IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. G 168 of 2016

BETWEEN

(1) BDO CAYMAN LTD.
(2) DELOITTE AND TOUCHE
(3) ERNST & YOUNG LTD
(4) KPMG
(5) PRICEWATERHOUSECOOPERS

Applicants

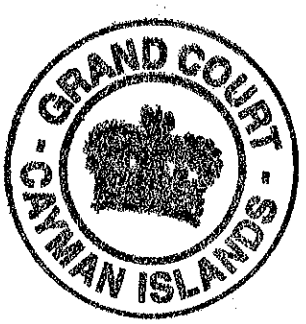
AND

(1) THE GOVERNOR IN CABINET

Respondent

IN OPEN COURT

Appearances:	**Mr. Mac Imrie and Mr. Christian La-Rhoda Thomas of Maples and Calder for the Applicants** **Mr. Paul Bowen QC instructed by Mrs. Marilyn Brandt and Mr. Kashka Hemans of the Attorney General's Chambers on behalf of the Respondent**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**21 and 22 June 2017 and 12 October 2017**
Draft Judgment Circulated:	**27 April 2018**
Judgment Delivered:	**7 May 2018**



HEADNOTE

Administrative Law - Judicial Review - Whether decisions Unlawful - Hard-edged questions of law - Trade and Business Licensing Law (2007 Revision) - Core question - Must Accountancy firms pay two fees or one in respect of their trade and business licenses?

GRAND COURT · CAYMAN ISLANDS ·

JUDGMENT

Introduction

1. This is an application for judicial review. The Applicants are all accountancy firms carrying on business in the Cayman Islands.

2. This review relates to the decisions made by the Governor in Cabinet ("**the Respondent**") to dismiss the Applicants' respective appeals made under section 17 of the ***Trade and Business Licensing Law (2007 Revision)*** **("*the 2007 Law*")**, on 19 April 2016, as communicated to the Applicants, on or after 10 June 2016.

3. The review raises some long-standing questions of importance. The central issue concerns a question of statutory construction: Under ***the 2007 Law***, what is the correct and true construction: must accountancy firms pay one fee or two fees for their trade and business licences? The critical provisions of ***the 2007 Law*** are sections 12 and 14, and the Schedule, especially, under the heading "*Professional*", Item 1 "*Accountant*", and Item 2 "*Accountancy firms*". Simply put, the Applicants say that only one fee is payable by them, and that that is the fee pursuant to Item 2. The Respondent says that two fees are payable, both the fee pursuant to Item 2, as well as the fee pursuant to Item 1.

Background

4. Notices of Appeal were filed on behalf of each of the Applicants against respective decisions of the Trade and Business Licensing Board ("**the Board**"), requiring each of the Applicants, at their next trade and business licence renewal, to pay a fee of CI $2,000 for each professional member of the business as defined by Item 1 of the Schedule to ***the 2007 Law*** ("**the Per Accountant Fee**"), and claiming such payments dating back for past periods that varied from Applicant to Applicant. The Per Accountant Fee was being claimed by the Board in addition to the fee paid by the Applicants respectively pursuant to Item 2 of the Schedule to ***the 2007 Law*** **("the Per Firm Fee").** The Notices of Appeal were in substantially, but not identically the same form, and were filed on behalf of the Applicants by their respective Attorneys-at-Law, as follows:

(a) Ernst & Young - 8 October 2014;

(b) BDO Cayman Ltd - 17 October 2014;

(c) PricewaterhouseCoopers - 18 June 2015;

(d) KPMG - 24 June 2015.

(e) Deloitte and Touche - 25 September 2015.

5. By letter dated 8 June 2016, written by the Clerk of the Cabinet, and received on or after 10 June 2016, ("**the Decision**"), each of the Applicants' attorneys were respectively advised that Cabinet met on 19 April 2016 in regards to the appeals, and dismissed the appeals on the ground that they had no merit.

6. Reasons for the Decision were provided on 15 July 2016, the material aspect of which states as follows:

> "*Having carefully considered all the submissions on behalf of the appellant and upon careful review of the Law, as well as legal advice, Cabinet is of the opinion that the language in the Scheduled* (sic) *of the Trade and Business Licensing Law (2007 Revision) clearly contemplates the payment of fees for the accounting firm as well as for each professional member of the firm. That is, there are two separate sets of fees payable.*"

7. On 1 January 2016, the ***Trade and Business Licensing Law, (2014 Revision)*** ("***the 2014 Law***") came into force. ***The 2007 Law*** (in force at all material times), was repealed by ***the 2014 Law***. As part of the statutory changes, the item "*Accountancy firms*" in the Schedule of prescribed fees was amended to include an express requirement that the Per Accountant Fee is payable in addition to the Per Firm Fee.

8. The Applicants say that, it was months after the appeals had been filed, and the Law subsequently changed, that they received notice from the cabinet office that their appeals had been dismissed.

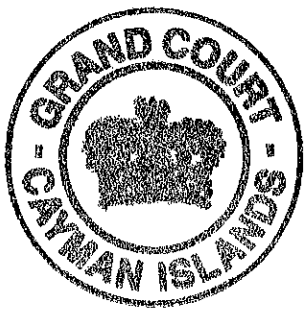
9. The Applicants now challenge the Decision. On 2 November 2016 I granted the Applicants leave to apply for judicial review, following an *inter partes* contested hearing. The ruling is reported at 2016 (2) CILR 324.

10. In ***the 2014 Law***, the Legislature has made it clear, and it is accepted by all the parties, that both fees are payable under ***the 2014 Law***. One might therefore wonder about the necessity and relevance of the present proceedings. However, there is very much a need for resolution; the point is not academic. This is because ***the 2014 Law*** only came into effect on 1 January 2016 and cannot speak to the circumstances and time periods relevant to these proceedings. This Court's task is to arrive at the one right construction of the relevant provisions of ***the 2007 Law***. The Court's duty is simply to do the best it can to arrive at the true meaning, no matter how difficult the process is.

The Relief Sought

11. In their originating motion, the Applicants apply for the following relief:

(a) An order of certiorari to quash the Decision.



(b) A declaration that the Applicants are not liable to pay a fee of CI $2,000 under item 1 of the Schedule in ***the 2007 Law*** for every accountant they employ, the Per Accountant Fee, in addition to the Per Firm Fee for Accountancy firms calculated and paid by reference to the number of accountants or other professionals within the firm, under item 2 of the said Schedule.

(c) A declaration that the term "*Accountant*" in Item 1 of the Schedule of prescribed fees under ***the 2007 Law*** (then in force) does not include accountants who have already been counted within the number of accountants or other professionals for determining the Per Firm Fee payable by Accountancy Firms.

(d) A declaration that the Applicants are not required to pay any additional fees, and are entitled to refunds for the overpayment(s) of any Per Accountant Fee

paid in respect of their trade and business licence renewals between 2002 and 2012.

(e) Costs.

(f) Further and other relief.

12. The Applicants seek judicial review on three grounds, with the ground listed at (a) below, being the main one:

(a) Unlawfulness: the Respondent made an error of law.

(b) Unreasonableness /irrationality: the Decision was plainly wrong and therefore so unreasonable that no reasonable decision-maker could come to it.

(c) Breach of natural justice: The refusal to allow the Applicants to be heard and make legal submissions infringed upon the principles of procedural fairness.

13. The parties have indicated that although the Court is asked to determine these grounds, it is not requested, nor required, to make a determination about any amounts actually paid or owed.

The Legislation - *the 2007 Law*

14. Section 3 provides:

"***Exemption of certain persons and products***

3. *This Law does not apply to:*

(a) any trade or business licensed to be carried on as such under any other law without reference to this Law;

(b) artisans, craftsmen and other persons who do not carry on a business of their own but are themselves employed by other persons;

(c) the sale of agricultural products by the producers thereof;

(d) the sale of handwork or other products produced by the individuals or family units in premises not normally open to the public; or

(e) any corporation or body which satisfies the Board that it has been formed for the purposes and does not permit the payment of any dividends to its members."

