IN THE COURT OF APPEAL OF BELIZE AD 2015
CIVIL APPEAL NO 29 OF 2012

SPEEDNET COMMUNICATIONS LIMITED Appellant

v

PUBLIC UTILITIES COMMISSION Respondent

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal

E A Marshalleck SC for the appellant.
F Lumor SC for the respondent.

_____

5 December 2013 and 19 June 2015.

SIR MANUEL SOSA P

Introduction

[1] There is raised by the present appeal a question of much importance (and by no means easy) on the interpretation of the word ‘channel’ as used in the final row of the fifth table provided in the schedule to the Telecommunications (Licensing Classification, Authorisation and Fee Structure) Regulations 2002 (which schedule and regulations shall, for the sake of convenience, be referred to in the remainder of this judgment as

'the Schedule' and 'the Regulations', respectively). For ease of reference, the table in question is here reproduced:

FEE STRUCTURE
FREQUENCY AUTHORISATION

	Application Fees	Licence Fees		
		First Year		Annually
	(A)	(B) On grant of Licence	(C) At end of first year	(D)
Mobile Cellular	$1,000	$5,000 less fee in column (A)	$1,000 per channel less fee in column (B)	$1,000 per channel
Paging	$1,000	$2,500 less fee in column (A)	$1,000 per channel less fee in column (B)	$1,000 per channel
Point to Point Links HF VHF UHF SHF				$100 per channel

The issue, put in broad terms, is whether, as used in the final row of the table reproduced above, 'channel' means radio frequency channel, as the appellant submits, or voice channel, as the respondent contends. Neither the Regulations nor their parent Act, viz the Belize Telecommunications Act ('the Telecom Act') provide a definition of the word 'channel'. Moreover, that word is not to be found anywhere in the Telecom Act; and its appearances in the Regulations are confined to the Schedule, specifically to

the last of the five tables which together comprise it. What is more, counsel representing the parties on this appeal were unable to direct the Court to any decided case dealing with the interpretation of the word in another piece of legislation, whether in this or any other jurisdiction.

The parties

[2] The appellant, Speednet Communications Limited ('Speednet'), is a company incorporated and having its registered office situate in Belize and is also a licensed provider of public telecommunication service to some 90,000 customers. The respondent, the Public Utilities Commission ('the PUC'), is a body corporate with perpetual succession and a common seal. It was established as such under section 3 of the Public Utilities Commission Act ("the PUC Act'), which Act further provides for it (the PUC) to be an autonomous institution.

The PUC Act and the Telecom Act: relevant provisions

[3] The general functions of the PUC are stated in section 22 of the PUC Act in the form of a twofold duty 'to ensure that the services rendered by a public utility undertaking operated by a public utility provider … are satisfactory and that the charges imposed in respect of those services are reasonable …' As regards the funds and income of the PUC, provision is to be found in the PUC Act as well as in the Telecom Act. Thus, the PUC Act, which came into force on 24 August 1999, provides at section 37 that –

> 'The funds of the [PUC] shall consist of:-
>
> (a) such sums as may from time to time be appropriated by the National Assembly for the purposes of the [PUC]; and
>
> (b) <u>such sums as may in any manner become payable to or vested in the [PUC] from any lawful source whatever</u>.' [Emphasis added.]

while section 10(2) of the Telecom Act, which came into force on 13 August 2002, states (reversing the order found in the PUC Act) that –

'The PUC shall derive its income from –

(a) any charge or fee that may be prescribed pursuant to this Act or any other law;

(b) any sum appropriated from the Consolidated Revenue Fund.' [Emphasis added.]

[4] As declared by its section 3, the primary object of the Telecom Act is the making of provision for 'the regulation and control of, telecommunications matters in the public interest'. That main object is complemented by eleven other objects which are spelled out in the remainder of that section and which include ensuring 'the efficient use of the radio frequency spectrum': see para (j) of the section. Section 2 of the Telecom Act defines the term 'frequency spectrum' as meaning, unless the context should otherwise require, 'the continuous range of electromagnetic wave frequencies used for telecommunications'. Consistently with the object last stated above, section (2) of the Telecom Act authorises the PUC to –

'… perform all such acts and do all such things as are reasonably necessary, ancillary, incidental or supplementary to the performance of any of its functions as assigned or transferred to it under this Act in a manner which it considers is best calculated to …

(j) manage and administer the use of the radio frequency spectrum …'

[5] Having given such authority to the PUC, the Telecom Act then vests it with 'the control, planning, administration, management and licensing' of the radio frequency spectrum: see section 12(1). Subsection (2) of this same section proceeds thereafter to impose an important requirement on the PUC in this regard, stating as follows:

'In controlling, planning, administering, managing and licensing the use of the radio frequency spectrum, the PUC shall comply with the applicable standards and requirements of the International Telecommunications Union and its Radio Regulations, as agreed or adopted by Belize.'

[6] At subsection 12(3), the PUC is further authorised from time to time to prepare a 'spectrum allocation plan' in respect of any part of the frequency spectrum. The prescribed objects of such a plan are set out at subsection 12(4). Among them are the defining of the way in which the radio frequency spectrum shall be used (para (a)) and the aiming at ensuring that the radio frequency spectrum shall be utilised and managed in an orderly, efficient and effective manner (para (b)). The Legislature's evident concern over the manner in which the radio frequency spectrum is to be used finds expression again at section 15 of the Telecom Act, which section creates a general requirement for a telecommunication service provider to operate under and in accordance with a licence issued by the PUC. Thus, at subsection (2), it is provided that the operation of 'any system that uses scarce resources such as the radio frequency spectrum' in order to provide telecommunication service to the public shall require licensing.

[7] The Telecom Act contains more than one provision for the making by the PUC of subsidiary legislation. Thus, at section 7(a) it authorises the PUC to make, *inter alia*, regulations necessary for its (the Telecom Act's) own implementation; and, at section 7(b), it further authorises the same body to make, *inter alia*, regulations for its (the PUC's) administrative operations in respect of its powers and functions under the Telecom Act. Section 15(8) goes so far as to require the PUC to make regulations governing the grant of licences. Section 26(1), in like fashion, places on the PUC a duty to make regulations for the imposition, implementation, monitoring and enforcement of rates in certain specified categories of case.

