

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 CIVIL DIVISION  
3  
4

Cause No.: 134 of 2017

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6  
7 BETWEEN

8 DATALINK, LTD.

9 Plaintiff

10 And

11  
12 UTILITY, REGULATION AND COMPETITION OFFICE

13 Defendant

14 And

15 INFINITY BROADBAND LTD (TRADING AS "C3")  
16 WESTTEL LTD (TRADING AS "LOGIC")  
17 CABLE AND WIRELESS (CAYMAN ISLANDS) LTD. (TRADING AS "FLOW")  
18

19 Interested Parties  
20  
21

22 IN OPEN COURT  
23

24 Appearances:

Ms. Helen Mountfield, Q.C., with Mr. McMaster Q.C. of Appleby  
Attorneys for the Plaintiff

27 Mr. Paul Bowen Q.C., with Mr. Michael Wingrave, of Dinner Martin,  
28 Attorneys for the Defendant  
29

30 Before:

Hon. Justice Marlene I. Carter Actg.

31  
32 Heard:

4<sup>th</sup> - 8<sup>th</sup> June 2018  
33  
34  
35

36 HEADNOTE  
37  
38

39 *Civil – Judicial Review (JR) – Utility Regulation and Competition (URC) Law 2016,*  
40 *Section 7 (1) — Draft Administrative Determination- Consultation*  
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45 JUDGMENT  
46



1. The Plaintiff seeks Judicial Review (JR) of the Defendant's Determination, (ICT 2017-1), Determination on Pole Attachment Reservation Fees (hereinafter "the Decision"), wherein it concluded that the reserved spaces fees charged by the Plaintiff were "*contrary to sections 65 (5) and 69 (2) (b) of the ICT Law and Regulations 6(a), 6(j) and 10(1)(b) of the Infrastructure Sharing Regulations.*"

## BACKGROUND

2. The Plaintiff is responsible for managing and licensing communications spaces on utility poles, which are designated for the attachment of communications cables for information and communications technology ("ICT").
3. The Defendant is the Regulator established by s.4 of the *Utility Regulation and Competition (URC) Law 2016*, (hereinafter referred to as "the URC Law"), responsible, *inter alia*, for regulating the sharing of infrastructure between ICT providers.
4. The Plaintiff entered into various pole-sharing agreements for the provision of licensed communications spaces to other ICT providers (hereinafter referred to as "the Licensees"), which allow the Licensees to reserve communications spaces on utility poles until such time as they are required, in return for the payment of reserved spaces fees and total annual minimum payments. Both the Licensees and the Plaintiff fall under the regulation of the Defendant.
5. On 12<sup>th</sup> September 2014, one of the Licensees, C3, submitted a complaint to the Defendant, regarding the height of its space on the Plaintiff's utility poles. On 27<sup>th</sup> April 2016, the Defendant rejected C3's complaint. At the same time the Defendant published two consultation



papers one of which was "ICT Consultation 2016-2 – pole attachment reserved spaces fees, permits application process and charging principles" (hereinafter "the Consultation").

6. Relevant to this application, the Consultation included a section on the "*the appropriateness of the reserved spaces fees relating to the attachment of communication cables to CUC's electricity poles*". The Defendant expressed its concern that reserved spaces fees had been imposed in a discriminatory way and invited consultation responses on its proposal to strike out references to reserved space, reserved spaces payments and minimum annual payments from the contracts of some of the Licensees.<sup>1</sup>

7. The Plaintiff and other licensees submitted responses to the Consultation and on the 9<sup>th</sup> December 2016, the Defendant formed a Pole Attachment Industry Working Group, comprised of representatives from the Plaintiff and the Licensees to consider a number of issues including the "pricing/costing elements applicable in the Pole Sharing Agreements". At the Defendant's request, the members of the Working group submitted final position papers on 21<sup>st</sup> and 26<sup>th</sup> April 2017. At the Defendant's further request, the members of the group submitted responses to each other's final position papers on 16<sup>th</sup> and 20<sup>th</sup> June 2017.

8. The Decision was issued on the 11<sup>th</sup> July 2017. In essence the Defendant came to the conclusion<sup>2</sup> that the Plaintiff's operation of "**Reserved Space**", "**Quarterly Reserved Space Payments**" and "**Total Minimum Annual Payments**" is contrary to sections 65 (5) and 69 (2) (b) of the ICT Law and Regulations 6(a), 6(j) and 10(1)(b) of the Infrastructure Sharing Regulations in that it had "impeded the efficient utilisation of pole infrastructure", "harmed competition in the Cayman Islands for ICT networks and for ICT services", "been provided at

<sup>1</sup> The C3 and Logic contracts (but not the Flow contract, which had not yet been entered into).

<sup>2</sup> See paragraphs 161 – 164 of the Decision



1 rates, terms and conditions which were not reasonable” and “had been discriminatory (both  
2 at horizontal level and with self-preference)”.

3  
4 9. The Defendant determined that “it was appropriate to modify those parts of the Pole  
5 Attachment Agreements which have had the effect of limiting (a) the efficient and harmonized  
6 utilisation of infrastructure, and (b) the promotion of competition in the provision of ICT  
7 services of ICT networks.” The Defendant made clear that it considered “that DataLink has  
8 not provided infrastructure sharing services in accordance with section 65 (5) of the ICT Law”.

9  
10 10. As a result of its findings the Defendant directed the Plaintiff to “Remove all references to,  
11 including the effects of, the: “Reserved Space”; “Quarterly Reserved Space Payment” and  
12 “Total Minimum Annual Payments” from its Pole Attachment Agreements with C3, Logic  
13 and Flow, such removals to be confirmed to the Defendant within thirty (30) calendar days  
14 from the date of the Decision.