15. Sections 12 and 14 provide:

*"**Trades and businesses requiring to be licensed***

12. Every person carrying on a trade or business mentioned in the Schedule shall, unless exempted under section 3, take out an annual licence in respect thereof in accordance with this Law in respect of each place where such trade or business is carried on.

.....

Fees payable

14. (1) An application for the renewal of a licence shall be made at least twenty- eight days before the date of expiry of the licence and shall be accompanied by the fee set out in the Schedule.

Provided that in the case of a trade or business carried out in Cayman Brac or Little Cayman the application shall be accompanied by a fee of fifty per cent of such fee.

(2) An application for the grant of a new licence shall be accompanied by the fee apportioned to the number of unexpired months in the calendar year, part of a month being calculated as one month.

(3) All licences granted under this Law shall, unless renewed, expire on the first anniversary of their date of grant or renewal.

(4) If, in any case, the Board is not satisfied that an applicant's trade or business has been correctly described or that the appropriate fee has been tendered, the Board shall so inform the applicant who shall be given an opportunity to justify to the Board the description of the trade or business or the fee tendered, either in person or in writing as the Board may direct. The Board shall then or within fifteen days give its decision, which shall be an administrative decision and which shall be final.

(5) In the event of the Board refusing to grant a licence, the Board may, in its discretion, refund the fee tendered or such portion thereof as the Board may deem fit."

16. The Schedule provides:

"SCHEDULE

Fees

Sections 13 and 14

Professional

For the purposes of this heading-

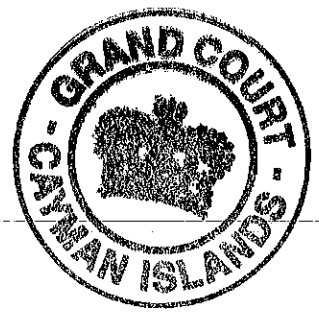
.....

"firm" means a company, a partnership or other business enterprise;

"member" means a partner, director, associate or other professional employee;

"other professional " means-

a) a person who engages in a trade or business (such as an accountant, actuary, architect, engineer, statistician and



surveyor) which is different from his employer's main trade or business; and

b) who provides chargeable services in his trade or business to his employer's customers; and

"professional" includes accountant, actuary, architect, engineer, statistician and surveyor.

1.	*Accountant*	*including auditor, actuary, bookkeeper and statistician*	*$2,000 for each professional member of the business*
2.	*Accountancy firms*	*A firm of 1-5 accountants and other professionals*	*Exempt*
		A firm of 6-10 accountants and other professionals	*$20,000*
		A firm of 11-15 accountants and other professionals	*$40,000*
		A firm of 16-20 accountants and other professionals	*$60,000*
		A firm of 21-25 accountants and other professionals	*$200,000*
		A firm of 26-30 accountants and other professionals	*$250,000*
		A firm of 31-40 accountants and other professionals	*$300,000*
		A firm of 41-50 accountants and other professionals	*$350,000*
		A firm of 51 or more accountants and other professionals	*$400,000*
3.	*Agent*	*Including airline, shipping or travel agent, salesman or advertising agent or consultant, and any other professional agent not mentioned herein*	*$750 for each professional member of the business*
4	*Architect, Engineer, Surveyor*	*Including any architect, civil, electrical or mechanical engineer, land or quantity surveyor or any other professionally qualified person in the field of construction*	*$1,500 for each professional member of the business*
5	*Auctioneer*	*Being a person other than a Government officer or an officer of the Court acting in the course of his duties*	*$750 for each professional*

GRAND COURT · CAYMAN ISLANDS ·

		who sells or offers for sale any kind of property or right to property to another whether by public auction or private treaty	*member of business*
6	*Broker*	*Being a person who, for a commission or other reward, negotiates contracts between other brokers or principals and includes a commission agent, a del credere agent and factor*	*$750 for each professional member of the business*
7	*Computer specialist*		*$1,500*
8	*Insurance Agent*	*Including an agent, broker or underwriter engaged in the business of insurance or assurance*	
		Agents-	*$350*
		Sub-agents-	*$125*
9	*Real Estate Agents*	*Being a person who as principal or agent deals or offers to deal in real estate or tenancies thereof*	*$750 for each professional member of the business*
10	*Firms of professionals other than accountants and lawyers*	*A firm of 1-5 professionals*	*Exempt*
		A firm of 6-10 professionals	*$15,000*
		A firm of 11-15 professionals	*$25,000*
		A firm of 16-20 professionals	*$40,000*
		A firm of 21-25 professionals	*$50,000*
		A firm of 26 or more professionals	*$100,000*

Trades and Technical....

Commerce.....

Industry, Agriculture and Primary Activities.....

Miscellaneous

Any other business or trade not specified herein in which a service is offered for reward	*$300*
A non-refundable processing fee to accompany every application for the grant or renewal of a licence	*$75*

....."

17. The duty and function of determining appeals against decisions made by the Board is conferred on the Respondent pursuant to section 17 of ***the 2007 Law***. In sub-section 2 of ***the 2007 Law***, "*Governor*" is defined as meaning "*the Governor in Cabinet*". Sub-section 17(1) provides:

> "***Appeals from decisions of Board***
>
> *17.1. A person aggrieved by, or dissatisfied with, a decision of the Board may, within twenty-one days of the communication of the decision to him, or such longer period as the Governor may, for good cause shown, allow, appeal therefrom to the Governor whose decision shall be final and binding on the appellant."*

18. Sub-sections 18(2) and (3) of ***the 2007 Law*** provides as follows:

> "
>
> .....
>
> *(2) On receipt of the notice of appeal, the Governor shall, if the appellant has applied to be heard personally or by a representative, decide whether he shall be so heard and, if it is so decided, fix a time and date for such hearing and shall notify the appellant and the Board thereof.*
>
> *(3) At the hearing of an appeal where the appellant or his representative is present, the appellant or his representative shall be given an opportunity to address the Governor, and the representative of the Board shall be heard in answer if called upon by the Governor in that behalf, and the Governor may call upon either party to address it further."*

19. Section 19 of ***the 2007 Law*** provides that decisions made by the Respondent in respect of the Law are administrative decisions.

Decision Amenable to Judicial Review

20. At this stage, it is plain that both sides agree that the Decision is amenable to judicial review. Though there is dispute as to whether grounds of unreasonableness or breach of natural justice are relevant, it is agreed that there is a "*hard-edged*" question of law for the Court to resolve. See the earlier judgment, at paragraphs 17 and 18 and the references to the *Judicial Review Handbook* by Fordham, 6th Edition paragraph 16.3, and Chapter 48 headed "*Error of Law. A body must not make a material error of law.*" Chapter 48 includes references to authorities that demonstrate (as do a number of others), that errors of law are not ousted by a statutory finality clause, such as that contained in section 17(1) of ***the 2007 Law.***

GRAND COURT · CAYMAN ISLANDS

Statutory Interpretation

21. Mr. Imrie, on behalf of the Applicants indicates that they do not disagree with the general principles of statutory interpretation set out at paragraphs 60-67 of the Respondent's Detailed Grounds for Contesting the Application for Judicial Review (the "**Outline**"). However, essentially, they contend that the sequence in which the Respondent explains these principles is not correct. They say that the Respondent's Outline seems to under-emphasize the importance of the plain and ordinary meaning of the words used in the context of the statute as a whole. Further, that they over-emphasize the use of various extraneous interpretive guides which, the Applicants submit, on traditional principles are only brought into play in a waterfall manner, i.e. dropping down to the next level of extraneous interpretive guides only if the answer is not clear at an earlier stage.