[8] Most relevantly, however, section 56 provides as follows:

> '(1) The PUC may make regulations for the better carrying out of the provisions of this Act and for prescribing any matter or thing that needs to be prescribed.
>
> (2) Without prejudice to the generality of the foregoing, the PUC may, by regulations prescribe:-

(a) procedures for applying for licences;

(b) the fees payable to the PUC in relation to applications, licences and …'

(c) the procedures relating to the management of the spectrum …'

The Regulations: relevant provisions

[9] The Regulations and the Schedule, which forms part of them, were apparently made by the PUC with its powers under section 56 primarily in mind. Hence, the Regulations' long title, worded with appropriate and customary caution, is:

> 'REGULATIONS made by the [PUC] pursuant to the powers conferred upon it by section 56 of the [Telecom Act], and all other powers thereunto it enabling.'

It is not out of the question that (but unnecessary to decide whether) powers conferred by provisions other than those of section 56 came into play on the making of the Regulations.

[10] Part V of the Regulations is headed "FREQUENCY AUTHORISATION". Regulation 7, the sole regulation set out in Part V, is accompanied by a marginal note reading 'Application for frequency authorisation'. As relevant for present purposes, it states:

> '7. (1) An application for a licence under this Part shall (*sic*) made in writing in such form and in such manner, and shall contain such information and particulars and shall be accompaied (*sic*) by such details as may from time to time be specified by the PUC.
>
> (2) An application for a licence under this section (*sic*) shall be accompanied by a non-refundable fee as contained in the Schedule to these Regulations.

…

(7) Where an application is approved the PUC shall issue the frequency authorisation on payment of the prescribed fee …'

[11] The heading of Part VI of the Regulations is 'FEE STRUCTURE'. This part comprises Regulations 8 and 9, of which only the former, whose main marginal note reads 'Payment of fees', is material for present purposes. It provides as follows:

'8. (1) Any person applying under these Regulations for an Individual Licence, a Class Licence, or a Frequency Authorisation shall be required to pay the fees as set out in the Schedule as follows:

(a) on filing of the application, the Application Fee;

(b) on grant of the licence, the Initial Fee;

(c) at the end of the first calendar year, the Annual Fee; and

(d) annually, after the first calendar year, the Annual Fee.

(2) Any fees not covered above which may be applicable to a licensee shall be paid annually by the licensee in accordance with the fees listed in the Schedule.'

The factual background

[12] In 2010 Speednet applied to the PUC under regulation 7(1) of the Regulations for frequency authorisation in respect of the 13 point to point links. The PUC approved the application and, by letter dated 2 August 2010, advised Speednet of such approval and of the fee being charged for the frequency authorisation, viz BZ $238,000.00. Such fee was being calculated on the basis that authorisation was required for a total of 238 channels and the Schedule authorised a fee of $1,000.00 per channel. Speednet questioned the basis of the calculation. It accordingly advised the PUC, by letter dated 11 August 2010, that such calculation was erroneous and that, as it understood the

Schedule, the applicable fee was $1,300.00 only, since the application for 13 point to point links involved no more than 13 channels at a rate of $100.00 per channel. Speednet, interestingly, enclosed with its letter a cheque in the sum of $1,300.00. The PUC recognised that it was incorrect to charge at a rate of $1,000.00 per channel. (The prescribed fee, as has already been noted above, is '$100 per channel'.) But, by letter dated 29 October 2010, it advised Speednet that the proper fee was, in fact, $792,500.00.

[13] The PUC's letter provided the following breakdown of the fee:

No of Links	B/W per link MHz	channels/link	cost/channel	Total
11	14	466	BZ $100	BZ $512,600
3	28	933	BZ $100	BZ $279,900
14	238	7925		BZ $792,500

According to this breakdown, the PUC was treating the application of Speednet as one in respect of 14, rather than 13, point to point links. (Speednet was later to accept, by separate letters dated 10 and 20 November 2010, that the number of point to point links involved was, indeed, 14.) Of those 14 links, 11 were of a bandwidth of 14 MHz per link. Each of those 11 links involved 466 channels, in the sense of voice channels. The total number of channels being charged for, as far as these 11 links were concerned, was, therefore, 466 multiplied by 11, that is to say 5,126 channels. As the authorised fee per channel, according to the Schedule, was $100 per channel, the total fee for all links having a bandwidth of 14 MHz each was 5,126 multiplied by $100, that is to say $512,600.00.

[14] The remaining three links were, according to the breakdown, of a bandwidth of 28 MHz per link. Each of those links involved 933 channels, in the sense, again, of voice channels. The total number of channels being charged for, as far as these three links were concerned, was therefore 933 multiplied by 3, that is to say 2,799 channels.

As the authorised fee per channel, according to the Schedule, was $100 per channel, the total fee for all the links having a bandwidth of 28 MHz each was 2,799 multiplied by $100.00, that is to say $279,900.00.

[15] Adding together the sub-totals of $512,600.00 and $279,900.00, the PUC arrived at the grand total of BZ $792,500.00.

[16] The difficulty of Speednet with the PUC's calculation of the fee for the frequency authorisation applied for was (as it continues to be) that it is based on the PUC's interpretation that channel in the phrase '$100 per channel' means voice channel. Its own interpretation, first explained to the PUC by letter dated 10 November 2010, was (and is) that channel in that phrase means radio frequency channel. It claimed (and claims) further that, in the result, its application for 13 point to point links (as pointed out above, the number was admitted to be 14 in two separate letters dated 10 November 2010 and 20 November 2010) involved only 13 channels within the true meaning of the phrase in question. The proper fee chargeable by the PUC was (and is), therefore, it contends, $100.00 multiplied by 13, that is to say BZ $1,300.00 only.

