[2016] CCJ 23 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. BZCV2015/001
BZ Civil Appeal No. 29 of 2012

BETWEEN

SPEEDNET COMMUNICATIONS LIMITED	**APPELLANT**

AND

PUBLIC UTILITIES COMMISSION	**RESPONDENT**

Before The Honourables — **Mr Justice A Saunders**
Mr Justice J Wit
Mr Justice D Hayton
Mr Justice W Anderson
Mme Justice M Rajnauth-Lee

Appearances

Mr Eamon Courtenay SC and Mr E Andrew Marshalleck SC for the Appellant

Mr Fred Lumor SC and Ms Sheena Pitts for the Respondent

JUDGMENT
of
The Honourable Justices Saunders, Wit, Hayton, Anderson and Rajnauth-Lee
Delivered jointly by
The Honourable Mr Justice Wit
and
The Honourable Mr Justice Anderson

on
the 9th day of December 2016

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Introduction

[1] Speednet Communications Limited ("Speednet") is a private company duly formed and existing under the Laws of Belize and is a licenced telecommunications services provider to some 90,000 customers in Belize. Speednet's licence was issued to it in July, 2003 by the Public Utilities Commission ("the PUC"), a body corporate duly formed and existing under the Public Utilities Commission Act, 1999 ("the PUC Act of 1999")[1] and charged with the legislative duty to implement the policy of the Government relating to the telecommunications industry.

[2] In 2010, Speednet applied to the PUC for frequency authorisation for the use of thirteen (13) Point-to-Point links. The PUC approved the application and initially advised that the annual fee to be paid by Speednet would be $238,000. The PUC arrived at that figure by multiplying the number of megahertz ("MHz") contained in the totality of links by a charge of $1000 per MHz. Both parties quickly realised that this figure was erroneous. The governing subsidiary legislation specified that "$100 per channel" was payable as the licence fee, and not $1000 per MHz. The PUC then charged $792,500 as the annual Licence Fee. It argued that the radio frequency channels included 7,925 'voice' channels and that the licence fee was to be calculated on the basis of $100 per 'voice channel'. Speednet tendered, on a "without prejudice" basis, a cheque for "the total sum of $792,000 demanded" but contended that the annual fee payable for the 13 Point-to-Point links ought to have been $100 per 'radio frequency' channel amounting to a total charge of $1,300. As an aside, it was subsequently agreed by the parties that the frequency application by Speednet required fourteen (14), rather than 13, Point-to-Point links, but nothing of substance turns on this. Nor, for that matter, does anything turn on the fact that the cheque tendered was for $500 less than the sum demanded. What does matter is the meaning to be attributed to 'channel' as the criterion for determining the applicable licence fee.

[1] CAP 223.

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[3] The word 'channel' is used in the legislative enactment under which Speednet had made its application for the Point-to-Point links, namely, the Schedule to the Telecommunications (Licensing, Classification Authorisation and Fee Structure) Regulations 2002,[2] herein referred to as "the Schedule" and "the Regulations" respectively. Unfortunately, 'channel' does not appear and therefore is not defined in the Regulations or its parent statute, the Belize Telecommunications Act 2002[3] ("the Telecoms Act of 2002"). The word does appear but is also not defined in the Schedule to the Regulations. Nevertheless, both the Supreme Court and the Court of Appeal accepted, albeit for different reasons, the contention of the PUC and held that 'channel' was to be construed as meaning 'voice' channel.

[4] The parties agree that the substance of this appeal is to determine the correct interpretation to be given to the word 'channel' as it is used in the Schedule to the Regulations to specify the Licence Fees payable for Point-to-Point links. The legal issue is therefore narrowly circumscribed but has potentially significant implications for the telecommunications industry and the wider economy.

<u>The Supreme Court Proceedings</u>

[5] The Supreme Court proceedings were commenced by Fixed Date Claim Form and supporting Affidavit of Mr Ernesto Torres, Chief Executive Officer of Speednet, both dated 14th November, 2011.[4] Speednet claimed that the PUC had wrongfully and unlawfully charged and collected $792,000 as the frequency authorisation licence fees for the 13 Point-to-Point links, and sought an order for the refund of this sum together with such other relief as the court deemed just, and costs. Speednet supported this claim by arguing that the PUC had failed to define 'channel' in the Schedule as it relates to Point-to-Point links and, citing *R v Winstanley*[5] and *Inland Revenue Commissioners v Ross and Coulter and Others*

[2] SI 2002/110.
[3] CAP 229.
[4] Record of Appeal, 335 – 359.
[5] [1831] Eng R 202; (1831) 1 C & J 434; 148 ER 1492.