22. Reference was made by Counsel to the recent decision of Williams J in ***Donette Thompson v The Cayman Islands Health Services Authority and Another*** 2016 (1) CILR 93, in particular, paragraphs 45-68 where Counsel states that the relevant principles were reviewed and applied.

23. The Applicants submit that in practice, the following approach is to be taken:

(a) Firstly, if the legislation is unambiguous, then the Court must carry out that intention expressed unambiguously, even if the result produced is harsh;

(b) Secondly, if the legislation appears ambiguous, then the Court should construe the statute by reference to internal aids when striving to ascertain the intention of the legislature as expressed in the statute, i.e. the Court should look to "*every other word or phrase in the relevant statute, all implication therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention*" - ***Charles Savarin v John Williams*** (1995) 51 W.I.R. 175 paragraph 78.

(c) Thirdly, if the above is insufficient, then the Court will look to external statutory aids such as the ***Interpretation Law (1995 Revision)*** *(the "**Interpretation Law**"),* or other *"linked legislation".*

(d) Fourthly, if the above is insufficient, then the Court may turn to other external aids that are historically recognised as being often useful such as reports by Royal/Official Commissions and a statute's legislative antecedents – see ***R v Secretary of State for the Environment, Transport and the Regions, and another, ex parte Spath Holme Ltd*** [2001] 2 A.C. 349. However, the Court's reliance on such external aids is caveated by the fundamental element of the rule of law that legal certainty requires that "*the proper ascertainment of the law as enacted by Parliament that the law should be found in the text of the statute, not in the unenacted statements or answers of ministers or individual parliamentarians*".

24. As pointed out in <u>Bennion on Statutory Interpretation</u>, Section 363, page 1058, when identifying the meaning of a statute the Court will begin by applying the primary rule that words are to be given their plain and ordinary meaning. Further, as stated in <u>Halsbury's Laws of England</u>, Volume 44(1) (4th Edition (Reissue)) paragraph 1487:

"If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."

25. The Applicants contend that on the ordinary meaning of the language in sections 12 and 14 of the Law and the Schedule, the only fee payable in respect of an application for a trade and business license for the category of an "*Accountancy firm*" is the Per Firm Fee specified in the Schedule. They submit that the Schedule sets out a scheme for charging fees for business licenses, and that these are calculated in different ways. So, for example, by people for professional services businesses, by seats for restaurants, by shop size for retailers and so forth. They submit that the reasonable interpretation, therefore, is that each business should fall into one category, not multiple categories. The Applicants submit that if the Court is of the view that the language is plain and unambiguous then the process of interpretation can be completed at this first step. They say that this is the primary result for which they contend, and which they maintain is wholly consistent with the approach to statutory interpretation manifested in the UK Supreme Court ruling in the recent decision ***The Joint Administrators of LB Holdings Intermediate 2 Limited v The Joint Administrators of Lehman Brothers International (Europe) and others*** [2017] UKSC 38, where the Court stated at paragraph 123 of the Majority decision, per Lord Neuberger:

> *"...when it comes to deciding the meaning of a legislative provision, judges are primarily concerned with arriving at a coherent interpretation, which, while taking into account commerciality and reasonableness, pays proper regard to the language of the provision interpreted in its context."*

26. The Applicants say that in the event the Court finds that sections 12 or 14 or the Schedule are ambiguous or obscure, then reference to the Hansard Reports can be made, provided they meet that criteria for reference. The Applicants say that if reference is made to the Hansard Reports on which they rely, their case would also succeed in any event.

27. In addition, the Applicants submit that, to the extent that ***the 2007 Law*** imports the two fees then the decision amounts to a breach of the principle of doubtful penalization. This is a principle that is applicable to Statutes that seek to interfere with or restrict economic interests including the carrying on of a trade or business. Reference was made to the dicta of Evans LJ in ***Ingram v JRC*** [1997] 4 All ER 395, at 414, where he stated that "*I appreciate that in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision, so that the taxpayer shall not become liable to the tax unless that is clearly and unequivocally the effect of the statutory provisions*".

GRAND COURT CAYMAN ISLANDS

The Issue of Other Aids to Statutory Interpretation

28. According to the Applicants, it is noteworthy that despite appearing to put its case on the basis that multiple additional aids to interpretation should be taken into account by the Court beyond the literal meaning of the words in question, the Respondent does not contend that there is any ambiguity or uncertainty in the words on which the Applicants rely. The Applicants contend that the Respondent's approach is wrong, and that the Court does not need to look to any other statutory interpretation aids and should not do so. However, for the purposes of argument, the Applicants have responded to the points raised by the Respondent in its Outline.

The Respondent's arguments – Statutory Interpretation

29. Mr. Bowen QC, who is instructed by the Attorney General's Chambers on behalf of the Respondent, has expressed the view that the only issue in dispute is whether the Respondent was correct in determining a question of law, namely whether the Board had power to levy both the Per Firm Fee and the Per Accountant Fee and, accordingly, whether the Respondent was right to dismiss the Applicants' appeals under section 17 of ***the 2007 Law.***

30. However, learned Queen's Counsel submits that some of the Applicants' submissions as to the proper approach to statutory interpretation are misconceived. In particular, it is submitted on the Respondent's part that, with the exception of reports of proceedings in

GRAND COURT · CAYMAN ISLANDS ·

Parliament, including Hansard, which are subject to special rules laid down in ***Pepper v Hart***, both 'internal' and 'external' aids to construction may be considered regardless of whether there is any 'ambiguity' in the grammatical or literal meaning of an enactment. (My emphasis)

31. It was submitted that the process of statutory construction is not one of identifying and applying the grammatical or literal meaning of a provision regardless of the wider statutory context. Therefore, while the grammatical or literal meaning is the starting point, the court must construe the enactment in its wider context in order to determine the intention of the legislator, which is the 'paramount criterion'. Only then can the Court identify the *legal meaning* of the enactment.

32. Expanding on the argument, it was submitted that only if the enactment is grammatically capable of one meaning only, and on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, will the legal meaning have the same meaning as the grammatical meaning (the 'plain meaning' rule - see *Bennion*, s. 195, p. 507). If, on the other hand, on an informed interpretation the wider context does raise a doubt as to whether that meaning is the one intended by the legislator- when it may be said the provision is ambiguous or leads to an absurdity - then the Court will need to weigh the competing considerations, including any relevant statutory presumptions, in determining the legal meaning. But it is not necessary for an 'ambiguity' to be identified before that wider context is considered. Reference was also made to *Bennion*, s. 193 page 504.

33. Learned Counsel suggests that on an 'informed interpretation' the Court considers the wider context including internal aids, such as other provisions in the same Statute, and it may include external aids, such as the legislative history and other materials *in pari materia* which may provide guidance as to the underlying legislative intention. It was argued, that while the use of external aids may have constitutional implications –because citizens should be able to understand the meaning of a statutory provision from its wording alone, it is not necessary (as the Applicants contend) for there to be some 'ambiguity' before those aids to construction may be considered. Thus, the Court can

consider these aids to construction even where the grammatical or legal meaning of a provision is clear, although the clearer the meaning, the slower the Court should be in adopting another meaning on the basis of an external aid. Reference was made to ***Spath Holme , R v Environment Secretary, ex p*** [2001] 2 A.C. 349, pages 396-398.

34. It was Mr. Bowen's position that this 'purposive' approach to statutory interpretation has now displaced the literal approach contended for by the Applicants. In relation to tax statutes, reference was made to ***WT Ramsay Ltd. v Inland Revenue Commissioners*** [1982] A.C. 300, ***Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)*** [2005] 1 A.C.684, paras. 28-29, and ***UBS AG v Revenue and Customs Commrs (SC (E)*** [2016] 1 W.L.R 1005, paras 61-62.