[17] On 6 May 2011, Speednet, through its Attorneys-at-Law Barrow & Co, tendered to the PUC, on a 'without prejudice' basis, a cheque for what it referred to as 'the total sum of BZ $792,000 demanded'. (The sum in fact demanded by the PUC was, of course, not BZ $792,000.00, but BZ $792,500.00).) The PUC had by letter dated 21 December 2010 reiterated its advice that Speednet was not authorised to use the frequency in question unless and until it (the PUC) received the fee it was charging. (There is no indication that the tender of the cheque in the sum of BZ $792,000.00, only, was not accepted; and it is noted that the refund sought by Speednet in the instant case is one in the amount of BZ $792,000.00, only.)

The proceedings in the court below

[18] Speednet then commenced on 14 November 2011 proceedings in the court below by the filing of a Fixed Date Claim Form pursuant to Rule 56 of the Civil

Procedure Rules. The claim was for declaratory relief and a consequential order against the PUC. The court below was asked to declare that –

> '(i) the fee payable for frequency authorisation in respect of point to point links under the Regulations is $100.00 per radio frequency channel annually after the first year of authorisation; and
>
> (ii) the PUC wrongfully and unlawfully charged and collected $792,000 from Speednet as the frequency authorisation fee for 13 point to point links approved for use by Speednet by letter dated 2 August 2010;'

and to order the refund by the PUC to Speednet of the sum of $792,000.00. (It will be noted that, despite the earlier acceptance by Speednet, in at least two letters, that the correct number of links was 14, the litigation was, for some reason, commenced on the basis that only 13 links were involved.)

[19] In the court below, the trial judge, Legall J, identified the crucial question for decision early on in his judgment. He said, at para 2:

> 'The question is this: What does the word "channel" that appears in the phrase "$100 per channel" in the Schedule mean?'

He went on to consider the mutually opposing positions of Speednet and the PUC as set out in the affidavit evidence before him. Next he examined the submissions made, and the authorities cited, to him by counsel. Thereafter, at para 15 of his judgment, he concluded as follows:

> 'The burden is on [Speednet] to prove, on a balance of probabilities, the claim in this matter and that the word channel as used in the phrase "$100 per channel" in the Schedule means radio frequency channel … I am not satisfied on the evidence, that [Speednet] has satisfied this burden.'

He proceeded to dismiss the claim and to order that each party bear its own costs.

The appeal to this Court: relief sought and grounds of appeal relied upon

[20] Speednet seeks from this Court the following relief:

> ‘(i) A declaration that in accordance with [the Regulations] the fee payable for frequency authorisation of point to point links is $100.00 per radio frequency channel annually after the first year of authorization;
>
> (ii) A declaration that the [PUC] wrongfully and unlawfully charged and collected … $792,000 from [Speednet] as frequency authorization licence fees for … 13 point to point links approved for use by [Speednet] by letter from the [PUC] dated [2 August] 2010;
>
> (iii) An order that the [PUC] refund to [Speednet] … $792,000.00 being the amount wrongfully charged and collected by the [PUC] from [Speednet] as frequency authorization fees for the … 13 point to point links aforesaid.
>
> (iv) Such further or other relief as the court deems just; and
>
> (v) Costs.’

[21] The appeal is advanced in reliance on the following three grounds of appeal:

> ‘1. The … judge erred in law and misdirected himself in holding that the [Regulations] were neither made by the Crown nor the Government nor the Legislature but by a statutory corporation and is (*sic*) not tax legislation made by the Crown or the Legislature so that rules of interpretation governing revenue provisions such as those set forth in the decisions of *R. v Winstanley* and *Inland Revenue Commissioners v. Ross and Coneter* [*sic*]*, et al* do not apply;

2. The … judge erred in law and misdirected himself in resolving the issue of interpretation of the [Regulations] on the basis that [Speednet] had not on the evidence proven the word channel as used in the phrase "$100 per channel" in the Schedule means radio frequency channel; and

3. The … judge erred in law and misdirected himself by construing the [Regulations] to mean $100 per voice channel on the basis of evidence of the PUC as opposed to construction as a matter of law of the words used in the [Regulations].'

The respondent's notice before this Court: relief sought and contentions advanced

[22] The relief sought by the PUC from this Court is that the decision of Legall J be varied as follows:

> 'Given the industry standards, customs and practices, and the provisions of section 12 of the Telecommunications Act, Act No 16 of 2002, the word "channel" used in the Regulations has a clear meaning.'

[23] The PUC bases its claim for relief on the following two contentions:

'1. The … trial judge erred in not making a specific finding that [Speednet] knew and always understood the word "channel" to mean "voice channel".

2. The … trial judge erred in not finding on the evidence before the Court that by industry standards, customs and practices, "channel" means "voice channel".

The submissions before this Court

(i) On behalf of Speednet

[24] Seeking to support ground 1, Mr Marshalleck SC, for Speednet, submitted that the judge erred in concluding that the Regulations were not made by the Legislature. Pointing to the twofold fact that the Regulations are contained in an instrument bearing the heading 'Statutory Instrument No 110 of 2002' and that their long title is to the effect already indicated above (para [9]), counsel for Speednet contended that there could be no reasonable doubt that the Regulations are subsidiary legislation made under authority delegated by the Legislature to the PUC. They were therefore to be construed in accordance with established principles of statutory interpretation. The principles enunciated in the English cases of *Rex v Winstanley* 148 ER 1492 and *Inland Revenue Commissioners v Ross and Coulter and Others (Bladnoch Distillery Co Ltd)* [1948] 1 All ER 616 ought, therefore, to have been applied by Legall J, who, in the submission of Mr Marshalleck, wrongly held that the Regulations were made 'neither by the Crown nor the Government nor the Legislature'.

[25] In his "Written Submissions of the Appellant", Mr Marshalleck wrote, at para 33:

> '[Speednet] submits that the word "channel" as used in the [Regulations] is reasonably capable of meaning both a "voice channel" as posited by the [PUC] as well as a "radio frequency channel" as posited by [Speednet] and that given that there exist these plausible alternative meanings in the context which are both consistent with the purpose of the legislation, the meaning most favourable to [Speednet] ought properly to be adopted.'