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(Bladnoch Distillery Co Ltd)[6], submitted that the word should therefore be construed against the PUC.

[6] The PUC disputed Speednet's claim. By an Affidavit sworn to by Mr John Avery, Chairman of the PUC, it alleged that the Licence Fees were to be calculated on the basis of $100 per 'voice' channel and not per 'radio frequency' channel.[7] The Third Affidavit of Mr Avery was dedicated to simplifying and clarifying the concept of 'radio frequency' channel or 'channel'. Speednet did not file an Affidavit in Response to Mr Avery's Third Affidavit.

[7] Legall J delivered judgment on 26th November 2012. The learned judge considered the mutually opposing contentions of Speednet and the PUC as set out in the affidavit evidence, the submissions made and the authorities cited to him by counsel. He was of the view that 'channel' could possibly bear the meaning of 'voice' or 'radio frequency' but as the Regulations were not made by the legislature but rather by a statutory corporation, the principle of statutory interpretation that ambiguous provisions in a taxing statute ought to be construed against the Crown did not apply. Accordingly, the judge dismissed Speednet's claim and ordered that each party should bear its own costs.

The Appeal in the Court of Appeal

[8] Both sides were dissatisfied with the decision of Legall J and appealed to the Court of Appeal. Speednet contended that the judge erred in holding that the Regulations were not made by the legislature so that the rules of statutory interpretation governing revenue provisions such as those set forth in *R v Winstanley* and *Inland Revenue Commissioners v Ross and Coulter and Others (Bladnoch Distillery Co Ltd)* did not apply. Further, the judge had 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

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[6] [1948] 1 All ER 616.
[7] Record of Appeal, 360-363.

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words used in the Regulations. For its part, the PUC conceded that the Regulations were made by the legislature and that the principle enunciated in *Winstanley* and *Ross* (the so-called principle of doubtful penalisation) could in principle be applied to the Regulations. However, the PUC contended in its cross-appeal that there was no room for such application because, given the background usage in the industry standards and the provisions of section 12 of the Act, the word 'channel' in the Regulations clearly meant 'voice' channel.

[9] The judgment of the Court of Appeal was delivered on 19th June 2015 by Sosa P. The learned President held that Speednet's appeal should be dismissed save to the extent that the Licence Fee payable for frequency authorisation of Point-to-Point links was not required by law to be paid in advance but rather at the end of the first year of authorisation. In consequence, the PUC was required to pay to Speednet interest at the rate of 6 per centum per annum on the sum of $792,000 from the date of payment of this sum to the date when payment should lawfully have been made. The claim for relief by the PUC was upheld and the decision of the trial judge varied to reflect that given the industry standards, customs and practices, and the provisions of section 12 of the Telecoms Act of 2002 the word 'channel' used in the Regulations had the clear meaning of 'voice' channel. The PUC was to be paid 80 per centum of its costs of the appeal. In all other respects the orders of Mr Justice Legall were affirmed.

[10] Sosa P arrived at these conclusions by first rejecting the concession made by the PUC as to the nature of the governing legislation. The President reasoned that there was a fundamental difference between a 'tax' and a 'fee'. Accordingly, the principle against doubtful penalisation did not apply because,

> "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."[8]

[8] *Speednet Communications Limited v Public Utilities Commission* (Court of Appeal of Belize, 19 June 2015) [40] (Sosa P); Record of Appeal, 299.

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Having found that the principle against doubtful penalisation did not apply, the court rejected the interpretation of the word 'channel' advanced by Speednet thus, in effect, ending Speednet's appeal. The President then turned to consider the cross-appeal and accepted that the word 'channel' as used in the Regulations was a technical term and therefore evidence was admissible as to its meaning. He examined certain passages of viva voce evidence from the trial court, and considered the definition of 'channel' given in a Wikipedia article. He summarized:

> "In short, I have reached the conclusion, based on my understanding of the article in Wikipedia, read in 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 communication."[9]

The Appeal before this Court

[11] Speednet applied to this Court on the 4th November 2015 for special leave to appeal the decision of the Court of Appeal and that leave was granted on the 14th December 2015.[10] In its Notice of Appeal dated 17th December 2015, Speednet advances the following grounds of appeal, namely that the Justices of Appeal erred and misdirected themselves by:

a. Finding that the technical term 'channel' used in the Regulations has a clear meaning on a plain reading of the Regulations and on the basis of evidence of the PUC as opposed to construction as a matter of law of the words used in the Regulations;

b. Holding that the licence fee cannot be construed as a tax and, in any event, that the rules of statutory interpretation, such as doubtful penalisation and those set forth in the decisions in *R v Winstanley* and *Inland Revenue Commissioners v Ross and Coulter*, et al, do not apply to the said licence fee;

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[9] *Speednet* (n 8) [46] (Sosa P); Record of Appeal, 303.
[10] Record of Appeal, 275 - 276.