15  
16 11. The Defendant also directed<sup>3</sup> the Plaintiff to consider and agree separately with each of the  
17 Licensees “the type and quantum of the reservation fees to be repaid by DataLink to C3, Logic  
18 and Flow respectively.”

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20  
21 **CHALLENGE TO THE DECISION**

22 12. The Plaintiff applied for and was granted Leave to Apply for Judicial Review on 9<sup>th</sup> August  
23 2017. The Plaintiff was also granted a stay of the Decision at that time.

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<sup>3</sup> See the “Follow up Procedures” at paragraphs 174 – 177 of the Decision

1 13. On the 25<sup>th</sup> of August 2017 the Plaintiff filed a Notice of Originating Motion and its Statement  
2 of Facts and Grounds. The Notice of Originating Motion was supported by the affidavit of  
3 Claire Stafford.

4  
5 14. It is useful to summarize of the grounds of challenge (as set out by the Plaintiff in its skeleton  
6 of 7<sup>th</sup> May 2018) as follows:

- 7 i. *the Defendant breached the requirements of section 7 of the Utility Regulation and*  
8 *Competition Law 2016 by failing to issue the Decision in draft, in order to enable the*  
9 *Plaintiff to make representations on it and for these to be considered before a decision*  
10 *was finalized;*  
11 ii. *There is a fundamental inconsistency in the Decision. The Decision imposed two*  
12 *requirements on the Plaintiff as a result of the Defendant's findings. The first requirement*  
13 *was ... to leave it to the Plaintiff to negotiate with the Licensees on the amount of any*  
14 *repayment of reservation fees, and to consider the matter further only if no agreement*  
15 *was reached. ... the Decision also required all references to reservation fees be*  
16 *immediately struck from the licences. The effect of the second requirement is that,*  
17 *notwithstanding the Defendant's acceptance of the legality of reservation fees in*  
18 *principle, the Licensees will have an unqualified right to the repayment of the reservation*  
19 *fees in full. This renders obsolete the ostensible requirement to negotiate levels of*  
20 *repayment;*  
21 iii. *contrary to the constitutional protection for property, the interference with the Plaintiff's*  
22 *property rights was disproportionate in that the removal of its rights by the Decision went*  
23 *much further than was necessary to secure the regulatory objectives;*  
24 iv. *the Defendant failed to have regard to a number of vitally material considerations and*  
25 *accordingly acted irrationally;*



1 v. the Defendant acted ultra vires in using regulatory powers to address circumstances  
2 which arose before those powers were in existence.

3  
4  
5 **FURTHER GROUNDS OF CHALLENGE**  
6

7 15. On 29<sup>th</sup> September 2017, the Plaintiff was granted leave to amend the Originating Motion and  
8 Ground of Judicial Review to include a ground of “conspicuous unfairness.” The Plaintiff did  
9 not pursue the “conspicuous unfairness” ground at the hearing, instead seeking that the Court  
10 have regard to what was related to therein of the Defendant’s conduct as “*part of the factual*  
11 *background to the Decision and the unsatisfactory nature of the decision-making process.*”  
12

13 16. At hearing of the Originating Motion, counsel for the Defendant drew to the Court’s attention  
14 that the Plaintiff appeared to have added further grounds of challenge to the Decision for which  
15 permission had not been granted by this court. The Defendant objected to this course. Counsel  
16 for the Plaintiff responded that these were not new grounds as they were essentially  
17 encompassed within the grounds for which permission had already been granted and pointed  
18 to the fact the Defendant was not prejudiced at the hearing even if these were found to be new  
19 grounds and that the Defendant appeared well able to answer the Plaintiff’s submissions as  
20 evidenced by the Defendant’s filed skeleton arguments.  
21

22 17. In the usual course a Plaintiff seeking permission to amend its grounds would be expected to  
23 have given proper notice to the other side and any other relevant party. The discretion remains  
24 with the court. It appears to this court that application should have been sought for leave to  
25 argue Ground ‘1A,’ that the Defendant had acted in breach of the Consultation Procedure  
26 Guidelines, which this court considers a “new” ground of challenge. The Plaintiff is not  
27 allowed to pursue this ground and as was agreed at the hearing, this court will not now consider

1 the arguments relating to same. The other “new” grounds of challenge are essentially  
2 amplification of arguments on the grounds for which leave had been sought and granted under  
3 the headings of irrationality and the expropriation of the Plaintiff’s property contrary to the Bill  
4 of Rights, and accordingly arguments on those matters will stand.

5 **GROUND 1 – BREACH OF THE URC LAW**  
6

7 18. Section 7 (1) of the URC Law provides as follows:

- 8 “7. (1) Prior to issuing an administrative determination which, in the  
9 reasonable opinion of the Office, is of public significance, and subject  
10 to specific procedures under sectoral legislation, the Office shall -  
11 (a) issue the proposed determination in the form of a draft  
12 administrative determination;  
13 (b) allow persons with sufficient interest or who are likely to be  
14 affected a reasonable opportunity to comment on the draft  
15 administrative determination; and  
16 (c) give due consideration to those comments with a view to  
17 determining what administrative determination (if any) should be  
18 issued.”  
19



20  
21 **THE PLAINTIFF’S SUBMISSIONS**  
22

23 19. The Plaintiff submits that the Defendant breached its duty pursuant to s.7 (1) of the URC to  
24 issue the Decision in draft.