The legal foundation for this submission consisted of passages taken from the judgments of *Winstanley* and *Ross*, the former of which English cases was an 1831 revenue decision involving auction duty (imposed by the statute 19 Geo 3), while the latter was a 1948 tax decision involving excess profits tax (imposed by the Finance Act 1943). Counsel for Speednet went on to write at para 37 of his submissions:

> ‘This historical approach [meaning that evidenced in the two cases just mentioned] gave rise to a presumption in favour of the taxpayer when construing the charging provisions of the Taxing (*sic*) Acts. This presumption is reflected within the now established canon of statutory interpretation referred to as the principle against doubtful penalization.’

It was counsel’s contention that this principle ‘extends to the Regulations under consideration’: para 39 of his submissions.

[26] Summarising the modern position in this area of statutory interpretation, counsel for Speednet stated at para 41 of his written submissions that -

> ‘Where … an ambiguity in a taxing Act cannot be resolved by reference to the intention of the legislature as gathered from the words of the enactment the old presumption in favour of the taxpayer still applies. It is accordingly now regarded as a residual presumption as opposed to a primary one.’

In attempting thereafter to demonstrate that this is, indeed, the current position, Mr Marshalleck, for some reason which is not readily apparent, switched the focus of the discussion from English authorities to the Canadian decision in *Municipal Contracting v Nova Scotia (Attorney General)*, 2003 NSCA10 (CANLII), a case plainly concerned with the interpretation of tax legislation, viz ‘the Regulations, O.I.C.81-973 N.S. Reg. 102/81 (as amended)’ passed pursuant to the Gasoline and Diesel Oil Tax Act, R.S.N.S. 1989, c. 183: see para [1] of the judgment.

[27] I pause here to note that, at para 43 of his written submissions, Mr Marshalleck erroneously attributes to the Nova Scotia Court of Appeal certain statements which, in fact, formed part of the submissions of the appellant taxpayer’s counsel before that court. (Admittedly, such statements were taken by counsel in the *Municipal Contracting* case from the judgment in an earlier case, viz *Québec Communauté urbaine) v Corp Notre-Dame de Bon-Secours*, 1994 CanLII 58 (SCC), a Canadian case also concerned with the interpretation of tax legislation.) In fact, the Nova Scotia Court of Appeal,

dismissing the appeal, concluded that, contrary to the submissions of the appellant taxpayer's counsel, the appeal before it was 'not an appropriate case to rely upon that presumption [the residual presumption in favour of the taxpayer]' and, further, that 'The trial judge made no error in not applying this presumption': see paras [57] and [58], respectively, of the judgment in *Municipal Contracting*.

[28] Mr Marshalleck further submitted that it is manifestly not the function of a court, when interpreting legislation, to determine the reasonableness or fairness of any fee: para 52 of his written submissions. He continued, in that same paragraph:

> 'Where the construction of [a?] statute fixing the amount of a fee is ambiguous and the ambiguity cannot be resolved by reference to established rules of interpretation the old presumption in favour of the taxpayer applies, even when pursuing the modern approach, in the interest of fairness to the subject and out of respect for the economic interests of the subject.'

He reminded the Court of the option open to the PUC to amend the Regulations and thus impose a higher fee than that which would be payable if Speednet's submissions were to prevail in the present appeal.

(ii) On behalf of the PUC

[29] In relation to ground 1, Mr Lumor SC, for the PUC, stated in his written submissions (para 27) that '[t]he [PUC] is unable to support the decision of [Legall J] on principles of law set out in [Speednet's] [ground] 1 …' With respect, I find (and at the hearing, found) that statement lacking in precision. For that reason, I sought clarification from Mr Lumor at the very outset of his reply to Mr Marshalleck. The pertinent exchange was as follows (transcript, pp 53-54):

> 'SOSA P: If I may just at the very outset ask you to confirm the understanding that I have of your concession. It does encompass the point that was made by the holding of the trial judge that this was not a taxing statute? Your

concession is that, indeed, the trial judge was wrong in reaching that conclusion?

MR LUMOR: Yes …

…

MR LUMOR: … the other point we conceded. I think the Learned Trial Judge had written or taken the position that that statutory instrument is not the subsidiary legislation. I think that is one of the issues [Speednet] complained about. We conceded their point that the instrument is subsidiary legislation.'

(I have altered the punctuation of my portion of the above exchange as necessary in order to facilitate comprehension.)

[30] That said, however, Mr Lumor was emphatic before this Court that the position of the PUC in the court below was not in any way being varied on appeal. As he put it at para 22 of his 'Written Submissions of the Respondent':

> '[The PUC's] position at the trial remains the same, that the live issue in the appeal speaks to the meaning of a technical term or word rather than an ambiguity arising on the meaning of the word "channel" employed in the Schedule to SI 110 of 2002.'

[31] Mr Lumor rested his argument on five main propositions, derived entirely from Bennion on Statutory Interpretation, 5th ed ('Bennion'). The first of these propositions is that –

> 'If a word has a technical meaning in relation to a certain area of trade, business technology, or other non-legal expertise, and is used in a context dealing with that expertise, it is to be given its technical meaning, unless the contrary intention appears.' (Bennion, sect 367, p 1203)

The second is –

> ‘Evidence may not be adduced of the meaning of terms of which the Court takes judicial notice; but it is admissible as respects the meaning of other terms.’ (Bennion, sect 376, p 1223)

The third is –

> ‘It seems that evidence should be admitted to establish whether or not a term is a technical term. If the evidence shows it is, then the court determines whether it was intended in the technical sense. If the court finds it was, then evidence of what the technical meaning is becomes admissible.’ (Bennion, p 1224)

The fourth is –

> ‘Technical non-legal terms. Evidence may be given of the meaning of a word used in a technical sense (other than legal terms of which the court takes judicial notice).’ (Bennion, p 224)

And the fifth is –

> ‘Reference books. Reference books may be consulted in lieu of evidence.’ (Bennion, p 1224)

[32] Mr Lumor commended to the Court as a reference work worthy of such consultation ‘Wikipedia, the free encyclopedia’, which is available on the Internet. He cited to the Court the following short article on ‘Channel (communications)’ taken from that work:

> ‘In telecommunications, and computer networking, a communication channel, or channel, refers either to a physical transmission medium, such as a wire, or to a logical connection over a multiplexed medium such as a radio channel. A channel is used to convey an information signal, for example a digital bit stream, from one of several senders (or transmitters)

to one of several receivers. A channel has a certain capacity for transmitting information, often measured by its bandwidth in Hz or its data rate in bits per second.' [Emphasis added.]