35. Also, argues the Respondent, the Applicants are wrong to suggest that section 4(b) of the ***Interpretation Law*** (by which words in the singular include the plural) is of relevance only where there is some uncertainty or ambiguity in the literal or grammatical meaning. It was argued that section 4(b) obliges the Court, when construing any other Law, to adopt the meanings assigned by the ***Interpretation Law*** "*unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided*".

The Applicants' Skeleton Argument

Errors of Law correctable by judicial review

36. The Applicants submit that a public authority acts upon an error of law if it:

(i) Misinterprets a statute, or any other legal document or a rule of common law;

(ii) Takes legally irrelevant considerations into account, or fails to take relevant considerations into account;

(iii) Admits inadmissible evidence, rejects admissible evidence, or takes a decision on no evidence or on the basis of a material mistake of fact; or

(iv) Mis-directs itself as to the burden of proof.

37. Counsel for the Applicants argues that the amount of the fee is determined by reference to the table in the Schedule headed as item *"2. Accountancy firms"* and that the prescribed fee is based on the number of accountants and other professionals employed by the firm.

38. The Applicants submit that it is plain and obvious that on a literal interpretation of the ordinary meaning of the words in sections 12 and 14 of ***the 2007 Law*** and the Schedule, the trade and business licence fee for the licence category of "*Accountancy firms*" is solely based on the number of accountants and other professionals employed as at the relevant date; the Per Firm Fee. In their submissions dated 7 June 2017, at paragraph 3.5, the Applicants go on to proffer the view that, if it had been intended that more than one fee was payable, different language would have been used. However, they continue, that would have "*created a situation in which the accountants, unlike any other businesses in the Schedule, would have paid two fees and not one - a strikingly odd outcome in the context of the whole Law and Schedule".*

39. Mr. Imrie opines that there are two primary reasons that a clear point of construction has become "*clouded*", but that at the same time, neither of these reasons trumps the ordinary and natural meaning of the words and sentences of the Law referred to in the foregoing paragraphs. These, Counsel puts forward, as being the following:

(a) Prior to the introduction into the legislation of the category of "*accountancy firm*" and the Per Firm Fee on 14 January 2002, accountancy firms had paid for their licenses on a different basis, namely a fee for the category of the business of "*Accountant*", which fee was calculated by reference to the total number of accountants who were members of the business (the "**Per Accountant Fee**"). The category of "*Accountant*" and *Per Accountant Fee* remained in place in the Schedule after 14 January 2002. Following the introduction of new wording in the Schedule, which created a specific category of license fee for "*Accountancy firms*" from 14 January 2002 onwards, some accountancy firms began paying only the Per Firm Fee under

Item 2, whilst others paid that fee and also continued to pay the Per Accountant Fee under Item 1, as they had done in the past. According to the Applicants, the Per Accountant Fee under Item 1 remained in the Schedule for good reason, namely that other businesses which are not accountancy firms but who nevertheless are licensed as Accountants because they employ accountants, auditors, actuaries or statisticians (such as insurance adjusters, business advisors, researchers or consultants), must pay the professional fee. Confusion, and some debate, as to how many fees were payable continued for more than twelve years. The Trade and Business Licensing Board (the "**Board**") (through the Department of Commerce - the "**DCI**") did not clarify the position and did not attempt to exercise its power (although the Applicants say that the DCI had been made aware of the issue), and did not attempt to exercise its power under s. 14(4) of ***the 2007 Law*** to issue a determination of the point until the matter was finally brought to a head by the Applicants in October 2014.

(b) When the Applicants themselves sought to resolve the confusion by exercising their right of appeal against the Board's decision, the Applicants say that it appears that the history and the country's then fiscal situation gave rise to the introduction of a political policy debate about how the Law and the Schedule should be applied to accountancy firms. The Applicants say that although such debates and narratives do not usually make their way into legal submissions, in this case the Respondent has sought to rely upon various affidavits by Government employees, and documents, in order to try and justify its opposition to this application. The Applicants say that they object to the attempt to rely upon much of this evidence, a great deal of which they say is hearsay evidence, submission or opinion, and in any event they say it is not admissible as an aid to statutory interpretation in the way in which the Respondent contends. The Applicants aver that one consequence of their challenge to the Government's attempt to enforce two types of fees for a single trade and business licence was that the Legislature then amended the Law by changing the words of the Schedule to impose a new requirement that

both fees were payable. The Applicants submit that the wording of the amended Schedule, which came into effect in January 2016, demonstrates that the Applicants' interpretation of the Law in place prior to that amendment is the correct one.

40. The Applicants maintain that it is as a consequence of the Respondent's attempts to bring these two extraneous and non-legal factors into play to justify the two fee argument that this matter has become more complex than it otherwise needed to be.

41. Both sides have referred to extracts from Official Reports of Debates (**"Hansard"**) in support of their respective positions.

42. In *Bennion,* on page 568, interesting commentary is given in relation to the rights of advocates and the citing of Hansard which satisfies me that I should allow the references sought by Counsel. See also ***Spath Holme*** at pages 398H to 399C. In *Bennion*, it is stated as follows:

> *"Rights of advocates*
> *It seems that, for the reason set out in the Code s 201(2), advocates should be allowed to cite Hansard whenever they argue that the Pepper v Hart conditions are satisfied, even though in the end the court rules against that contention. Only when the court has heard the whole of the advocate's argument, and consulted the material referred to in that argument, can it properly decide whether or not the tests are satisfied? It is only after close examination that the ambiguities....become apparent. This does not permit citation of material which obviously fails the tests, but considerable margin needs to be allowed for legitimate differences of opinion...."*

The Respondent's view as to the proper interpretation of the relevant provisions of *the 2007 Law*

Literal or grammatical interpretation: the starting point

A: The Respondent's interpretation - both fees are payable

43. The Respondent maintains, that on a literal reading of ***the 2007 Law*** both the Per Accountant Fee and the Per Firm Fee are payable by the Applicants. The argument is that the Applicants are obliged by sections 12 and 14 to pay the requisite 'fee' set out in the Schedule, which may be taken to include 'fees' "*unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided*" (Section 4(b) of the ***Interpretation Law***). It was submitted that it is not otherwise expressly provided. The Applicants are "*Accountancy firms*", within the meaning of Item 2 of the Schedule, so, it was submitted, the Per Firm Fee applies according to the Banded Fee there set out. The Applicants, it was argued, also employ "*Accountants*", within the meaning of Item 1, so the Per Accountant Fee is also - on the face of it - payable. The Respondent's position is that, in the absence of any statutory criteria setting out when one fee is payable instead of another the inevitable inference to be drawn is that both fees must be paid.

44. The Respondent says that there are two other points to be noted. The first is that they say accountants are treated materially the same as other professionals who are also required to pay the traders' licence fee, including actuaries, architects, engineers, statisticians and surveyors (see the definitions set out under 'Professional' in the Schedule). It was also noted that the position has also changed somewhat under ***the 2014 Law***, in that the Banded Firm Fee is now only payable by other professional firms in the construction industry. Firms of such professionals are obliged to pay the Banded Firm Fee, albeit at lower rates than Accountants (and lawyers) – see Schedule, paragraph 10. It was originally submitted that these firms are also, on the face of it, liable to pay the Per Professional Fee for each professional member of the business: paragraphs 3, 4, 5, 6, 8 and 9 of the Schedule. An example given by the Respondent relates to a firm of architects, which is "*a firm of professionals other than accountants or lawyers*" for the purposes of paragraph 10 of the Schedule. If that firm contains 6 professional members, it is obliged to pay the Banded Firm Fee of $15,000 (the equivalent fee for the same size of accountancy firm is $20,000). In addition, under paragraph 4 the firm is also required to pay the Per Professional Fee at a rate of $1500 for each professional member of the

GRAND COURT · CAYMAN ISLANDS ·

business (the equivalent fee for accountants being $2,000). So, it was submitted, it is wrong to say that accountants are singled out for an unfair double tax. If, as the Respondent maintains, accountancy firms are liable to pay both the Banded Firm Fee and the Per Professional Fee, so are all the other professional firms.