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c. Failing to find that the PUC had unlawfully charged Speednet $792,000 as the applicable licence fee, and in failing to order the refund to Speednet of the said amount (less $1,400 being the correct licence fee); and

d. Awarding the PUC 80 per centum of its costs of the appeal, to be taxed if not sooner agreed.

[12] These grounds of appeal are considered in turn.

Does 'Channel' have a clear meaning?

[13] We agree with the Court of Appeal that certain principles to be found in *Bennion on Statutory Interpretation*[11] ("Bennion") are applicable to the facts of this case. Summarised, these principles are that a word or phrase having a technical meaning in relation to a particular expertise, and used in a context with that expertise, is to be given its technical meaning. Evidence of the meaning of technical terms is admissible and indeed may be required; and such evidence may be derived from experts or from textbooks or academic writings.

[14] The Court of Appeal recognized that there was common ground between the parties that 'channel' as used in the phrase "$100 per channel" in the Schedule was to be given the technical meaning as used in the telecommunications industry, and therefore turned, in accordance with the principles enunciated in Bennion, to the available evidence. It considered an extract from an article in Wikipedia, submitted on behalf of the PUC, which, the court accepted, reflected the standards and requirements of the International Telecommunications Union. The extract stated the following:

> "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* ..."[12]

[11] Francis Bennion, *Bennion on Statutory Interpretation* (Kay Goodall and Geoffrey Morris eds, 5th edn, LexisNexis, 2008).
[12] *Speednet* (n 8) [43] (Sosa P); Record of Appeal, 265 (emphasis added).

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[15] The court acknowledged that the article nowhere used the term 'voice channel' nor for that matter did it anywhere employ the term 'radio frequency channel' but considered portions of the viva voce evidence before the Supreme Court which concerned the nature of a 'voice' channel. In his evidence in chief, Mr John Avery, Chairman of the PUC and an engineer by profession, stated that[13]:

> "… 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."

And further[14]:

> "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."

[16] The Court of Appeal also took into account the following pertinent exchange made during the examination-in-chief of Speednet's Mr Torres[15]:

> "Q: … Mr Torres, what is a voice channel?
>
> …

[13] *Speednet* (n 8) [44] (Sosa P); Record of Appeal, 265.
[14] *Speednet* (n 8) [44] (Sosa P); Record of Appeal, 266.
[15] *Speednet* (n 8) [44] (Sosa P), Record of Appeal, 266-267.

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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 radio links used. 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."

[17] The court then made reference to the following exchange between Legall J and Mr Marshalleck SC, counsel for Speednet, which followed the learned judge's indication that the term 'voice channel' had not been defined for him in the affidavit evidence[16]:

"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?

[16] *Speednet* (n 8) [44] (Sosa P), Record of Appeal, 267.

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

[18] Reading the Wikipedia article in the light of the excerpts from the evidence of Mr Avery and Mr Torres set out above, the court concluded that 'channel' referred to a channel concerned with the transmission or communication of the human voice. As such it was a channel of such space or bandwidth as was essential for the carrying of the frequencies of the human voice from sender to receiver, which, as far as Belize was concerned, had been determined by the PUC to be one of 30 kilohertz ("KHz") if an analogue system of telecommunications is employed.

[19] We entertain considerable reservations regarding the methodology used by the Court of Appeal to arrive at its conclusion that the word 'channel' as used in the Schedule to the Regulations has the meaning of 'voice' channel. Where a court is tasked with construing the meaning of a technical term, as in the present context 'channel' certainly is, evidence may be admitted from experts or from textbooks or academic writings. The best evidence would have been expert evidence but the usual affidavit of a neutral expert witness was not provided and so does not form part of the Record. Insofar as the court relied on the evidence of Mr Avery about the use of 30KHz as indicative of the amount of bandwidth required for a voice transmission using an analogue system, there seems little basis for treating this as determining the meaning of 'channel'. It must be borne in mind that this testimony of Mr Avery was self-serving evidence of a practice entirely internal to the PUC and no evidence was adduced to show support for it anywhere in the Regulations. Nor was there evidence that the information about the practice was otherwise available from public sources.

[20] We agree with the significant reluctance and reservation expressed by Sosa P in treating the article from Wikipedia as evidence of similar quality to that found in specialized reference texts. While we agree with the concerns expressed by the learned President, we respectfully disagree with his resolution of the problem. We do not agree that he ought, notwithstanding his clear unease, to have accepted the

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article as the evidential centrepiece for the meaning of 'channel' as he appears to have done.