[33] For my part, I was initially concerned as to the propriety of counsel relying on this article from Wikipedia in this Court, being unsure that it had been placed before the court below. This concern is evidenced by an exchange with Mr Marshalleck recorded at pages 45-47 of the transcript and reproduced below:

'SOSA P: Do you have anything to say, as you proceed, with regard to the material which has been produced on the other side from sources such as Wikipedia? I say this because you might wish to anticipate your friend on the other side or you may wish to hear him first and then respond.

MR. MARSHALLECK: That's what I had proposed to do but the - -

SOSA P: I leave that entirely up to you.

MR. MARSHALLECK: Obliged, My Lord.

SOSA P: But while he does make the point that, according to the textbook, I think it is Bennion on Statutory Interpretation, reference books may be resorted to in lieu of evidence. I think that's the language of his written submissions …

MR. MARSHALLECK: Yes, to ascertain the meaning of technical words.

SOSA P: Yes. Nevertheless, it seems to me that there is the element of fresh evidence [a loose allusion

to material from reference books as 'evidence'] if you are going to introduce that in the Court of Appeal in circumstances where it was not introduced in the court below. So I don't know whether this is the point at which to throw it out.

MR. MARSHALLECK: My Lord, this is how I would deal with that …'

Mr. Marshalleck went on sequentially to set out the steps which, in his submission, led to the conclusion he was urging upon this Court. He wrapped up as follows (p 48, transcript):

> 'So that there exist more than one technical [meaning] for the word "channel" is indisputable and we say faced with the two choices, it should be resolved in favour of the subject.'

On his way, however, to the statement of such conclusion, Mr Marshalleck made the following acknowledgement of his own, at pages 47-48, transcript:

> 'And I accept that where you seek to advance a technical meaning of a term, recourse can be had to publications to assist the court in coming to the right technical meaning.'

[34] It must be noted, however, that, seeking to take away with one hand that which had been given with the other, counsel for Speednet immediately added:

> 'But again that applies where there is only one technical meaning that's readily discoverable from the relevant literature. Here we have … two technical meanings and they were readily discoverable from the vocabulary of the [International Telecommunications Union's] recommendations that were discussed before the court.'

[35] In my still somewhat unallayed concern as to whether the article in question from Wikipedia had been placed before the court below, I determinedly returned to the

subject during the oral argument of Mr Lumor, when, upon his referring to the recommendations of the International Telecommunications Union, the following exchange occurred:

> 'SOSA P: Yes, but when I raised the question with Mr Marshalleck earlier, what I was thinking about was none of those things but, rather, I believe they are tabs 6 to 8 to your written submissions, beginning with the extract from [the] website of Wikipedia, followed by other material which seems to come from unidentified sources, TIA/[EIA].
>
> MR LUMOR: That is the International Telecommunications. Those are the documents starting from Tab 6 to Tab 8 in my written submissions.
>
> …
>
> SOSA P: My question was: Were these materials before the trial judge before the court below?
>
> MR LUMOR: Absolutely yes.
>
> SOSA P: Very well.
>
> MR LUMOR: My Lord, in my submissions below, I just want to give the tab numbers to His (*sic*) Lordship, those were tabs 3 to 7 in my written submissions in the court below, all of them.'

All of these representations of Mr Lumor were made without demur from Mr Marshalleck.

[36] I would pause here to express my own regret that counsel for the PUC chose to seek enlightenment for himself and for the courts (that below as well as this one) from a

general work of reference, such as Wikipedia, rather than from a specialised work of reference or dictionary. This Court must, however, make do with what both counsel have placed before it.

Discussion

[37] I accept the submission of Mr Marshalleck that the judge was in error in concluding that the Regulations were not made by the Legislature. They are certainly subsidiary legislation made under the delegated authority of the Legislature. This is not a point requiring elaboration. But I am entirely unable to accept any suggestion that the principle enunciated in *Winstanley* and *Ross* or any principle derived therefrom by a process of refinement or development in succeeding years has any application to the present case. I am not unmindful, in so saying, of the concession of Mr Lumor referred to above.

[38] A court, however, will only act upon a concession made by a party to litigation where it is satisfied that such concession is sound and otherwise properly made. Self-evidently, it is not in keeping with fundamental notions of justice for a court to found its judgment upon a concession which it considers less than sound. For my part, I am unable after due analysis of it, to regard Mr Lumor's pertinent concession as sound. It is a concession which, to my mind, fails to appreciate the basic distinction between a tax and a fee. The words 'tax' and 'fee', as I see it, are two perfectly ordinary words of the English language. As I said in my dissenting judgment in *The Attorney General of Belize and anor v The Maya Leaders Alliance and ors*, Civil Appeal No 27 of 2010, a judgment delivered on 25 July 2013, at para [1]:

> 'By section 6(q) of the Evidence Act, every judge is required to take judicial notice of the meaning of English words.'

(Of the meaning of such words, as the second of the propositions taken by Mr Lumor from Bennion makes clear, evidence is not to be adduced: see para [31], above, for such proposition.)

[39] According to the Concise Oxford Dictionary of Current English, 8th ed, the definition of 'tax' is a contribution to State revenue compulsorily levied on individuals, property or businesses', while that of 'fee' is money paid as part of a special transaction, for a privilege, admission to a society, etc (enrolment fee)'. The fee of '$100 per channel' with which the Court is concerned was quite clearly no contribution to State revenue; and, moreover, the element of compulsory levying was completely absent from it. The fee was money to be paid, without a doubt. And the payment was to be part of a special transaction, ie a licensing. That special transaction required payment for a privilege, that of authorisation to use the radio frequency spectrum, a resource considered scarce by statute: see para [5], above. As part of the income of an autonomous institution (paras [2] and [3], above), this fee stood in sharp contradistinction to both the auction duty and the excess profits tax with which the pieces of legislation considered in *Winstanley* and *Ross*, respectively, were concerned. (And it stood in similarly sharp contradistinction to the gasoline and diesel oil tax with which the legislation considered in *Municipal Contracting* was concerned.) Among the three definitions of 'revenue' provided in the dictionary already referred to above, is 'a State's annual income from which public expenses are met'. I have no doubt, for my part, that when, in the authorities, cases are categorised as revenue cases, it is invariably with that particular meaning of the word revenue in mind. A striking case in point is *Winstanley* itself, where, at p 1495 of the report, Lord Wynford said:

> 'In all revenue cases, let the officers of Government take care that the Legislature is made to speak plain and intelligible language. If the Legislature is not made to speak plain and intelligible language, let not individuals suffer, but let the public. I am bound to say, if there is any doubt about these words, the benefit of that doubt should be given to the subject.' [Emphasis added.]