45. Secondly, the Respondent says that where a 'Professional' employed by a professional firm engages in a trade or business that is different to his employer's main trade or business and he provides 'chargeable services in his trade or business or to his employer's customers', he is treated as an 'other professional' within the meaning of the Schedule. He is then included as a 'professional' in the headcount for the relevant paragraph of the Schedule for the Banded Firm Fee that applies to his employer.

B: The Applicants' Interpretation – one fee is payable

46. The Respondent asserted that the Applicants' interpretation deprives Item 1 (and Items 3, 4, 5, 6, 8 and 9) of the Schedule of any useful meaning. The Respondent maintained that if the Per Accountant Fee is not payable by an Accountancy firm that has included all relevant professionals in the head count for the Banded Firm Fee then there are no circumstances in which the Per Accountant Fee is payable.

47. The Respondent asserts that the Applicants' interpretation requires the Court to read words into the Schedule that are not there. According to the Applicants, the Per Accountant Fee in item 1 is not payable where an accountant is employed by an Accountancy firm, but is payable where an accountant is employed by a firm other than an Accountancy firm for which he provides 'chargeable services in his trade or business to his employer's customers'. It is submitted by the Respondent that paragraph 1 contains no such qualification. If the Applicants were right, Mr. Bowen QC claims, additional wording would have to be read into paragraph 1 as follows:

> *"$2,000 for each professional member of the business other than an Accountancy Firm."*

48. It was submitted that a similar qualification would also have to be read into paras 3, 4, 5, 6, 8 and 9 of the Schedule to exempt other professionals from the Per Professional Fee

GRAND COURT · CAYMAN ISLANDS ·

where they have been included in the head count for the Banded Firm Fee. Learned Counsel argues that there is no such wording and that it is not open to the Court to read words into the statute other than in very limited circumstances that do not exist here. Reference was made to ***Inco Europe Ltd. v First Choice Distribution Ltd*** [2000] 1 W.L.R. 586, 592C-H.

49. Further, the Respondent avers that the premise upon which the Applicants advance their interpretation – namely that if the Respondent is right only Accountants would be required to pay both the Banded Firm Fee and the Per Professional Fee, which they say would be a 'strikingly odd outcome', is a patently false one. The Respondent suggests that under ***the 2007 Law*** Accountants and Accountancy firms are required to pay traders license fees in the same way as all other professional firms, albeit, that higher rates apply to Accountants. On the Respondent's interpretation, Accountants and other professionals must pay both the Banded Firm Fee and the Per Professional Fee, so Accountants are not subject to a 'double tax' that does not apply to other professional firms. It was argued, that whilst Accountants (and lawyers) pay a higher rate than other professional firms it is clearly open to the legislature to impose different rates for different professional firms.

50. Reference was made to the Applicants' assertion that if the Per Accountant Fee was payable by Accountancy firms Item 1 of the Schedule would have stated that the fee was payable by 'each professional member of the business or Accountancy Firm', the term 'business' being used in contradistinction to 'Accountancy Firm'. It was submitted on behalf of the Respondent that again, this submission is misconceived. That the term 'business' encompasses an Accountancy Firm, just as it encompasses a 'Firm of professionals other than accountants' in paragraph 10.

(1) The informed/purposive interpretation: the wider context

51. Mr. Bowen QC submits that regardless of the view which the Court reaches as to the literal interpretation to be given to sections 12 and 14 and the Schedule, it must still consider the provisions in their wider context and adopt a purposive construction. The Respondent opines that when this is done, these wider considerations reinforce the

GRAND COURT · CAYMAN ISLANDS ·

interpretation for which it contends and undermines the Applicants' competing interpretation.

a) Pre-enacting history

52. The legislative history, it was submitted, support the Respondent's view as it demonstrates, firstly, that the Per Accountant Fee was payable under ***the 2001 Law*** by all Accountancy Firms (and other professional firms) prior to the introduction of the Banded Firm Fee by ***the 2002 Order***. It shows that the Banded Firm Fee was introduced alongside, not in substitution for, the Per Professional Fee for accountancy and other professional firms; and that no amendment was made to the wording of paragraph 1 (or 3, 4, 5, 6, 8 and 9) of the Schedule to ***the 2001 Law*** to qualify the existing obligation of accountancy or other professional businesses to pay the Per Professional Fee. It was submitted that the strong inference is that the Legislative Assembly intended the Per Professional Fee to continue to be payable alongside the Banded Firm Fee. Thereafter the Per Professional Fee was increased in 2006, which the Respondent says is another indicator that the obligation to pay the Per Professional Fee was not changed in 2002. If the Applicants were right, it was argued, following ***the 2002 Order*** the Per Professional Fee would have raised a negligible, if any, amount of revenue and the 2002 increase would have been an almost entirely pointless exercise. It was argued that the inference may be drawn from this legislative history that both the Banded Firm Fee and the Per Professional Fee were intended to be payable.

b) The mischief the legislation was intended to address/Hansard

53. The Respondent reiterates that it is not necessary for there to be any 'ambiguity' in order for the Court to consider the mischief or purpose of the legislation. Thus, it was submitted that evidence of the policy considerations (such as that provided by Mr. Jefferson, who was at the material time in 2001 Assistant Financial Secretary) is relevant and admissible for this purpose. However, the Respondent acknowledges that, as regards Hansard references, these are a special case and may only be referred to where the ***Pepper v Hart*** test is satisfied.

54. The Respondent maintains that the overriding purpose of ***the 2002 Order*** which first introduced the Banded Firm Fee was to raise additional revenue to address a budgetary crisis and to ensure a larger share of the fiscal burden was borne by the financial services industry, including big accountancy and law firms, and that the Banded Fee was introduced as an additional revenue-raising measure to achieve these purposes. Mr. Bowen QC submits that this was evidenced by the affidavit of Mr. Jefferson and certain Hansard extracts. The Respondent submits that its interpretation that both the Per Professional Fee and Banded Firm Fee are payable is therefore consistent with these statutory purposes.

GRAND COURT · CAYMAN ISLANDS ·

The Applicants' and the Respondent's competing arguments regarding certain aspects of the evidence and Hansard extracts

55. Whilst the Applicants appear to accept that the introduction of the Per Firm Fee was for the purpose of increasing the amount of trade and business licence fees paid by the financial services sector, in particular accountancy firms, they say that the second purpose was to provide an exemption from any trade and business licence fees to small accountancy firms, with a view to encouraging the growth of local Caymanian firms. Reference was made by the Applicants to the discussion of ***the 2002 Order*** in a Legislative Assembly debate on 12 December 2001.

56. Reference was made to the contribution of MLA Mr. Rolston Anglin, who discussed the proposed change to the trade and business licence regime (including the Banded Firm Fee) at pages 1351 – 1352 of Hansard.

57. It is the Applicants' position that the affidavit of Mr. Jefferson is not admissible for the purpose upon which the Respondent relies upon it. The Applicants say that paragraphs 12-27 of Mr. Jefferson's affidavit set out certain facts on the government's proposed budget and deficit which they say are irrelevant to the subject matter of the proceedings, i.e. the process by which the Respondent made the decision to reject the Applicants' Notices of Appeal. They also say that the content of those paragraphs is not admissible as an aid to statutory interpretation under the *contemporanea expositio* principle, as they are not official statements or guidelines issued for the purpose of assisting in the implementation or understanding of the statute. The Applicants also object to the contents

GRAND COURT · CAYMAN ISLANDS ·

of paragraphs 18, 20, 21 and 23 as being largely made up of statements of opinion or of impermissible statements of information and belief.