[21] Moreover, we are also not altogether convinced that the conclusion reached in the court below necessarily follows from the evidence accepted by it on the meaning of 'channel'. Nothing in the Wikipedia article suggested that 'channel' as used in the scale of fees to be found in the Regulations meant a 'voice' channel. The critical indication was that, "A channel is used to convey an information signal….”; a definition which appears consistent with 'channel' meaning either a 'radio frequency' channel or a 'voice' channel. The emphasis placed on the viva voce evidence of Mr John Avery to support the conclusion that 'channel' referred to 'voice' channel,[17] appears misplaced. That evidence was not an explanation of 'channel' as used in the Regulations, but rather an exposition of a part of the history of the Regulations and the internal policy of the PUC as to the mode of determining the charge for Point-to-Point links. Similarly, the concessions of Mr Torres as regards the definition of 'voice' channel appear to have been just that; agreement on 30 KHz as the definition used by the PUC for 'voice' channel. Nothing in Mr Marshalleck's exchange with the learned judge could be construed as a concession of the meaning of 'channel' as it appears in the Schedule to the Regulations. In sum, we are not persuaded that the evidence before the court below was sufficiently cogent and clear to justify the conclusion which the court reached with respect to the definitive interpretation of 'channel'.

[22] We further agree with Speednet that the court below did not pay sufficient regard to the actual words of the Regulation themselves, and specifically, the Fee Structure in the Schedule to the Regulations[18] which provides:

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[17] *Speednet* (n 8) [44] (Sosa P); Record of Appeal, 265-268.
[18] The Telecommunications (Licensing, Classification, Authorisation and Fee Structure) Regulations, 2002, SI 2001/110.

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FEE STRUCTURE - FREQUENCY AUTHORIZATION

	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

[23] It is evident from the words used in the final row of the Schedule that there is no mention of a fee for 'voice' channels. There is, however, the highly relevant fact that the Point-to-Point links are expressly divided into illustrations of radio frequency channels (HF, VHF, UHF, SHF). These examples are made to the exclusion of reference to, or examples of, voice channels. As Bennion comments, the paramount responsibility of a court is to discover what the legislator intended and this intention is primarily to be ascertained from the text of the enactment in question. That responsibility must necessarily have focussed attention on the fact, and any relevant implications of the legislative usage, of radio frequency channels in relation to Point-to-Point links. All other things being equal, the examples of radio frequency channels given in the final row of the Schedule may well have

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been a very powerful indication to support Speednet's contention that the legislature intended to refer to 'radio frequency' channel.

[24] But all other things are not equal. Apart from Point-to-Point links, two other categories are mentioned in the Schedule, namely, Mobile Cellular and Paging. The fee structures for Mobile Cellular and Paging are more complicated than that of Point-to-Point Links but two points are clear beyond peradventure. First, the fee for Mobile Cellular and Paging is payable on the basis of 'voice' channels. Both parties have accepted that 'channel' in the first two instances refer to 'voice' channel which has been defined by the PUC as comprising 30kHz. Secondly, the fee for the Mobile Cellular and Paging Channels are significantly higher than payment for Point-to-Point Links. Apart from application fees and fees payable on the grant of the licence (neither of which applies for Point-to-Point Links), $1000 is payable per channel for Mobile Cellular and Paging whereas merely $100 is payable per channel for Point-to-Point Links.

[25] A question naturally arises as to whether the relatively small fee per channel in relation to Point-to-Point Links is an indicator that 'channel' was intended to be understood as the smaller multiple 'entities' within the radio frequency channels, and thus attract a lower fee than applicable to Mobile Cellular and Paging. From this perspective, the illustrations of radio frequency channels in the Schedule would be just that: illustrations of the radio frequencies assignable without having any necessary bearing on the formula for the fee structure. This was at the heart of a line of argument advanced before us by Mr Lumor SC who contended that the fee payable for radio frequency would be absurdly low if Point-to-Point Links in the Schedule were interpreted to mean the broader concept of radio channels.

[26] Mr Courtenay SC did not accept that the interpretation of 'channel' turns on the economic implications of the fee structure. Indeed, he argued that if the "$100 per channel" meant voice channel, the additional $100 could have been engrafted onto the fee for Mobile Cellular and the Regulations more efficiently drafted simply as '$1100 per channel' for Mobile Cellular.