The second and third underlined words in this passage render it clear as crystal, to me, that revenue cases are there being seen as cases pitting the subject against the State. A case which pits a licensee against an autonomous licensor is, as I see it, a far cry, indeed, from such cases.

[40] As already adumbrated at para [37], above, I similarly reject Mr Marshalleck's contention that the modern principle against doubtful penalisation is applicable to the instant appeal. The concept of penalisation is, in my opinion, one utterly alien to statutory provisions which merely impose and fix the amount of a fee for frequency authorisation. The idea that a fee of such a kind constitutes a penalty is, with respect, entirely lacking in logic. Applying for frequency authorisation, an inherently innocuous act, is not the type of conduct that calls, in a rational society, for penalisation; and there is nothing whatever in the Regulations to suggest that an application of that kind is in itself, or otherwise, considered by the rule-maker to be an action fit to be visited with punitive consequences.

[41] In the result, I am not prepared to hold that the word 'channel' should, for the reasons advanced by the appellant, be interpreted to mean radio frequency channel.

[42] What, then, of the submissions of Mr Lumor? The first of the five main foundational propositions extracted by him from Bennion (for which, see para [31], above) seems apposite to the facts of this appeal. It is not, and could not be, in dispute that channel as used in the phrase '$100 per channel' in the Schedule has, and should be given, a technical meaning. Mr Marshalleck's contention was that radio frequency channel was the correct technical meaning of channel. Mr Lumor, apparently with the second and third propositions from Bennion (for which, see para [31], above) in mind, asked Mr Ernesto Torres, Speednet's Chief Executive Officer and an engineer by profession, in cross-examination, whether the terms used in the Schedule were 'technical terms which are unique to the telecommunications industry'; and he obtained a reply in the affirmative: p 42, transcript of trial. The trial judge's admission of Mr Torres' evidence in this respect was consistent with the second and third propositions from Bennion. So, too, was the determination of Legall J that the term was used in a technical sense. By virtue of that determination, evidence of the technical meaning of the term 'channel' became admissible in accordance with the third proposition from Bennion to which reference has already been made above and which I accept as sound and applicable. Under the fourth proposition from Bennion, which I similarly accept (and for which, see para [31], above), the question of judicial notice did not arise as the term

'channel' is not a legal term but, rather, as already indicated, a technical term used in the telecommunications industry.

[43] I accept the contention of Mr Lumor that Legall J ought next to have taken guidance from reference books in lieu of evidence as a court is entitled to do consistently with the fifth proposition from Bennion (for which, see para [31], above). I am also left with no alternative but to conclude that the pertinent article on 'Channel (communications)' from Wikipedia, the free encyclopedia was, as a matter of fact, placed before Legall J in the court below, as Mr Lumor, with the tacit assent of Mr Marshalleck, represented to the Court. (I accept Mr Lumor's unchallenged assertion that that article reflects the standards and requirements of the International Telecommunications Union – for which, see para [35], above - it being inconceivable, in my view, that Wikipedia would reflect any other standards and requirements, if such there be.) Focusing on the parts of that article which are material for present purposes, I note that, according to the author/s:

> 'In telecommunications … a … **channel**, refers either to a physical transmission medium such as a wire, or to a logical connection over a multiplexed medium such as a radio channel. A channel is used to convey an information signal, for example a digital bit stream, from one of several *senders* (or transmitters) to one of several *receivers …'* [Emphasis added.]

[44] It is true that the article nowhere uses the term 'voice channel'. Nor does it, for that matter, anywhere employ the term 'radio frequency channel'. (The non-use of the former term was, to my mind, a good reason for Mr Lumor to have sought an article on, or a definition of, 'voice channel' in some respected, specialised reference work available on the internet, or even in Wikipedia.) But I do not regard such non-use of the term 'voice channel' as exacting any real toll on the argument of Mr Lumor. After all, abundant light was shed on the nature of a voice channel in the course of the hearing below. Thus, it was the evidence-in-chief of Mr John Avery, the Chairman of the PUC and an engineer by profession (as Mr Marshalleck recognised), that:

> '… whatever type of equipment you're using, if you purchase a piece of equipment it will allocate a certain amount of spectrum for a voice channel and that will remain the same regardless of the size of the total frequencies assign (*sic*) to the point to point link.'

During that phase of his evidence, Mr Avery further said:

> 'Now the thing is when this SI was formed or was made Speednet wasn't in operation, and BTL was using an analogue system. At that time it was specific that that is the size of a voice channel 30 KHz. Now that digital technology has been introduced the actual frequency needed for voice channel, and it depends on the technology, but because of digital technology - - has been reduced significantly. So one technology might use 12 KHz, one might use 8, one might use 10. So if we were to get specific with respect to the type of technology then the fees complained about would go even higher. So in order to keep the fees from ballooning and being arbitrary and inconsistent the PUC has consistently use (*sic*) the 30 KHz designation for a voice channel and that has been applied from the time this [statutory instrument] was formed (*sic*) up until today.'

And during the examination-in-chief of Mr Torres, there was the following pertinent exchange:

> 'Q: … Mr Torres, what is a voice channel?
>
> …
>
> THE COURT: The voice channel?
>
> WITNESS: Right. Is that frequency spectrum as I had mentioned to you.
>
> THE COURT: The total.