25  
26 20. The Plaintiff submits that the Defendant’s breach of its statutory duty to issue the Decision in  
27 Draft was material as before issuing the Decision, the only reasoning provided by the  
28 Defendant in relation to reserved spaces and reserved spaces fees was contained in the  
29 Consultation and ran to 4 pages. By contrast, the reasoning contained in the Decision, which  
30 runs to 77 pages, was substantially more developed, thus highlighting the extent to which the  
31 Plaintiff was deprived of the opportunity to comment on the Defendant’s proposed reasoning.  
32 The Plaintiff submits that if it had been granted that opportunity to which it was entitled by  
33 s.7(1) it would have addressed the Defendant on the matters set out in the other grounds of  
34 challenge on this application as well as those matters raised and expanded in the first affidavit

1 of Claire Stafford wherein Stafford listed a number of matters that the Plaintiff contends, had  
2 a draft determination been issued, the Plaintiff would have commented on in particular.<sup>4</sup>

3  
4 **THE DEFENDANT'S SUBMISSIONS**  
5

6 21. The Defendant accepted that the Decision was an Administrative Determination and that it was  
7 under a duty to issue a Draft Administrative Determination pursuant to s.7(1)(a).

8  
9 22. However, the Defendant in reply submitted that the Plaintiff's first ground of review should be  
10 dismissed. The Defendant's set out a number of reasons for its position, the first of which is  
11 that it did issue a 'draft administrative determination' within the meaning of s.7(1)(a). In  
12 support of this argument the Defendant pointed out that there is no statutory provision or  
13 stipulation as to when a draft determination must be issued and that it could therefore be  
14 published at the same time as the original consultation.<sup>5</sup> Further the Defendant argued that the  
15 consultation contained sufficient detail of the eventual determination to amount to a draft  
16 administrative determination, as it contained the main ideas and intentions later found in the  
17 Decision. In particular the Defendant referred to the "proposals" contained in paragraph 165  
18 of the Consultation as being reflected in paragraph 173 of the Decision, and that this was  
19 essentially the operative part of the Defendant's Decision within s.2 of the URC Law. Counsel  
20 for the Defendant argued that although these were headed "proposals" in the Consultation,  
21 rather than "draft determinations" that the Court should find that this is their effect.

22  
23  
24 23. The Defendant also argued that there was sufficient background reasoning in the consultation  
25 document to be a draft determination as this allowed persons with sufficient interest or those  
26 who were likely to be affected a reasonable opportunity to comment on the draft, submitting

<sup>4</sup> These comments are dealt with in detail later in this judgment.

<sup>5</sup> See OfReg Consultation Guidance at paragraph 38

1 that if the consultation document was sufficient to satisfy s.7(1)(b) that it would follow that  
2 there was no breach of 7(1)(a). The Defendant further argued that s.7(1)(a) does not require a  
3 full draft of the determination to be published after consultation has been concluded as the  
4 Plaintiffs contend. In this regard counsel for the Defendant referred the court to the practice of  
5 the UK regulator OfCom.<sup>6</sup>  
6

7 24. The conclusion on this aspect as set out in the Defendant's skeleton argument was:

8 *"It is respectfully submitted that s 7(1)(a) should be interpreted so as to allow OfReg the*  
9 *flexibility either to issue a 'full' draft determination later in the process or a more concise*  
10 *draft determination earlier in the process (consistent with Ofcom's approach) as OfReg*  
11 *considers appropriate, depending upon the circumstances, subject only to the requirements*  
12 *of s 7(1)(b) and s 7(4). To impose a requirement to publish a 'full' draft determination in*  
13 *all cases (as contended for by the Plaintiff) will result in a 'significant concentration of*  
14 *work both for [OfReg] and for stakeholders' towards the end of the consultation process*  
15 *that in many cases will be unnecessary and may leave some stakeholders with insufficient*  
16 *time to comment, leading to delays and/ or an inadequate consultation.*<sup>7</sup>  
17  
18

19 25. Secondly, the Defendant submitted that s.7(1)(a) does not lay down an absolute requirement  
20 that a draft administrative determination must be issued in every case. The Defendant contents  
21 that s.7(2) wherein the Defendant must publish its procedures for seeking comments which  
22 includes "guiding principles for determining when the Office may derogate from standard  
23 procedures", should be read as anticipating that there may be circumstances where OfReg may  
24 derogate from standard procedures. It follows counsel states that if the issue of a draft  
25 administrative determination is part of the standard procedure that there may be circumstances  
26 in which the Defendant may make a determination without first issuing a draft. Counsel argued  
27 that this was especially so where there had been a consultation process as well as a Working  
28 Group process which allowed "sufficient consultation to take place as to comply with the

<sup>6</sup> OfCom previously published a full draft of its proposed determination for comment but changed this practice in 2011 to publishing a document which set out for comment the main elements of Ofcom's provisional reasoning and assessment in relation to the matters in dispute.

<sup>7</sup> Paragraph 31 of the Defendant's skeleton argument.

1 principles of natural justice.” In such circumstances, “...a failure to provide a draft  
2 administrative determination is not unlawful.”

3  
4 26. Thirdly, that a breach of the requirement to publish a draft administrative determination does  
5 not invalidate the determination, provided the determination, in other respects, satisfied the  
6 statutory purpose of section 7 and the underlying common law principles to which it gives  
7 effect. Counsel for the Defendant therefore submitted that even if a full draft needed to be  
8 published and even if that requirement obtained in every case, the consultation procedure as a  
9 whole was fair and therefore even a breach of s.7(1)(a) does not invalidate the determination.