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[27] We are not prepared to commit to either of these arguments pressed by the two sides. It is common ground between the parties that the word 'channel' in the Schedule to the Regulations is in principle capable of meaning 'radio frequency' or 'voice' channel. This is manifest not only from the correspondence preceding the Claim but also from the evidence of both witnesses, namely, Ernesto Torres and John Avery, at the trial of the Claim. Similarly, the Court of Appeal also accepted that 'channel' could mean both 'radio frequency' channel and 'voice' channel. It cannot be the case that the determination of the legal meaning to be given to 'channel' wholly turns upon the economics of the fee structure. Similarly, we would note, a historical practice or custom of the PUC in designating a 'voice' channel as comprising 30KHz cannot have any bearing on the interpretation of the word 'channel' because such practice or custom, if any, only becomes important if the court first determines that 'channel' has the meaning of 'voice' channel.

[28] It follows, therefore, that the issue of the meaning to be ascribed to 'channel' can only be properly resolved, as a matter of law, by applying the appropriate cannons of construction.

Application of rules of statutory interpretation

[29] Where more than one construction of any provision or an Act or subsidiary legislation is possible, the principles of interpretation require that a construction which promotes the general legislative purpose underlying the provision is to be preferred to a construction which would not.[19] The purpose may also and more particularly be gleaned from the stated remit of the PUC. Unfortunately, there is little clarity to be obtained as to the meaning of 'channel' from the legislative purpose of the statute in question. As mentioned, the word 'channel' does not appear and therefore is not defined in the PUC Act of 1999 or in the Telecoms Act of 2002. This is not to say, however, that there are no provisions of these enactments which are important in establishing the relevant statutory context. There are several.

[19] Interpretation Act, 1981 (CAP 1), ss. 65 and 66.

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[30] Section 12 of the Telecoms Act of 2002, heavily relied upon by Legall J at first instance, vests the PUC with the control, planning, administration, management and licensing of the radio frequency spectrum. The section goes on further to provide that in carrying out this function the PUC, "shall comply with the applicable standards and the requirements of the International Telecommunications Union and its Radio Regulations, as agreed to or adopted by Belize."[20] The PUC is required to be transparent in allocating radio frequency and to ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner. Section 15 (1) provides for the licensing of telecommunications services and provides that, "no person shall provide any telecommunication service except under and in accordance with a telecommunication service licence issued by" the PUC. Contravention of this provision is an offence which "shall be liable on summary conviction to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment."[21] Section 56 provides that the PUC may make regulations for the better carrying out of the provisions of the Act including the "procedures for applying for licences"[22] and "the fees payable"[23] to the PUC in relation to the applications.

[31] Regulations made pursuant to section 56 of the Telecoms Act of 2002 provide for licensing, classification, authorisation and fee structure for applications. The word 'channel' does not appear and is not defined in the Regulations themselves but it does appear (without being defined) in the third table of the Schedule to the Regulations outlining the fee structure for frequency authorisation, reproduced above.

[32] It is not clear that these provisions have any necessary or definitive bearing on the meaning to be ascribed to 'channel' in the Schedule. At first impression, the reference in section 12 to compliance with the standards and requirements of the International Telecommunications Union ("ITU") appears promising. This is

[20] Belize Telecommunications Act, 2002 (CAP 229), s. 12 (2).
[21] Belize Telecommunications Act, 2002 (CAP 229), s. 48.
[22] Belize Telecommunications Act, 2002 (CAP 229) s. 56 (1) (a).
[23] Belize Telecommunications Act, 2002 (CAP 229) s. 56 (1) (b).

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especially so because the Interpretation Act of Belize requires that a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not (section 65 (b)), a rule that also applies, with the necessary modifications, to subsidiary legislation (section 66). However, on close examination, the ambiguity of the terminology in the Schedule is not resolved by the evidence produced of ITU practices and usages as this does not reveal an international practice. What can be gleaned from that evidence is that in analogue systems an amount of 30 KHz is internationally considered to be the standard for a 'voice' channel. But that does not answer the question which is before us.

[33] In the absence of clear directives as to the meaning of 'channel' from the legislative purpose or from the legislative directive to utilize the practices and usage of the International Telecommunications Union, Speednet argues that 'the principle against doubtful penalisation' ought to apply.

Principle against doubtful penalisation

[34] An early emanation of this principle can be found in the 19th century revenue decision of *Rex v Winstanley*[24] in which the House of Lords interpreted the meaning of "the estate of a bankrupt" for purposes of duties payable on the sale of assets in the bankrupt's estate. The governing legislation exempted the estate of the bankrupt from the obligation to pay the duty but the Crown argued that such estate did not include the property rights of mortgagees of the bankrupt. In holding against the Crown, the House observed that unless the whole interest in the property was treated as the estate of the bankrupt the funds available to the creditors would be diminished which would be contrary to the intention of the legislator. In his concurring judgment, Lord Wynford said the following:

> "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

[24] *Winstanley* (n 5).