WITNESS: Right. And I also mentioned that there is 30 KHz channel, but that 30 KHz channel is used to break up the spectrum that the point to point radio links use. In other words, if a radio link has x amount of spectrum the engineers and the industry break that up into 30 KHz what they call band width (*sic*) to determine its capacity, how many channels can it take, how much of the 30 KHz channels can it take.

THE COURT: I see. Yes, go ahead.

WITNESS: I will leave that definition like that.'

Interestingly, when Legall J, not long after the exchange last reproduced above, complained that the term 'voice channel' was not being defined for him in the affidavit evidence, the following exchange ensued:

'MR MARSHALLECK: It is [being defined].

THE COURT: He [Mr Torres] is just explaining it to me [orally].

MR MARSHALLECK: No, My Lord, it's right there in Mr Avery's affidavit.

THE COURT: But what it means?

MR MARSHALLECK: It tells you it's 30 KHz.

THE COURT: And what is that?

MR MARSHALLECK: It's the amount of space that's required for a voice transmission using an analogue system.'

Mr Marshalleck proceeded to refer the trial judge to paragraph 11 of Mr. Avery's first affidavit, at which it was deposed that -

> ‘A voice channel is the only fixed measurable unit. PUC assesses the size of a voice channel at 30 KHz.’

[45] Reading the Wikipedia article relied upon by the PUC in the light of the excerpts from the evidence of Mr Avery and Mr Torres already set out above, I understand that, in the second of its meanings given in such article, channel refers to a channel concerned with the transmission or communication of the human voice. As such, it is a channel which is of such bandwidth as is essential for the carrying of the frequencies of the human voice from sender to receiver. As far as Belize is concerned, that bandwidth has been determined by the PUC to be one of 30 KHz if an analogue system of telecommunication is being employed. In the Wikipedia article in question, it is stated that -

> ‘A channel has a certain capacity for transmitting information, often measured by its bandwidth in Hz or its data in bits per second.’

The relevant determination of the PUC, assuming as it does, the use of an analogue system of telecommunication, rather than of digital telecommunications, proffers no measurement in terms of bits per second; and it is a determination which has persisted over the years, despite what, on the evidence of Mr Avery adverted to above (at para [44]), has been a reduction of the minimum bandwidth necessary for carrying the human voice (intelligibly, as has necessarily to be assumed) with the advent of digital technology into the field of telecommunication.

[46] In short, I have reached the conclusion, based on my understanding of the article in Wikipedia, read in the light of the pertinent evidence adduced in the court below, that ‘channel’ as used in the phrase ‘$100 per channel’ in the Schedule to the regulations means voice channel, that is to say a transmission or communication channel which, in the context of Belize, is of a bandwidth of 30 KHz and, hence, able to carry the human voice intelligibly, given the use of an analogue system of telecommunication. (And I have borne in mind throughout, Mr Marshalleck’s recognition that ‘voice channel’ is a plausible meaning of the word ‘channel’, as so used, and that such meaning is consistent with the purpose of the legislation under consideration: see para [25], above.)

The subsidiary question

[47] The sole subsidiary question raised in the appeal, and remaining in the circumstances, is that as to the point of time at which the fee was payable in law. This, to my mind, is a question entirely free of difficulty. As has already been noted above, section 15(2)(b) of the Telecom Act provides that a licence shall be required in order to enable a person to operate any system that uses scarce resources such as the radio frequency spectrum in order to provide telecommunication service to the public. Section 15(5), also referred to above, further provides for an application for a licence to be accompanied by 'such fee, if any, as may be prescribed'.

[48] When one turns to the Regulations, however, one finds in the Schedule no prescription whatever of an application fee as such in the case of frequency authorisation in respect of point to point links. The fee of $100.00 per channel payable falls under the heading of 'Licence Fees' rather than that of 'Application Fees'. What is more, it falls under the sub-heading 'Annually' rather than that of 'First Year'. And unlike Licence Fees falling under the sub-heading 'First Year', Licence Fees falling under the sub-heading 'Annually' are not expressly said to be payable either 'On grant of licence' or 'At end of first year'. In these circumstances, I fail to see how it can be said that the licence fee of $100.00 per channel is payable on grant of the licence or, for that matter, <u>at</u> the end of the first year. It is clearly the case that it is only payable <u>after</u> the end of the first year of frequency authorisation.

[49] One does not, of course, disregard the general provisions of regulation 7(2) and (7), already set out at para [10], above. These provisions unquestionably concern applications for frequency authorisation; and the one requires such an application to be 'accompanied by' the pertinent fee while the other speaks, consistently, of the issuance of frequency authorisation as a step to be taken by the PUC 'on payment' of such a fee. These provisions simply and, to my mind, properly reflect the realities of the world of business. Entities conducting business in the rarefied atmosphere of telecommunications should find it natural, and expect, to have to pay 'up front' for licences. And, as noted at para [12] above, Speednet itself (before the complete

souring of relations with the PUC) tendered its cheque for $1,300.00 without first receiving the desired authorisation. But the provisions of regulation 7(2) and (7) do not stand alone in the Regulations. They are followed by regulation 8, reproduced at para [11], above, whose provisions deal with specific fees rather than just fees in general. While regulation 7 addresses 'application', a broad enough heading, regulation 8 zeroes in on 'payment', a sub-heading, as it were, of 'application'. The latter regulation pellucidly puts the relevant requirement as one arising 'annually after the first calendar year'. Regulation 8 thus possesses the attribute of specificity and also constitutes the last word on the topic of payment to be found in the body, as such, of the Regulations. On top of that, it is in complete harmony with the Schedule, as regards the timing of payment.

[50] The PUC may consider it convenient to amend this Schedule in order to bring it in line with commercial reality.