10  
11 27. Fourthly, the consultation process complied with s.7(1)(b) and s.7(4) and was fair.<sup>8</sup> The  
12 Defendant submitted that the process followed by the Defendant allowed persons with  
13 sufficient interest a reasonable opportunity to comment as well as an opportunity to make  
14 written representations on why the Defendant ought not to make such a determination. For that  
15 reason, whether the breach of section 7(1) was material or not is not the only consideration.  
16 Counsel referred the Court to the case of *R v North and East Devon Health Authority, ex p*  
17 *Coughlan*<sup>9</sup> where Lord Woolf stated:

18 *It has to be remembered that consultation is not litigation: the consulting*  
19 *authority is not required to publicize every submission it receives or*  
20 *(absent some statutory obligation) to disclose all its advice. Its obligation*  
21 *is to let those who have a potential interest in the subject matter know in*  
22 *clear terms what the proposal is and exactly why it is under positive*  
23 *consideration, telling them enough (which may be a good deal) to enable*  
24 *them to make an intelligent response. The obligation, although it may be*  
25 *quite onerous, goes no further than this.”*  
26

<sup>8</sup> The Defendant accepts that Section 7(4) is irrelevant for the purposes of this application as both parties agree that this was a matter of public importance and therefore it is Section 7(1) which applies.

<sup>9</sup> *Coughlan* [2001] QB 213, para 108

1 28. The Defendant concluded that the consultation process met the tests set out in Coughlan and  
2 was fair and sufficient for the purposes of s.7(1)(b), s 7(4) and/ or the common law.

3  
4 **THE PLAINTIFF'S REPLY**  
5

6 29. Counsel for the Plaintiff in reply addressed the Defendant's arguments and amplified her own  
7 assertions that:

- 8 (i) The short consultation proposal set out in the Defendant's second consultation cannot  
9 in any way be read as a 'draft' of the Decision under challenge as an administrative  
10 determination comprises both the directions and the reasons in support of them to  
11 comply with s.6(4)(e) of the URC Law which requires that an administrative  
12 determination must set out the Defendant's reasoning. She contended that the  
13 consultation document focused on asking questions for the purposes of formulating a  
14 position, rather than providing reasons to justify a position already formulated. The  
15 consultation document contains barely any of the reasoning which is found in the actual  
16 administrative determination, i.e. the Decision.
- 17 (ii) Counsel submitted that there was a difference in effect between a consultation and a  
18 draft determination in ordinary language and in law;
- 19 (iii) Counsel pointed to the legislative history of the provision s.7(1). She invited the court  
20 to consider the previous legislative provisions<sup>10</sup> which permitted licensees to seek a  
21 reconsideration of certain regulatory decisions after a regulator had delivered its final  
22 decision, failing which a right of appeal against the reconsideration obtained. This  
23 was in contrast to s.7 of the URC which in essence replaced the structure of 'decision-  
24 reconsideration-appeal' with the scheme set out in s.7, namely, the publication of a  
25 draft decision, with an opportunity to comment, followed by a final decision. Counsel  
26 concluded this point as follows: *"Thus, the draft determination process is intended to  
27 afford the subject of the determination an opportunity to persuade the Defendant to  
28 reconsider its (otherwise final) decision. By contrast with consultation, it is not  
29 intended to be a general public opportunity to comment on a proposal which is being  
30 advanced at a formative stage, and to have those comments contribute to the decision-  
31 making process in general."*

<sup>10</sup> These included section 71 of the Electricity Regulatory Authority Law (2010 Revision) and section 78 of the Information and Communications Technology Authority Law (2016 Revision).

1 (iv) The legislation which had repealed the previous provisions which allowed for appeal  
2 against administrative determinations and which now provided instead for draft  
3 administrative determinations to be issued, did not come into force until 10 January  
4 2017 by which date the consultation document had already been issued and the date  
5 for responses, 28 June 2016, had long past. She submitted thus:

6 *"The Defendant could only establish that the document it issued on 27 April 2016*  
7 *constituted a "draft determination" within the meaning of s 7(1) of the URC Law*  
8 *if that law could in some way have retrospectively turned the document into a*  
9 *"draft determination".*

10 *However, it is an established principle of construction that "unless a contrary*  
11 *intention appears, an enactment is not intended to have a retrospective operation"*  
12 *...There is no such contrary intention in the URC Law."*

13  
14 **THE EVIDENCE**  
15

16 30. The Plaintiff filed the affidavit of Claire Stafford in support of the originating motion. Relevant  
17 to this ground of challenge, Ms. Stafford indicated that: "There are also a number of statements  
18 made by the Defendant in the Decision in regard to which, had the Decision been issued in  
19 draft, the Plaintiff would have commented." Stafford went on to set out what these were:

20  
21 "60. ...

22 *...In particular:*

23 (a) *Paragraph 101 – the Defendant states that the reservation fees were initially*  
24 *introduced by CUC [CS-1, page 35]. Had the Decision been issued in draft, the*  
25 *Plaintiff would have ensured that the Decision was taken on a correct factual basis.*  
26 *As set out above, it was Infinity which proposed these fees, ostensibly to afford it the*  
27 *access to infrastructure needed to meet the authority's licence conditions for roll-*  
28 *out.*

29 (b) *Paragraph 107 – DataLink should be required to demonstrate that all reservation*  
30 *fees charged as the "Quarterly Reserved Space Payment" are directly related to*  
31 *DataLink's costs incurred as a result of keeping an attachment point reserved but*



1 not occupied. In other words, DataLink should demonstrate that the removal of  
2 reservation fees would result in a net loss for DataLink, when assuming such  
3 attachment points could be otherwise occupied and generate revenues for DataLink  
4 through pole attachment rental fees [CS-1, page 34].