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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."[25]

And later in his judgment:

> "… but that very circumstance brings it within the rule which, as long as I have anything to do with the administration of justice, I shall always act upon, and that is, to give the benefit of any doubt to the subject, and not the Crown. It is not the subject who makes the law, it is the Crown who proposes the law, and by whom the law is prepared; and if there is any ambiguity, let the Crown suffer, not the subject."[26]

[35] Similarly, in *Inland Revenue Commissioners v Ross and Coulter and Others (Bladnoch Distillery Co Ltd),*[27] a 1948 tax decision involving excess profits tax (imposed by the Finance Act 1943), Lord Thankerton said:

> "I cannot think that there can be much doubt as to the proper canons of construction of this taxing section. It is not a penal provision; counsel are apt to use the adjective 'penal' in describing the harsh consequences of a taxing provision, but, if the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect."[28]

[36] In the Court of Appeal, Sosa P decided that the rule against doubtful penalisation did not apply because the instant proceedings involved a fee and not a tax. The President said,

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[25] *Winstanley*, (1831) 1 C & J 434, 441; 148 ER 1492, 1495.
[26] *Winstanley*, (1831) 1 C & J 434, 442; 148 ER 1492, 1496.
[27] *Inland Revenue Commissioners* (n 6).
[28] *Ibid.,* 625 H.

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> "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."[29]

[37] We respectfully disagree. It does appear that whereas the cases relied on by Speednet were indeed related to tax/revenue legislation, these cases predated the concept of what was later to be called 'doubtful penalisation' and in no way limit the scope of the application of this approach to interpretation of tax or revenue statutes. The editors of Halsbury's Laws of England frame the principle as one of:

> "… legal policy that a person should not be penalised except under clear law, or in other words should not be put in peril upon an ambiguity; so the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which subjects a person to any detriment where the legislator's intention to do so is doubtful, or penalises him in a way which was not made clear by the legislation in question."[30]

[38] This formulation, which clearly goes beyond litigation over tax/revenue legislation, finds support in a wide range of cases. For instance, the principle of doubtful penalisation was applied in *Re: The Landlords Association for Northern Ireland's Application for Leave to Apply for Judicial Review; Re Boyle, Greer, Jackson and Laird's Application for Judicial Review*[31] which involved an application for Judicial Review of a part of the Housing (Northern Ireland) Order 2003 designed "to regulate the duties of landlords of houses in multiple occupation ("HMOs") to deal with anti-social behaviour of tenants and their guests."[32] In this case, not involving tax or revenue legislation, Girvan J

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[29] *Speednet* (n 8) [40] (Sosa P); Record 216.
[30] Halsbury's Laws (4th edn, 1995) (re-issue) vol 44(1), paras [1456] and [1464] (references omitted).
[31] [2005] NIQB 22.
[32] Ibid, [5].

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considered that certain conduct or breaches of conditions under a Scheme of the legislation not only gave rise to "a liability to prosecution, a penal consequence" but also to "a revocation of registration", which, he said, "is a clear detriment."[33] In another case, *Independent Committee for the Supervision of Telephone Information Services v Andronikou*[34] Walker J referred to a passage in Bennion stating that,

> "…by the exercise of state power, the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law. As the author makes clear in the section headed 'Comment', while the presumption against imposition of a statutory detriment to a person's property or other economic interests is well‑established, as so often in statutory interpretation there may be other criteria operating in favour of interference with property. As it seems to me, the inevitable practicalities of regulation in a field of this kind involve inferences that there will be some element of interference with economic rights."[35]

[39] We agree with Speednet that nothing of current relevance turns on the distinction between 'fee' and 'tax'. Both constitute a financial burden and therefore a potential relevant detriment. In circumstances where legislation specifies a fee as a condition for being licensed to conduct an activity and imposes civil and criminal penalties for engaging in that activity without such a licence, it can, we believe, be fairly said that the 'principle against ambiguous governmental imposition' (thus framed if one wants to avoid the somewhat confusing word 'penalisation') applies. In the present context, the legal foundation for its application is that it is the State which proposes and makes the law, not the subject. If there is genuine ambiguity such that the legislative intention is not clear or that the words of the legislation are such that they can genuinely and reasonably be understood in more than one way by those whose conduct it is

[33] Ibid. [46].
[34] [2007] EWHC 2307 (Admin).
[35] Ibid, [25].

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supposed to regulate, then the State, and not the subject, should bear the burden and suffer the consequences of that ambiguity.