Summary of main conclusions and their corollaries

[51] In summary, first, while I do not agree with the relevant part of the reasoning of Legall J, I coincide in his conclusion that the rules of interpretation governing revenue provisions such as those set forth in the decisions in *Winstanley* and *Ross* do not apply to the present case. Secondly, I agree with Mr Lumor that Legall J erred in not finding that, by industry standards, customs and practices, as revealed in the reference material placed before him (read in the light of the evidence) 'channel' means 'voice channel'. Thirdly, in view of the fact that I so agree with Mr Lumor, I consider it to be entirely beside the point whether Legall J was in error in resolving the issue of interpretation of the Regulations on the basis that Speednet had not, on the evidence, proved that the word 'channel' as used in the phrase '$100 per channel' in the Schedule means radio frequency channel. Fourthly, given, again, my agreement with Mr Lumor in the respect just mentioned above, I am unable to accept that it is a complaint determinative of the appeal that Legall J erred by construing the Regulations on the basis of evidence of the PUC rather than as a matter of law (as I am now construing them). Fifthly, my being in agreement with Mr Lumor in the respect already identified

above, renders it immaterial whether, as he further (and unnecessarily) contended, Legall J was in error in not specifically finding that Speednet knew and always understood the word ‘channel’ to mean ‘voice channel’.

Disposal

[52] For the reasons already given above, I am respectfully of the opinion that the original appeal should be dismissed save to the extent that it rests on the contention that the licence fee in question was not required by law to be paid in advance. I would therefore affirm the orders of the trial judge save to the extent that they denied the grant of one part of the declaration set out and numbered 1 in the Fixed Date Claim Form filed by Speednet in the court below. To such limited extent, I would set aside the first of the two orders of Legall J. The part of the declaration to which I am here referring is that concerning the time for payment of the relevant fee. I would grant that part of the declaration by amending such declaration as presently set out in the claim form (for which, see para [18], above), first, by the deletion from it of the words ‘$100 per radio frequency channel’ and the substitution for them of the word ‘payable’ and, secondly, by the insertion into it of the words ‘the end of’ immediately after the word ‘after’ and immediately before the word ‘the’. I would also order, consequentially, that the PUC pay to Speednet interest at the rate of 6 per centum per annum on the sum of $792,000.00 from, the date of payment of such sum to the PUC (which I would treat as 6 May 2011) to the date on which payment should lawfully have been made (which I would treat as 6 May 2012). Such payment from the PUC to Speednet may, under such proposed order, be effected by way of a set-off.

[53] I am further of the opinion that the claim for relief in the respondent’s notice should be allowed and that the decision of Legall J should be varied in order that it shall be to the following effect:

> ‘Given the industry standards, customs and practices, and the provisions of section 12 of the Telecommunications Act, Act No 16 of 2002, the word “channel” used in the Regulations has a clear meaning.’

[54] I would order that the PUC should have 80 per centum of its costs of this appeal, to be taxed if not sooner agreed; that such an order as to costs should stand and be final unless either party shall, within 10 days of the date of delivery of this judgment, apply for a contrary order; and further, that, in such an event, the matter of costs be decided by the Court on written submissions, to be filed and delivered by both parties in 14 days from the date of the making of such application.

[55] I humbly apologise for the lengthy delay in the giving of judgment in this appeal, a delay in large part the result of the unremittingly intense pressure of work under which this Court continues to have to function.

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SIR MANUEL SOSA P

AWICH JA

[56] I agree with the judgment of Sir Manuel Sosa P, which judgment I read in draft. he phrase “$100 per channel” is used in the fifth column of the table with the heading, “FEE STRUCTURE: FREQUENCY AUTHORISATION,” which is part of the “SCHEDULE” to ***the Telecommunications (Licensing Classification, Authorisation and Fee Structure Regulations, 2002; S.I. No. 110 of 2002***, made ***under s. 56 of the Belize Telecommunications Act Cap. 229, Laws of Belize***. The phrase states the annual fee to be paid by a licencee for “point to point links” frequencies. Sir Manuel Sosa P interprets the phrase, “$100 per channel” to mean, “$100 per voice channel.” I agree with him.

[57] The appellant claimed at the Supreme Court that, the phrase “$100 per channel” meant, “radio frequency channels,” not “voice channel,” and since the appellant applied for 13 radio frequency channels, the total annual fee to be paid was $100 x 13

channels, which is $1,300. The appellant lost the claim. The learned trial judge, Legall J made a declaration that, ‘channel’ meant voice channel, and so the annual fee to be paid was $100 x 7925 channels, a total of $792,500. Sir Manuel Sosa P has in this appeal upheld that meaning of ‘channel’ and the resulting total fee. I agree with his decision. Notwithstanding, I consider it desirable to add a few words of my own.

[58] All the three grounds of appeal were founded on an assumption that, in Law as in Finance and Economics, a licence fee is a tax. The assumption was erroneous. Sir Manuel Sosa P illustrates the error by applying the contrasting meanings of the word ‘tax’ and the word ‘fee’ in the Concise Oxford Dictionary of Current English, Eighth Edition. Tax is described in the dictionary as, “a contribution to State revenue, compulsorily levied on individuals, property or businesses.” A fee is described as, “money paid as part of a special transaction, for a privilege, admission to a society, etc.”

[59] It did not occur to Mr. A Marshalleck SC for the appellant, to check the dictionary meanings of the two words, ‘tax’ and ‘fee’ (or of licence fee). Obviously Mr. Marshalleck did not know that, in law a fee is different from a tax, and this difference has several significant consequences. There is no need to outline them here. I must, however, point out that, since a fee, that is, a licence fee, is not a tax, the submission by Mr. Marshalleck, in which he sought to apply the rule in ***Rex v Wislanley 148 E.R 1492 HL, and Inland Revenue Commissioners v Ross and Coulter and Others (Bladnoch Distillery Co Ltd) and Other Consolidated Appeals [1948] 1 All ER 616*** that, in interpreting a tax legislation any benefit of a doubt in the meaning of a word or a provision should be given to the subject (the intended tax payer), must crumble because the foundation of the submission has crumbled. The licence fee in this appeal is not a tax, the rule of interpreting doubtful words or provisions in a tax legislation to the benefit of the tax payer does not apply in respect to the licence fee chargeable under S.I. No 110 of 2002.

[60] I agree that the appeal be dismissed, and that the orders proposed by Sir Manuel Sosa P be the orders of the Court.

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AWICH JA

HAFIZ-BERTRAM JA

[61] I concur in the reasons for judgment given, and the orders proposed, by the learned President in his judgment, which I have read in draft.

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HAFIZ-BERTRAM JA