5 ...  
6 The consultation did not invite DataLink to demonstrate that the removal of  
7 reservation fees would result in a net loss. Had DataLink been asked to do so, it  
8 would have submitted that it was not necessary at all for DataLink to demonstrate  
9 losses and in the alternative, would have embarked on the complex analysis required  
10 to show loss.

11 (c) Paragraph 137 – the Quarterly Reserved Space Payment is based on the total  
12 number of poles owned by CUC, which exceeds the maximum number of poles  
13 available for attachment in a given quarter and therefore constitutes a form of  
14 infrastructure sharing charge which the Defendant considers is not reasonable. The  
15 Defendant then goes on to say (at paragraph 138) that this in effect assumes that the  
16 licensee would necessarily request access to all of CUC's utility poles, but that such  
17 an assumption is not reasonable unless it is specifically asked for by the licensee, as  
18 it ignores that licensees may have alternatives to CUC utility poles in some area (i.e.  
19 underground ducts). The Defendant did not consider in making the Decision that  
20 both Infinity and Logic did specifically request access to all of CUC's utility poles:

21 (d) In the email from Randy Merren on 13 December 2011 (referred to at paragraph 20  
22 above), Infinity stated that it was “essential that CUC's poles across Grand Cayman  
23 were available for use”. The Defendant also did not have regard to the fact that it  
24 had tacitly endorsed an approach to roll out that required reserve space agreements,  
25 as set out above.





1 (e) In the email from Mike Edenholtz to DataLink on 17 April 2013 (referred to at  
2 paragraph 44 above), Logic stated that it "will require reservation to 100% of pole  
3 assets".

4 (f) Paragraph 141 – the reservation fee was set as a percentage of the Annual  
5 Attachment Fee, without reference to DataLink's actual costs. This means it is not  
6 possible to assess whether the reservation fees determined in such way are directly  
7 related to DataLink's costs incurred as a result of keeping an attachment point  
8 reserved but not occupied [CS-1, page 48]. As set out in paragraph 53(b) above,  
9 this point did not form part of the consultation process and is something which  
10 DataLink would wish carefully to analyse and make representations upon. "

11  
12 31. In her second affidavit filed in this matter on the 17<sup>th</sup> November 2017, Ms. Stafford also raised  
13 additional issues with the position taken by the Defendant that the consultation was indeed the  
14 draft determination. She related the differences in the Section 7 approach to that which  
15 obtained previously relating to different regulated industries.

16  
17 32. She also related the position expressed by other relevant parties on the effect of the Section.  
18 At paragraph 12 of that affidavit:

19 "On 23 September 2016, Caribbean Utilities Company, Ltd (CUC) submitted  
20 comments on the URC Bill to the Electricity Regulatory Authority [CS-3, page 3-  
21 15]. On 29 September 2016, the Ministry responded to those comments [CS-3,  
22 page 16-24]. In relation to clause 7(1) of the URC Bill, the Ministry stated: "This  
23 provision, affords affected parties to comment on the draft Decision and thus  
24 provide the basis for the Office to reconsider its position prior to issuing a final  
25 Decision, noting that the Office shall give due consideration to those comments.  
26

1                   The Ministry is of the view that this procedure affords affected parties sufficient  
2                   opportunity to proffer arguments for reconsideration and that the logical next step  
3                   would therefore be judicial review.”

- 4       33.       She referred to s.7(2) of the URC law which requires the Defendant to publish its procedures  
5               for seeking comments, which shall include how the Office will issue draft administrative  
6               determinations under subsection as well as how consultations will be published. Ms Stafford  
7               noted that these Guidelines set out a usual timeframe for consultations, and then stated:



“...none of the circumstances in paragraph 38 of the Consultation Procedures Guidelines for including a draft determination within a consultation document appear to apply, and the Defendant has not contended otherwise. I also note that the Guidelines state that, if the Defendant proposes to depart from them, it “will set out its reasons for doing so” (para 11). No reasons were provided by the Defendant for departing from the Guidelines in this case.”

- 17       34.       The affidavit of Russell Richardson was filed in support of the Defendant’s case. In his first  
18               affidavit of the 20<sup>th</sup> of October 2017, Dr Richardson gave some background relating to the  
19               Defendant’s concern about “the slow development of efficient and competitive ICT services,  
20               particularly high-speed internet broadband, across Grand Cayman.” Based on these concerns  
21               the ICT Authority put together an internal working group to consider the problem. When an  
22               investigation arose into the C3-Datalink dispute, the ICT Authority staff considered in greater  
23               detail the pole attachment agreements and made a number of requests for information from  
24               DataLink and the Licensees.

- 25  
26       35.       Dr Richardson noted at Paragraph 19 of his affidavit:

27               *“The ICT Authority prepared a consultation paper as a collaborative effort with input from*  
28               *three categories of professionals acting as a team, ... The proposals in the consultation*  
29               *paper were arrived at by internal discussions within the team, subject to approval by the*  
30               *Board, and the aim was to set out the views of the ICT Authority on the issues at hand,*  
31               *subject to the responses received from the industry parties”*  
32  
33

1 36. Further in his affidavit, Dr. Richardson stated: *"In Consultation 2016-2, Part A, the Authority*  
2 *set out its preliminary view that the Reservation Fees contravened the ICT Laws in a number*  
3 *of respects."*<sup>11</sup>

