave

27. The test for whether to grant leave to apply for judicial review is well-established. It was summarised by Lord Bingham and Lord Walker in *Sharma v Brown-Antoine* [2007] 1 WLR 780 at [14] as follows:

> ***"(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy….."***

No point was raised before us or before the judge on delay or alternative remedy. Accordingly, the question for determination is whether there is an arguable ground for judicial review having a realistic prospect of success.

The Appellant's contention

28. The Appellant submits that the Royalty Fee is in effect a tax on turnover. It says that its grounds of appeal raise two central issues.

Issue 1 – does a tax on turnover require statutory authority and, if so, is there statutory authority in the ICT Act in sufficiently plain terms for the Respondent to levy a tax on turnover at a rate of 6%?

Issue 2 – if the Respondent's power to make regulations under section 97 includes a power to make regulations that prescribe taxes, does the licence issued to the Appellant constitute the making of regulations?

29. At the beginning of the hearing of this appeal, the court indicated that it wished particularly to be addressed on Issue 2. I would briefly summarise the submissions of Mr Buttler on Issue 2 as follows:

a. As the judge correctly found, section 30(1) requires the licence fees to be prescribed by regulations.
b. It is clearly arguable that a licence issued under section 30 does not itself constitute regulations and the judge was wrong to find to the contrary. The following matters support this contention.
c. The ICT Act itself clearly distinguishes between a licence and regulations, which are different things. '*Licence'* is defined as *'a licence granted under this Law*' whereas '*regulations'* is defined as '*regulations made under this Law'*. This clear difference is borne out by the fact that licences are granted under section 23 of the Act, whereas

regulations are made under section 97. These are different powers in respect of different things.

d. Licences are dealt with in Part III which is entitled '*Licencing'*. Part III includes provisions dealing with the power to grant a licence, the procedure for the grant of a licence, the assignment or transfer of a licence, licence fees, the duration of a licence and the renewal, modification, suspension and revocation of a licence. It also provides at section 34 for a register of applications and licences. All of these provisions cannot sensibly be applied to *'regulations'* which are a form of subordinate legislation.

e. Conversely, regulations are dealt with in section 97, which is in Part XI, headed *'General'*. This difference in definition and in treatment within the Act makes it clear that a licence is something completely different from a regulation and that a licence granted under the Act cannot at the same time itself be a regulation.

f. Regulations have to be published in the Gazette. Thus section 29 of the Interpretation Act provides as follows:

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

Section 3 of the Interpretation Act provides that *'Gazette'* means *'a Government Notice'*. Although we were not referred to any definition of *'Government Notice'*, it is clear from section 29(2) that it must be a document of some formality and public availability. The Appellant submits that there is nothing to suggest that the licences issued to the Appellant have been published in any Government Notice. Accordingly, even if, contrary to its primary submission, a licence can amount to regulations, the regulations have not been published in the Gazette as required and accordingly have

not taken effect. Section 61 of the Interpretation Act (which provides that where any regulation is required to be published in the Gazette, a Government Notice that such regulation has been made and of the place where copies thereof can be purchased or perused shall be sufficient compliance with such requirement) does not assist because there has been no Government Notice to such effect.

g. I should add that initially Mr Buttler submitted that, even if licences amount to regulations, there was no evidence that the Minister had been consulted on the Appellant's licences as required by section 97(3). Mr Grodzinski then produced a copy of the paper presented to Cabinet for the meeting in August 2003 referred to at para 5 above. It was not entirely clear whether Mr Buttler accepted that this satisfied the requirement for consultation with the Minister and this would need to be clarified and addressed prior to the judicial review hearing.

h. Contrary to the judge's understanding, the detailed terms of licences are not actually available on the public register kept by the Respondent and therefore they do not have the requisite public character of a regulation.

i. Bennion, Bailey and Norbury on Statutory Interpretation at section 3.3 gives examples of different types of delegated legislation, including regulations and orders, rules, by-laws and some seven other terms used to describe delegated legislation. However, there is nothing in Bennion to suggest that a licence can amount to delegated legislation. Similarly, section 3 of the Interpretation Act, whilst giving examples of several different types of instrument which fall within the definition of *'regulation'* does not include a licence.

30. It is not for this court to determine whether the above arguments are correct. However, on the face of it, they are powerful arguments. In fairness to the judge, it is right to point out that a number of the above arguments were not developed before him; indeed Mr Grodzinski objected that some of these points were new, but in my view they essentially relate to the correct interpretation of section 30 or the validity of any regulations, and arguments on construction can develop as time goes on. I do not consider that Mr Buttler's further thoughts have strayed outside acceptable boundaries, particularly in what is only an application for leave to apply for judicial review rather than a final decision as to the lawfulness of the licence fee.

31. Mr Grodzinski supported the judge's reasoning, relying on the wide definition of *'regulations'* in section 3 of the Interpretation Act and the public character of the licences issued to the Appellant. In this respect, he strongly disputed that the full terms of the licence were not publicly available on the Respondent's public register. Given the dispute between him and Mr Buttler, this was not a matter which the court was able to resolve at this stage; evidence will need to be adduced on the point in due course if it remains in dispute. He also pointed out that there was no definition of '*Government Notice'* and submitted that the publication of the licences by the Respondent amounted to a Government Notice.

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

33. It is for these reasons that the court allowed the appeal, granted leave to apply for judicial review and remitted the matter to the Grand Court for hearing. I would emphasise that the judge hearing the case will start with a clean slate. On the one hand, Kawaley J's conclusions must be set aside because of the further arguments which were not adduced before him and this court's view that those arguments have a realistic prospect of success. On the other, this court has expressed no concluded view as to whether, at the end of the day, the Appellant's arguments will succeed.

34. I should add that the appeal was only brought in respect of the Royalty Fee; it did not include the Regulatory Fee. Logically, if the Appellant's arguments on Issue 2 are correct, the Regulatory Fee is just as invalid as the Royalty Fee because there have been no regulations as required by the ICT Act. Mr Grodzinski submitted that the position of the Appellant was logically incoherent. Mr Buttler's response was that the Appellant was simply being pragmatic in that it understood the need for the Regulatory Fee and had no objection to paying such a fee. It seems to me that a pragmatic decision of this nature should not prohibit the Appellant from pursuing its case in respect of the Royalty Fee.

35. I should also add, for the sake of completeness, that we were informed that the Minister had published in the Cayman Islands Legislation Gazette a draft Information and Communications Technology (Validity) Bill 2024 ("the Bill"). The declared purpose of the Bill is to *"validate the charging, payment and collection of licence fees"* by the Respondent and its predecessor. Amongst other matters, the Bill provides that licence fees charged and collected by the Respondent prior to the coming into force of the Bill are validated and taken to have been lawfully charged by the Respondent as if the licence fees had been prescribed in regulations which were made under section 97(3)(a) and published in the Gazette, although there is, quite properly, an exception for any existing proceedings, such as the present case.

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

37. Having determined at the hearing that leave should be granted in respect of Issue 2, the court did not hear oral argument on Issue 1. Nevertheless the court ruled that leave was granted generally and it follows that the Appellant is free to pursue Issue 1 at the hearing of the judicial review. The court also indicated that there should be a directions hearing before the Grand Court in order to ensure that the issues and arguments to be raised before the Grand Court are clearly identified.

Montgomery, JA

I agree.

Martin, JA

I also agree.