58. The Applicants also refer to a later speech made by MLA Mr. Cline Glidden, then leader of Government Business, on 19 December 2001 during a debate on the budget. This excerpt was referenced in paragraph 22 of the Jefferson affidavit.

59. The Applicants therefore argue that the relevant admissible Hansard extracts support their interpretation of the Law.

60. The Applicants also say that the Respondent, despite its claims to raise revenue via trade and business licensing fees, and in particular the retention of the Per Accountant Fee for Accountancy firms, does not argue that the introduction of the Banded Firm Fee would not have achieved that effect, or at least contributed to the overall intention to raise revenue by way of trade and business license fees by $2.5 m. It was proffered that the Per Firm Fee significantly raised the costs of obtaining a Trade and Business License for the Firms, disproportionately so in respect of the larger firms.

61. The Respondent responds to these several points. The Respondent says that its interpretation is wholly consistent with the additional purpose of incentivizing small Caymanian accountancy and other professional firms. First, the Respondent says, small firms (i.e. those with 5 professional members or fewer), were already paying the Per Accountant Fee at $1500 per head before the introduction of the Per Firm Fee, so that the Respondent's interpretation does not mean that the financial burden on such firms was increased; given that they were exempt from the Per Firm Fee, their financial burden remained the same. Secondly, the Respondent argues that if the legislature intended to reduce the financial burden on such firms, while increasing the burden on larger firms, it could have included an exemption from the Per Accountant Fee for small firms as it did for the Per Firm Fee. It did not do so. The Applicants' interpretation on the other hand, the argument continues, would exempt <u>all</u> professional firms from paying the Per Accountant Fee, including large firms like the Applicants, which the Respondent says runs counter to the main purposes behind the introduction of ***the 2002 Order***. It may be inferred that Parliament did not intend that result.

GRAND COURT · CAYMAN ISLANDS ·

62. As regards the evidence of Mr. Jefferson, it was submitted that this was admissible. The Respondent argues that Mr. Jefferson gives evidence of the background and policy objectives that lay behind the introduction of ***the 2002 Order*** and the Banded Firm Fee. It submits that his evidence was clearly relevant to a matter directly in issue in these proceedings, namely the underlying purpose of the legislation, and which falls to be interpreted.

63. Importantly, however, the Respondent says that it accepts that the question for the Court is to determine the Legislator's, not the Government's intention. However, they suggest that evidence of what the Government intended when introducing the legislation is strong evidence of what the legislature intended.

64. What the Respondent appears to accept as a possible exception to the admissibility of Mr. Jefferson's evidence is as to his understanding of the speeches given in the Hansard references upon which the Applicants rely. However, it was submitted that matters referred to from Hansard are relevant and admissible even without Mr. Jefferson's evidence.

65. As regards the criticism that Mr. Jefferson did not state that the Per Firm Fee would not have achieved the Government's revenue aim, Mr. Bowen QC submits that that argument is flawed. Reference was made to paragraph 18 of the affidavit, where Mr Jefferson stated:

> "*What I am clear about is that the Per Firm Fee was intended to be an additional source of revenue for the Government, to be paid on top of the existing Per Professional Fee. At no time did we calculate the loss of revenue that would have resulted from the abolition of the Per Professional Fee*"

66. It was submitted that it follows, by necessary implication, that the projected additional $2.5 million in traders' licence fees was based on both the Per Firm Fee and the Per Professional Fee being recoverable from accountancy and other professional firms.

67. It was further submitted that the evidence points in a single direction, namely that the Government intended the PPF to continue to be payable alongside the new Banded Firm Fee. Learned Queen's Counsel opined that it is illuminating to note that the then managing partner of KPMG, Mr. Roy McTaggart, has previously accepted that it had been the Government's intention to introduce the Per Firm Fee as an additional fee to the Per Accountant Fee. Reference was made to Mr. McTaggart's letter of 3 February 2008 where he stated:

> *"I acknowledge that the Government may have in fact intended for this to happen when the revised law was introduced in 2003."*

68. However Mr. McTaggart did, in that letter, go on to say that he did not believe that the law, as currently drafted, can be interpreted to achieve this outcome, even if intended. Learned Counsel wrapped up this submission by saying that Mr. McTaggart's understanding is consistent with the other evidence, and that from the evidence it may be inferred that the Legislative Assembly intended the Per Accountant Fee to continue to be payable alongside the new Per Firm Fee. It was asserted that that being so, the relevant provisions should as far as possible be construed so as to give effect to the Legislator's intention in applying the purposive approach to statutory interpretation.

The *Contemporanea Expositio*

69. In the Respondent's Outline, at paragraph 78, it relies upon the post enacting history of ***the 2002 Order***. It is asserted that, after the introduction of ***the 2002 Order*** amending ***the 2001 Law***, with one exception (Deloitte), the understanding of all parties - the Government and those responsible for paying the new fees - was that both the Per Firm Fee and the Per Accountant Fee were payable.

70. As regards the view of the Government, it was argued that this is evidenced by (i) the fact that the Board consistently imposed a condition on traders' licenses that both fees be paid and (ii) Reliance is also placed on email of 14 October 2002 to Kerry Dixon, then Deputy Chief Immigration Officer from Mr. Jefferson.

71. The Respondent argues that well-resourced accountancy firms such as most of the Applicants would not have continued to pay the Per Accountant Fee if they did not believe that to be the import of the amendments introduced by ***the 2002 Order***.

72. In answer to these points, the Applicants mount a number of arguments. The main one is that the evidence relied upon by the Respondent is inadmissible and falls outside the *contemporanea expositio* doctrine.

73. Both sides refer to passages from Bennion, pages 653 - 656.

Laws *in Pari Materia*

74. The Respondent relies upon the position of lawyers under ***the 2002 Order***, and then subsequently, under ***the Legal Practitioners' Law 2015 ("Legal Practitioner's Law")*** as being *in pari materia*.

75. However, as regards this aspect of the argument, the Respondent accepts that the fact that the Practicing fee for attorneys is personal to the lawyer and not the law firm, may affect the weight that the Court might attach to the principle. Nevertheless, the Respondent submits that some weight may be attached to the *in pari materia* principle where, as here, it is submitted that it reinforces the other factors that support the Respondent's interpretation.

76. The argument here is essentially, that the position of lawyers is particularly striking given that other professionals – including actuaries, architects, engineers, statisticians and surveyors - are treated the same way and, on the Respondent's interpretation, are all required to pay the Banded Firm Fee and the Per Professional Fee. Lawyers, who are also professionals, were required by ***the 2002 Order*** to pay the Banded Firm Fee under ***the 2001 Law***. It later transpired that the amendments in ***the 2002 Order*** regarding lawyers could not apply to them. An amendment was then made to the ***Legal Practitioner's Law*** by the ***Legal Practitioners' (Amendment) Bill 2002***, so that, it was submitted, the equivalent of the Per Professional Fee and Banded Firm Fees were now levied under the ***Legal Practitioner's Law***.

Express Wording in *the 2014 Law*

77. The Respondent submits that the Board's interpretation is not undermined by the subsequent introduction in the ***Trade and Business Licensing Law (2014 Revision)*** of the words *"the fee in No. 1 for each accountant employed to the firm is in addition to the fee set out below"*. In summary, the Respondent's stance is that these words were introduced to clarify the position for the avoidance of doubt, and were not intended to introduce a fee that was not previously payable. Reference was made to Rajkumarsingh 4 and to a statement of MLA Hon. Mr. Wayne Panton when introducing the Bill in Hansard.

78. The Applicants opposition and dispute regarding the Respondent's construction, which is essentially two-pronged, is as follows:

(a) The affidavit of Mr. Rajkumarsingh is inadmissible opinion evidence;
(b) That no reliance should be placed on Hon. Mr. Panton's speech in Hansard, when introducing the 2014 Revision as a Bill, because it is self-serving.