[40] It may well be that the principle against ambiguous governmental imposition is a species and an illustration of a much wider 'ambiguity principle' that straddles both private law and public law. There is certainly a close relationship between such a principle in public law and the much older, well-known *contra proferentem* rule in private law which goes back to the classical period of Roman law where it was applied to certain contracts, for example, the *stipulatio* and contracts of sale. As it was the *stipulator* who formulated the question which determined the content of the *stipulatio*, he would bear the consequences of any ambiguity, "because he could just as well have made it clear what he wanted the other party to promise him."[36] Similarly, in the case of contracts of sale, the interpretation was *contra venditorum* as it used to be the vendor who would draw up the terms of the contract of sale. The rule was revived through medieval jurisprudence on the European Continent and by the 15th century the rule had found its way into the English common law.[37] There it would traditionally be applied in situations where an imbalance of power between the parties existed and the content of the contract had been more or less imposed by the stronger party. Thus, ambiguities in insurance policies, leases imposing obligations on the tenant, contracts for the sale of land, guarantees and grants, usually led to an interpretation in favour of the tenant, the purchaser, the guarantor or the grantee.[38] In the context of these kinds of contracts a comparison with legislation would sometimes be addressed. Accordingly, Frank J in *Siegelman v Cunard White Star Ltd*[39] said:

> "An ordinary contract has been called a sort of private statute, mutually made by the parties and governing their relations. But in a take-it-or-leave-

[36] Reinhard Zimmermann, *The Law of Obligations: Roman Foundation of the Civilian Tradition* (OUP, 1995), 639.
[37] Ibid, 462.
[38] See *Neill v Duke of Devonshire* (1882) 8 App Cas 135, 149, (per Lord Selborne LC): "It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee."
[39] (1955) 221 F 2d 189.

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> it contract, absent actual freedom to contract, the parties do not 'legislate' by mutual agreement; the dominant party 'legislates' for both."[40]

And Beattie J in *Geothermal Energy v Commissioner of Inland Revenue*[41] stated: "If I were in any doubt about the interpretation, which I am not, then because this is a taxing statute… I would construe the provision contra proferentem the respondent."[42] Interestingly, both in public law and in private law the ambiguity rule is more and more considered to be one of last resort which should only be invoked, "if the ambiguity cannot be resolved by any other legitimate means."[43]

[41] In the case of statutory interpretation, these other legitimate means of construing legal texts are usually, as in Belize, set out in an Interpretation Act. But there are other guiding principles of legal policy that also need to be observed, one of which is the principle that law should serve the public interest, prompting courts to strike a proper balance between individual and community rights. In the sphere of taxes, for example, clever and creative legal constructions to enable individual taxpayers to avoid paying their fair share of taxes have social effects that may well be considered to be contrary to the general public interest. Considerations like these caution against too readily applying the ambiguity principle when purposively construing a tax statute or other forms of revenue legislation. The subsidiary nature of the ambiguity principle must therefore be emphasized. On the other hand, there is the basic principle that law should be clear and predictable, capable of guiding the behaviour of its subjects. Individuals and companies should be able reasonably to chart their future endeavours and course of action on the basis of clear and solid legislative rules without having to fear any unpleasant surprises from the very entity that made these rules. States and governmental bodies cannot afford to be, or even seem to be, arbitrary in the application of their own rules. The very Rule of Law prevents Governments from applying a

[40] Ibid, 205-206.
[41] [1979] 2 NZLR 324.
[42] Ibid, 338.
[43] Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clear Language* (Cambridge University Press, 2001), 48 citing *St. Edmundsbury and Ipswich Diocesan Board of Finance and another v Clark* (No 2) [1975] 1 All ER 772, 780; [1975] 1 WLR 468, 477.

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'Humpty-Dumptian' and self-serving approach to their own ambiguous words making them mean what they choose them to mean.

[42] There can be no doubt that the PUC stands in the place of the Government vis-à-vis Speednet. The PUC was established by the PUC Act of 1999 as an autonomous corporate institution governed by that Act and any other law with the general function to ensure services rendered by public utility providers are satisfactory and that the charges imposed for those services are reasonable.[44] The PUC has the power, with the approval of the Minister, to make Regulations for the giving of effect to the provisions of the PUC Act of 1999.[45]

[43] The Telecoms Act of 2002 has as its primary object "… to provide for the regulation and control of telecommunications matters in the public interest."[46] It recognizes the PUC as the regulatory agency of the telecommunications sector[47] and section 6 (2) empowers the PUC to perform all such acts as are necessary or incidental to its functions best calculated to, inter alia, implement the policy of the Government relating to the telecommunications industry and the objectives of the Act; protect the interests of the telecommunication users, service providers and consumers; manage and administer the use of the radio frequency spectrum, and telephone numbering scheme; and receive and process fees. The PUC is given powers, specified in section 7, to carry out these functions.