4  
5 37. Dr. Richardson went on to say that *"Although these preliminary conclusions are not labelled*  
6 *as "draft Determinations" for the purposes of s 7(1) of the URC Law (which was not in force*  
7 *at the time – it did not come into force until 16 January 2017), ...I believe that this is their*  
8 *effect."*<sup>12</sup>

9  
10 38. Dr Richardson explained the thinking behind the setting up of the Working Group:

11  
12 "51. *We (the staff of the ICT Authority looking at this) found the responses to the*  
13 *Consultation to be unsatisfactory for a number of reasons including that some*  
14 *parties did not respond as fully we would have liked (for example, Logic did not*  
15 *respond at all). Also, we wanted to give Licensees the opportunity to try and*  
16 *resolve the matters under Consultation themselves. Therefore, we agreed the*  
17 *setting up of a Working Group to consider further with Licensees the various*  
18 *proposals which were the subject of the Consultations."*

19 ...  
20 "53. *The letter [to the persons invited to be part of the Working Group] went on to note,*  
21 *at para 30, that the Authority was currently consulting on most of the above Issues,*  
22 *as set out in its ICT Consultation 2016-2, and that 'In order to allow the Licensees*  
23 *themselves an opportunity to resolve the matters being considered by that*  
24 *consultation process, the Authority puts that consultation process on hold for the*  
25 *duration of the Industry Working Group (subject to paragraph 31 below)'. Para*  
26 *31 explained how the process would be confidential, except that the Working*  
27 *Group members would be invited to produce position papers which would be*  
28 *published on the ICTA website."*

29  
30  
31 39. Dr Richardson noted that at the stage where the Working Group was disbanded that the issues  
32 raised in Consultation 2016-2 remained outstanding and for this reason it was decided that the  
33 consultation would continue. The Defendant announced at that point that "The Office intends  
34 to address Parts A, B and C of the ICT Consultation 2016-2 separately and will issue

<sup>11</sup> See Paragraph 22 of the Richardson affidavit

<sup>12</sup> See paragraph 24 of the affidavit

1 determinations or additional questions for consultation as appropriate. Richardson noted that:  
2 “None of the consultees, including DataLink, responded with a request that OfReg issue any  
3 determination in draft.”

4  
5 40. Later in his affidavit Dr. Richardson commented further:

6 “144. Accordingly, it is plain that through the Consultation and the Working Group  
7 process DataLink had ample opportunities to comment upon, and to influence  
8 OfReg’s thinking in relation to, the issues surrounding Reservation Fees, including  
9 commenting on the submissions of the other key participants; that they were given  
10 an opportunity to make representations as to the procedure OfReg should take  
11 after the conclusion of the Working Group; and that they urged OfReg to take an  
12 immediate decision, not to issue a further draft determination.”



13  
14 COURT’S ANALYSIS AND CONCLUSIONS ON GROUND 1  
15

16 41. There is no dispute between the parties that s.7(1) creates a statutory duty to consult. It is agreed  
17 that the extent of the consultation was as follows: “Prior to issuing an administrative  
18 determination which it reasonably considers to be of public significance, OfReg must consult  
19 those with a sufficient interest or who are likely to be affected on the proposed determination  
20 by issuing a draft Administrative Determination.”

21  
22 42. The Plaintiff does not take issue with the Consultation or that the process that obtained once it  
23 was issued was fair. It is correct that the principles of fairness as outlined in *R v Brent London*  
24 *Borough Council, ex p Gunning*<sup>13</sup>, and *R v North and East Devon Health Authority ex p*  
25 *Couglan*<sup>14</sup> do not require a fair consultation to involve the publication of what is in effect the

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<sup>13</sup> [1985] 84 LGR 168 (see also *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947

<sup>14</sup> [2001] QB 213, para 108

1 final decision with all the background facts and reasoning. What is required is that the  
2 consultation contain sufficient reasoning to comply with the *Gunning* criteria but not  
3 necessarily the intended final reasoning. The Plaintiff has not challenged the fairness of the  
4 initial consultation process.

5  
6 43. The question for this court is whether the fairness of the consultation was sufficient to absolve  
7 the Defendant from having to issue a draft administrative determination or whether this fairness  
8 of the consultative process was sufficient to in essence absolve the Defendant from its duty to  
9 issue a draft administrative determination, thereby equating the effects of the consultation with  
10 the objects of the legislation in stipulating that a draft be issued prior to the final determination.

11  
12 44. There is no provision in the URC Law to prevent the issuance of a draft administrative  
13 determination at the same time as an initial consultation. The Consultation Procedure  
14 Guidelines issued by the Defendant allow for a draft administrative determination to be issued  
15 at the same time as an initial consultation. The Defendant clarified this position during the  
16 consultation on the issuance of those Guidelines and in its OF1-Determination on the  
17 Consultation Procedure Guidelines of the 7<sup>th</sup> of July 21078 OfReg stated as follows:

18  
19 *“The Office notes Digicel’s comments regarding the inappropriateness of including a*  
20 *draft determination with an initial consultation document without affording parties a full*  
21 *and proper opportunity to comment. The Office considers such concerns are misplaced.*  
22 *To the contrary, sharing with interested parties the specifics of the Office’s proposed*  
23 *approach is consistent with transparency and enables parties to address specific issues in*  
24 *the proposal, confirm its appropriateness, or suggest viable alternatives.”*  
25



1 45. It is apparent from the paragraph above that the Defendant was concerned to ensure that  
2 relevant parties understood that the consultation contained its proposed approach, that there  
3 was still an opportunity for the parties to address the specific issues in the proposal, to confirm  
4 its appropriateness or suggest viable alternatives to the draft administrative determination.