The Presumption against absurdity

79. The Respondent's position is that the Applicants' interpretation leads to an absurd or futile result, by which paragraph 1 of the Schedule of ***the 2007 Law*** is deprived of any meaning. It was urged that the Court should accordingly not adopt that interpretation, having regard to the presumption against absurdity.

The presumption against doubtful penalisation (or principle of legality)

80. It was submitted that this presumption/or principle does not assist the Applicants either because (a) on an informed interpretation there is no ambiguity in the meaning of ss. 12, 14 and the Schedule to ***the 2007 Law*** so the presumption does not apply; or, in any event (b) the presumption is outweighed by other principles of statutory interpretation. It was submitted that there was nothing unreasonable, unfair or arbitrary in imposing both the Per Firm Fee and the Per Accountant Fee on the Applicant firms under ***the 2007 Law***, not

least, it was submitted, because the same approach was applied to other professionals under the Law and to lawyers under the ***Legal Practitioners' Law***. Reference was made to ***R (Edison First Power Ltd v Central Valuation Officer*** [2003] 4 All E.R. 209, para 139.

The Evidence - On behalf of the Applicants

81. Affidavits of the following persons were filed in respect of the leave application and relied upon for the substantive hearing:

(a) Lauren Mary Nelson, who is employed as Area Director of Finance & Operations of the Third Applicant, Ernst & Young, filed 15 September 2016.

(b) Rachel Catherine Baxendale, who is employed as a litigation paralegal at Maples and Calder, Attorneys-at-law for the Applicants, filed 8 September 2016, whose affidavit mainly exhibited correspondence.

(c) Graeme Sunley, a Partner and Territory Leader of the Fifth Applicant, PricewaterhouseCoopers, filed 4 November 2016.

(d) Glen Trenouth, Managing Partner of the First Applicant, BDO Cayman Ltd, filed 4 November 2016.

(e) Kevin D Lloyd, Managing Partner of the Fourth Applicant the Cayman Islands firm of KPMG, filed 4 November 2016.

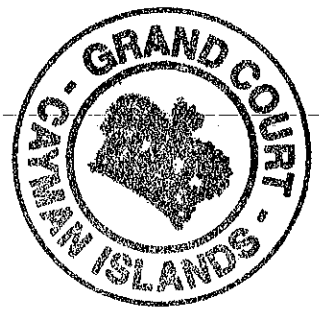
(f) Stuart Sybersma, Managing Partner of the Second Applicant, the Cayman Islands firm of Deloitte and Touche.

82. The Second Affidavit of Stuart Sybersma was filed on 27 March 2017.

The Evidence - On behalf of the Respondents

83. Numerous affidavits were filed on behalf of the Respondent, and as discussed previously, some paragraphs of some affidavits are objected to by the Applicants, whilst the admission of one affidavit was objected to in its entirety.

84. The affidavits of the following persons were filed for the hearing in June 2017:



(a) Kenneth Jefferson, the Financial Secretary of the Government of the Cayman Islands (from 1 November 2004). Mr. Jefferson became a Fellow of the Institute of Chartered Accountants in England and Wales in July 1991 (affidavit filed 1 February 2017. Mr. Jefferson was in 2001 Assistant Financial Secretary.

(b) Ryan Rajkumarsingh, Director of the Department of Commerce and Investment ("**the DCI**") since 1 September 2013 (First Affidavit filed 31 January 2018 ["**Rajkumarsingh 1**"]).

(c) Samuel Rose, Cabinet Secretary, who at time of the filing his affidavit 1 February 2017, had been in that position for four years.

(d) Ryan Rajkumarsingh, filed 3 February 2017 ("**Rajkumarsingh 2**").

(e) Ryan Rajkumarsingh, filed 4 April 2017 ("**Rajkumarsingh 3**").

(f) Ryan Rajkumarsingh, filed 20 June 2017 ("**Rajkumarsingh 4**").

(g) Claudia Brady, Head of the Compliance and Enforcement Division in the DCI, filed 22 June 2017.

The developments after the hearing in June

85. After the hearing was completed on 22 June 2017, I indicated to the parties that I would be reserving my judgment, so as to consider the substantial amount of material and authorities that had been cited.

86. However, a number of events have transpired since the hearing, which resulted in a further hearing taking place on 12 October 2017. In brief, by letter dated 10 July 2017, the Attorney General's Chambers wrote to the Court unilaterally, enclosing correspondence which it had received from Maples and Calder dated 30 June 2017 raising certain matters, and also the Attorney General's response letter dated 7 July 2017. On 11 July 2017 the Attorney General's Department also again unilaterally, filed a Further Note (which consisted of further submissions by the Attorney General's Department) and, yet another affidavit from Mr. Rajkumarsingh ("**Rajkumarsingh 5**"). The Court also received on 11 July 2017 a letter from Maples and Calder objecting to this unilateral action on the part of the Attorney General after judgment had been reserved.

87. On 13 July 2017 the Court sent an email (which it would seem inadvertently was sent to only Maples and Calder) indicating that the Court considered this approach by the Attorney General's Department, of sending the Court the correspondence from Maples and Calder, not addressed to the Court, a breach of Practice Direction 1/99. It was also indicated that the filing of the Further Note and Rajkumarsingh 5 without a joint communication to the Court by both sides, or application to the Court seeking a re-opening of the case, or the Judge's consideration of further matters, was inappropriate and that this material would not be considered by the Court.

88. The upshot of all of that is that by Summons dated 19 July 2017, filed 25 July 2017, the Attorney General's Department sought the following relief:

> *"1. An order under GCR Ord. 38, r. 2(1) that the Fifth Affidavit of Ryan Rajkumarsingh dated 11 July 2017 may be admitted into evidence and read at the trial for the reasons set out in the Respondent's Note dated 11 July 2017.*
> *2. An order that this matter be dealt with on the papers in the first instance.*
> *3. Such further orders and directions as this Honourable Court shall deem fit.*
> *4. Costs in the cause."*

GRAND COURT · CAYMAN ISLANDS ·

89. Oddly, the Attorney General's summons asked that their application be dealt with on the papers. It seemed obvious to me that that approach was not appropriate, there being a number of hotly contested issues surrounding it.

90. A hearing was therefore listed. I was able to hear the application on 12 October 2017.

The Hearing on 12 October 2017

91. In effect, the application to admit new evidence has been made Mr. Bowen QC explains, because he had inadvertently misled the Court on aspects of the case. He asks that the

Court admit Rajkumarsingh 5 *de bene esse*, and thereafter admit the evidence, although any ruling may be postponed until judgment is given on the substantive application.

92. This hearing has really added much convolution to an already complex matter. It is unfortunately, difficult to summarise what the application was all about.

The Respondent's Submissions

93. The Respondent's leading Counsel asserts that the relevance of how occupations other than accountants were treated under the Law only arose in this case as a result of an assertion made by the Applicants in their Skeleton Argument of 7 June 2017.

94. The Respondent says that this assertion was not made in the original application for leave which was granted in November 2016, nor in the Originating Motion for Judicial Review dated 9 November 2016. The Respondent therefore says that it did not have an opportunity of responding to such an allegation when filing its evidence in February 2017. The Respondent did respond to the assertion in its Skeleton Argument of 14 June, at paragraphs 15 and 21, stating that other professionals (such as architects) were treated the same as accountants in having to pay both the Per Professional Fee (under para 4) and the Banded Firm Fee (under para 10 as a firm of 'other professionals'). Thus, Mr. Bowen QC says, nothing in paragraphs 15 or 21 is misleading.

95. The claim of differential treatment assumed greater importance at the hearing, and the Respondent, at learned Counsel's request, sought to obtain evidence of firms in the occupations listed at paragraphs 3-9 of the Schedule who had been required to pay both the Per Professional Fee and the Banded Firm Fee under paragraph 10. This was the purpose of the filing of the Affidavit and exhibit to Ms. Brady's affidavit of 22 June 2017.