[44] It is also relevant that having made the Regulations in respect of which there is genuine ambiguity, the PUC is, itself, positioned to benefit directly and substantially if those regulations are interpreted in accordance with its contentions. Under the PUC Act of 1999, the funds of the PUC include "such sums as may in any manner become payable to or vested in the PUC from any lawful source whatsoever."[48] Section 6 (2) of the Act of 2002 empowers the PUC to "collect all prescribed and any other tariffs levies under this Act or related regulations." And section 10 (2) (a), in similarity with section 37 of the PUC Act

[44] Public Utilities Commission Act, 1999 (CAP 223), ss. 3, 22.
[45] Public Utilities Commission Act, 1999 (CAP 223), s. 55.
[46] Belize Telecommunications Act, 2002 (CAP 229), s. 3.
[47] Belize Telecommunications Act, 2002 (CAP 229), s. 6.
[48] Public Utilities Commission Act, 1999 (CAP 223), s. 37.

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of 1999, provides that the PUC derives its income from, among other things, "any charge or fee that may be prescribed pursuant to this Act or any other law".

[45] The PUC therefore exercises governmental powers in relation to the Telecoms Act of 2002 and its Regulations and benefits financially from the fees charged in those Regulations. In these circumstances, there is a clear responsibility on the PUC to ensure the Regulations speak in clear and intelligible language. If they do not, the PUC is always at liberty, with the approval of the Minister, to change the language used so that the Regulations do speak with clarity and intelligibility. What the PUC cannot do, consistent with its responsibility, is to take advantage of an ambiguity in the wording to impose an economic detriment or hardship on Speednet from which the PUC happens to benefit.

[46] There can be no doubt that interpreting 'channel' to mean 'voice channel' imposes significant economic detriment on Speednet. The Licence Fee for frequency authorisation imposes economic hardship and detriment because were the Court to interpret the word 'channel' to mean 'voice' channel, Speednet would be liable to pay BZ$792,500; however, if interpreted to mean 'radio frequency' channel, Speednet would be liable to pay BZ$1,400. The difference in liability is BZ$791,100, a significant economic liability. Under the Telecoms Act of 2002, a licence is required to operate any system that uses the radio frequency spectrum.[49] A failure to comply is an offence punishable on summary conviction by a fine not exceeding BZ$500,000 or by imprisonment for a term not exceeding five years, or both.[50] Speednet was therefore not able to import its radio equipment or to use the frequencies without paying the licence fee demanded by the PUC.[51] In these circumstances, we consider that the presumption against 'doubtful penalisation' or better 'ambiguous governmental imposition' is applicable to prevent the imposition by the PUC of an exorbitant charge.

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[49] Belize Telecommunications Act, 2002 (CAP 229), s. 15 (2).
[50] Belize Telecommunications Act, 2002 (CAP 229), s. 48.
[51] First Affidavit of Ernesto Torres, Record of Appeal, 342 [6d] and Letter from the Public Utilities Commission, Record of Appeal, 357.

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Conclusions

[47] The Courts finds that:

a. There is genuine ambiguity as to the meaning of the term 'channel' as used in the final row of the third table in the Schedule to the Regulations of the Telecoms Act of 2002.

b. This ambiguity must be resolved by application of the principle against doubtful penalisation or, as we prefer to call it, the principle against ambiguous governmental imposition, given that all other legitimate means of statutory interpretation have not produced a result that satisfactorily decides which of the two interpretations of the term 'channel' is the one intended or the one that can reasonably and objectively be considered the correct one.

c. Application of the principle against ambiguous governmental imposition leads to accepting Speednet's interpretation of the term 'channel' as 'radio frequency' channel being the least detrimental to Speednet, and thus, in the circumstances, the proper one. We do not assert that this is the technologically necessary meaning but rather that it is the meaning to be derived from the application of the relevant legal criteria.

d. The PUC has therefore unlawfully charged Speednet $792,500 as the applicable licence fee.

Orders

[48] The Court orders:

a) That the Respondent refunds to the Appellant the sum of $792,000 paid (less $1,400 being the correct licence fee); and

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b) Costs to the Appellant in this Court and the court below, to be taxed if not sooner agreed.

/s/A. Saunders
The Hon Mr Justice A Saunders

/s/ J. Wit
The Hon Mr Justice J Wit

/s/ D. Hayton
The Hon Mr Justice D Hayton

/s/ W. Anderson
The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee
The Hon Mme Justice M Rajnauth-Lee

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