5  
6 46. I am not persuaded by the argument that this approach can provide support for the issuance of  
7 a draft administrative determination and an initial consultation as the same document. It is  
8 evident that when the Defendant issued the two together that it was careful to ensure that the  
9 relevant parties understood that it was a draft administrative determination and a consultation  
10 that was being issued simultaneously. The striking difference between the  
11 approaches/processes relating to the Consultation Procedure Guidelines and that in the instant  
12 matter being that at no point during the Consultation or during the Working Group Process was  
13 the Plaintiff and the other interested parties informed that this is how they should view the  
14 Consultation, that it should be viewed as a consultation and also the draft administrative  
15 determination.

16  
17 47. In any event the Defendant's submission that the consultation is in effect the draft  
18 administrative determination does not stand up to scrutiny for a number of reasons.

- 19  
20 i. Factually, at the time that the Consultation was issued s.7(1) of the URC Law was not yet  
21 law.  
22 ii. Throughout Dr. Richardson's evidence it is evident that the Defendant did not  
23 contemplate in any aspect that the consultation document was the draft administrative  
24 determination. As paragraphs 36 -39 above highlight, there remained clear indications  
25 throughout the process, and here in addition to the Working Group Process, every

1 indication that the Defendant was still wanting to have comments and suggestions as to  
2 how the issues identified in the consultation could be addressed.

3 iii. The Defendant continued throughout to treat the consultative process for what it was, a  
4 process designed to receive views on the identified issues before making a determination.

5 There is nothing recorded in the Richardson affidavit that there was something other than  
6 a consultation. Even at the stage where the working group was disbanded, Richardson  
7 states at paragraph 74 of his affidavit of ...

8 74. *On 30 June 2017, the Office notified the parties that it was recommencing*  
9 *the consultation process in order to make determinations in respect of the*  
10 *issues which were not resolved by the Working Group process and placing*  
11 *the final position papers and reply comments submitted at the conclusion*  
12 *of the Working Group on the record of ICT Consultation 2016-2."*  
13  
14

15 48. I am not persuaded that because, arguably, the Defendant's final determination was not  
16 significantly different from what was identified initially as the pertinent issues and upon which  
17 comments were sought, that this fact could transform the consultation into a determination  
18 without more. This is not a matter of form but of substance. It is here that the principle of  
19 fairness must inform the Court's decision. The Plaintiff was entitled to know what the  
20 Defendant had concluded after the consultation process was its final determination on the  
21 issues. The Plaintiff was entitled to know that the consultative process had produced an  
22 outcome and to be able to specifically address that outcome at that latter stage as contemplated  
23 by Section 7(1)(b). The initial consultation is to that extent bereft of the full explanation for  
24 the Defendant's final determination. It is that full explanation that the Plaintiff was entitled  
25 by law to have before it offered its final comments.

26  
27 49. Had the Defendant, after the consultation was issued, concluded that essentially it would be its  
28 final decision, at the very least the Defendant should have informed the Plaintiff that they  
29 intended to treat the consultation as its draft administrative determination as required by s.7(1).

1 That it was material is not in doubt. The Defendant should have been vigilant to ensure that it  
2 was in compliance with its statutory duty. The difference between the consultation and what  
3 is required by s.7(1) of the URC Law is that the statute requires the draft administrative  
4 determination to contain the intended final reasoning. It is here that the two, consultation and  
5 draft administrative determination, diverge and differ.  
6

7 50. I would venture to state that if the Defendant had arrived at the view, as above, after the  
8 consultation had ended, the working group disbanded and all final position papers received, at  
9 the very least the Defendant should have informed the Plaintiff that they intended to treat the  
10 initial consultation as its draft administrative determination as required by s.7(1) and allowed  
11 any further comments as required by the other provisions in Section 7. Such a course may have  
12 assisted the Defendant's arguments.  
13

14 51. On the facts however, the fairness of the consultation was not sufficient to satisfy the obligation  
15 to issue the draft administrative determination and it is not sufficient to sufficient to satisfy  
16 7(1)(b) and (c) of the URC Law.  
17

18 52. In the case of *Mitu v Camden LBC*<sup>15</sup>, the Court of Appeal was concerned with procedures  
19 under the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999.  
20 The appellant had appealed to the authority for assistance to secure accommodation. The  
21 authority decided that the appellant was intentionally homeless and did not have a priority need.  
22 The Appellant requested a review of this decision. The reviewing officer decided, contrary to  
23 the original decision, that the appellant was not intentionally homeless, but agreed that he did  
24 not have a priority need. Regulation 8(2) provided that a reviewer who considered that there

<sup>15</sup> [2011] EWCA Civ 1249

1 was a deficiency in an original decision but who was minded nevertheless to make a decision  
2 which was against the interest of an appellant “shall notify the applicant” of what he was  
3 minded to do and the reasons why and further allow the applicant to make representations to  
4 the reviewer.

5  
6 53. The court held that the appellant should have been given notice under Regulation 8(2) of the  
7 reviewer’s decision. Lewison L.J. referred to the issue as being a procedural rather than a  
8 substantive question. He referred to the dicta of Rimer L.J in *Lambeth LBC v Johnston*.

9  
10 “23. In *Lambeth LBC v Johnston*<sup>16</sup>, Rimer LJ said [51]  
11 “...Reg.8(2) is not a discretionary option that the review officer can apply or disapply  
12 according to whether or not he or she considers that the service of a ‘minded to find’ notice  
13 would be of material benefit to the applicant. Regulation 8(2) imposes a dual, mandatory  
14 obligation upon the review officer. First, to ‘consider’ whether there was a deficiency or  
15 irregularity in the original decision or in the manner in which it was made. Secondly, if  
16 there was – and if the review officer is nonetheless minded to make a decision adverse to  
17 the applicant on one or more issues – to serve a ‘minded to find’ notice on the applicant  
18 explaining his reasons for his provisional views. In my judgement, there is no discretion  
19 on the review officer to give himself a dispensation from complying with either of those  
20 obligations. As regards the first part of it, I have referred to the fact that it is not a purely  
21 subjective exercise but that failure to arrive at the right ‘consideration’ can be challenged  
22 on usual public law grounds. As regards the second part, the language of reg. 8(2) is  
23 unambiguously mandatory – ‘the reviewer shall notify ...’.”

24  
25  
26 54. Lewison L.J. further emphasized that:

27 “On the facts of that case the applicant knew what was in issue and had in fact had the  
28 chance to make representations on those issues. Nevertheless, this court held that the  
29 reviewing officer had a duty to give a “minded to find” notice.”  
30

31 55. Lewison L.J found that:

32 “...if Mr. Mitu had had advance notice that he was minded to reach that decision, he would  
33 had the opportunity to persuade Mr. Bond that the discretion should have been exercised  
34 in his favour.”  
35  
36

<sup>16</sup> [2008] EWCA Civ 690

1 56. Similarly in the instant matter, it is not for the Defendant to say that further representations  
2 would have made no difference to the final Decision. There were further matters that the  
3 Plaintiff could have drawn to the Defendant's attention as detailed in the Stafford affidavit and  
4 referred to above. Counsel for the Plaintiff stated in her submission to this court that even the  
5 matters that inform the other grounds of review would have been relevant and could have been  
6 put before the Defendant for its consideration at that stage of the process.

7  
8 57. The Defendant objected to the Plaintiff's reference in argument to the Hansard Reports  
9 concerning the repeal of aspects of the earlier legislation and its replacement with the URC  
10 Law. Whether or not this court can refer to the Hansard reports, there is no argument that the  
11 Court can have regard to the previous sections of the repealed legislation and compare it with  
12 the sections at issue on this hearing. Under the ICT Law the procedure obtained wherein the  
13 Defendant would issue a decision and an interested party could seek a reconsideration of such  
14 decision. If they remained unsatisfied with the Defendant's decision after reconsideration the  
15 party could appeal the decision. Section 7(1) replaced that procedure and instead adopted the  
16 procedure in s.7 of the URC Law and as discussed herein.

17  
18 58. It is therefore quite relevant to note that upon the publication of a final administrative  
19 determination there is no provision in the URC law for an interested party who had had sight  
20 of a draft administrative decision and had had the opportunity to comment upon it to appeal the  
21 decision of the Defendant. The fact that the draft administrative determination must be issued  
22 when it concerns a matter of public significance brings into prominence the need to comply  
23 with the statutory duty to issue such a draft. To do otherwise could deprive an interested party  
24 of the opportunity to know and understand the proposed decision and the reasons therefor and  
25 in essence to appeal to the Defendant by its comments to look at its decision again, there being  
26 no other statutory means to accomplish this. There is no sense from the Richardson evidence

1 that that there had been any consideration of the effect of the change which took away the right  
2 to seek a reconsideration. If such a matter had been considered it may well have informed the  
3 Defendant's approach to the issue.

4  
5 59. The *URC Law* provides that the Defendant can set out issues for consultation. It is those issues  
6 which involve a matter of public significance wherein the "extra" consultation is contemplated.  
7 The Legislature must have determined that for such matters, an extra period of interaction  
8 between the parties after the Defendant come to a decision was necessary. On a matter of  
9 public significance, it is not within the remit of the Defendant to unilaterally determine that it  
10 can disregard the statutory procedure. The provisions of the section are prescriptive.

11  
12 60. Counsel for the Defendant has described Ground 1 as dealing with a hard-edged issue. I agree.  
13 The Defendant's breach of its statutory duty to issue the draft administrative determination has  
14 the effect of making that decision unlawful.

15  
16 61. The other grounds of challenge all relate to the vires of the decision. For the reasons I have set  
17 out here, having found that the Defendant acted ultra vires in issuing the decision as it did, I  
18 will not go on to deal with those grounds that seek to impugn the decision for other reasons  
19 having determined that the issue of the decision itself was unlawful.

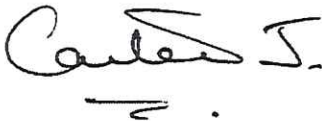
20  
21 62. I have considered whether this is a matter in which the court should exercise its discretion to  
22 look at the facts and make the decision itself. The nature of the matters which would inform  
23 such a decision, as is evident from the discrete issues raised in the consultation, working group  
24 and other submissions, is such that it requires expert knowledge. It is evident to this court that  
25 particular industry knowledge is essential. In arguments before the court Counsel referred to  
26 the margin of discretion that the court should be mindful of when reviewing the various reasons



1 for the decision itself. The matters raised by the Plaintiff upon which they would seek the  
2 Defendant's further consideration are complex and industry specific in their effect. The  
3 Defendant's responses to these matters are not such as to satisfy me make that it would be  
4 inevitable that the Decision would be the same even if s.7 were to be complied with now after  
5 this Court's Order.

6  
7 63. Accordingly, the decision is quashed and remitted back to the Defendant to comply with the  
8 letter of s.7(1) of the URC Law.

9  
10  
11 **Dated this the 17<sup>th</sup> July 2019**

12  
13 

14 **Carter J**  
15 **Acting Judge of the Grand Court**  
16  
17