96. During the hearing Queen's Counsel submitted, further, that all the occupations listed at paragraphs 3, 5, 6, 7, 8, and 9 in the Schedule were liable to pay both the Per Professional Fee as well as the Banded Firm Fee under paragraph 10 (unless exempt as a small firm) as a "*firm of professionals other than accountants or lawyers*". Mr. Bowen QC explains that this submission was based on his understanding of the position in light of what was

GRAND COURT · CAYMAN ISLANDS ·

then known, but without the benefit of consultation with Mr. Rajkumarsingh, who was out of the jurisdiction at the time.

97. After the hearing and the Court reserving judgment, on 30th June 2017 Maples wrote to the Attorney General's Chambers, raising a number of points, one of which was to state that having made enquiries they had evidence that *"the DCI has not in fact treated all or other non-accountancy businesses listed in the Schedule in the manner presented to the Court by the Government's leading counsel."*

98. Leading Counsel then took instructions from Mr. Rajkumarsingh who explained that the situation was not as leading Counsel had represented it to be, in a number of ways. Mr. Rajkumarsingh explained that only those occupations listed under paragraph 4 of the Schedule (architects, engineers and surveyors) were treated by the Board under ***the 2007 Law*** as 'other professionals' for the purposes of paragraph 10 because they were listed as such in the definition of 'professional' in the preamble to the Schedule. The occupations listed at paragraphs 3, 5, 6, 7, 8 and 9 were not 'professionals' within that definition so did not have to pay the Banded Firm Fee under paragraph 10, and were only charged the PPF. The underlined portion of this paragraph is in a nutshell, what I understand to be one of the main corrections to the Respondents' previous submissions.

99. Upon Counsel's advice, the Respondent arranged for the misunderstanding to be addressed as soon as possible by way of an affidavit. This is addressed at paragraphs 3-14 of Rajkumarsingh 5.

100. Learned Counsel's submissions continues by saying that the letter from Maples of 30 June also raised some further complaints concerning the treatment of firms other than accountancy firms who employ accountants which Mr. Rajkumarsingh had previously addressed in Rajkumarsingh 4. However, he took the opportunity of further addressing these complaints at paragraphs 15-24 of Rajkumarsingh 5. It was submitted that this evidence does not raise any new matters and simply confirms and clarifies the evidence in Rajkumarsingh 4 and the submissions made at the hearing in June.

The relevant law and principles

101. It would appear that there is general agreement by the parties on the relevant principles to be taken into account when considering a late application to admit evidence, including one made after the close of evidence. The Respondent made reference to ***Foster v Action Aviation Ltd.*** [2013] EWHC 293 (QB), and the Applicants do not disagree with the relevance of the discussion at paragraph 9, where it is stated as follows:

> *"In considering how to exercise my discretion I would regard the following considerations as being of particular relevance: (1) the reason why the evidence was not put forward before, (2) the significance of the evidence, (3) the prejudice to the applicant if the application is refused,(4) the prejudice to the other parties if the application is allowed and(5) the need to do justice to all the parties having regard to the overriding objective."*

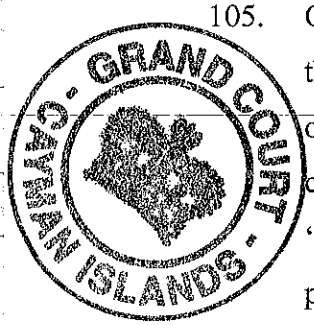
102. The Respondent's Counsel also refers to and relies upon ***Notts Fire Authority v Gladman Ltd*** (ChD) [2011] 1 W.L.R. 3235, where at paragraph 70 Smith J stated as follows:

> *"I do not believe that the person seeking to introduce the evidence has a heavy onus to justify it merely because it is late. Lateness can only be one factor. The essential exercise of the judge is to take into account all factors that are present in the case and weigh them all together and come to the appropriate conclusion in accordance with his duties as enshrined in the CPR."*

The Applicants' Submissions on the Application

103. The Applicants accept that the Respondent has a duty to correct the misleading or incorrect submissions. However, in their opinion, the Respondent has in some ways, gone further than that, and in others not gone far enough.

104. The Applicants accept the principles set out in ***Foster*** and ***Coltish Aircraft***. However, they say that, as with Rajkumarsingh 4, there is no sound reason why evidence has been filed so late in the day.



105. One of the Applicants' complaints regarding 'Brokers' has now been corrected, in that the Respondent concedes that 'Brokers' (paragraph 6 of the Schedule) are treated like the other occupations listed at paragraphs 3, 5, 7, 8 and 9 of the Schedule i.e. they were not charged the Banded Fee under paragraph 10 as they are not considered to be 'professionals', within the definition given in the preamble to the Schedule and thus paragraph 8 of Rajkumarsingh 5 should be read accordingly.

106. The remaining major complaint by the Applicants is that the Respondent and Rajkumarsingh 5 take the position that architects, engineers and surveyors, selected under category 4, also pay both the per-profession fee and the per firm fee. However, the Respondent, say the Applicants, has been unable to produce any evidence of a business paying fees in both category 4 and category 10. The exhibit to the Brady affidavit is, apparently for a sole trader who would not be required to pay a per-firm fee anyway. Contextually therefore, the Applicants complain about the suggestion in Rajkumarsingh 5 that it would be disproportionately time consuming and beyond the ordinary resources of the DCI to try to find any example. It was submitted that this seems unlikely in that the DCI system appears to be electronic and searchable. The Applicants say that the Brady affidavit specifically states at paragraphs 3 and 5 that two searches were in fact conducted to locate an example, and only one responsive record was found- the one exhibited to the Brady affidavit and which does not prove that two fees were paid. It was submitted, that as the Respondent is unable to provide an example of another business which paid two fees, the Applicants believe that the Court must conclude that the Respondent is unable to substantiate its case.

107. The Applicants refer to the fact that in Rajkumarsingh 5 at paragraph 20, it is stated that the Board has not searched for any examples of businesses which the Applicants say would properly fall within category 1- i.e. businesses which could not fairly be described as accountancy firms but who nevertheless employ accountants, actuaries, auditors or statisticians.

108. The Applicants note that the balance of Rajkumarsingh 5 repeats the submissions made on behalf of the Respondent at the hearing that the Applicants' interpretation would

enable businesses to employ a large number of accountants and then to register under category 1, thereby paying a cheaper license fee than would be required for an accounting firm under category 2. However, they say, notably, Rajkumarsingh 5 omits to address the Applicants' answer to that suggestion - namely that the Board is required to identify the nature of the business in question and select a category which is suitable for that business and, obviously, any business employing, say, 20 accountants providing accounting services to clients can be identified as an accounting firm. The Respondent has suggested that it is not apparent how the Board would even go about that process. However, Mr. Imrie submits that the answer is obvious. In essence, he submits that it is found within the four corners of the Law; - the obligation on the part of the Board to determine and select a category for each business (s. 12), identify the fee payable in respect of that category (s.14 (1)) and make decisions in relation to any disputes about whether the appropriate category has been identified and selected (s.14(4)). It was submitted that this process can be undertaken annually, at the time when each license is renewed.

109. Additionally, in relation to the Further Note, at paragraph 10.3, the Applicants asserted that, in practice, the Board has not required businesses that employ accountants providing such services to register as an accountancy firm and that that assertion is unsupported by any evidence. It is the Applicants' submission that it is not for them to call any evidence upon this point as all of this information is within the knowledge of the Respondent, and it has declined to undertake the searches.

The Respondent's Response to the Applicants' Objection to Rajkumarsingh 5

110. Reference was made to the Applicants' complaint that the Respondent has not produced any evidence of any firm of architects, engineers or surveyors that is required to pay both the Banded Firm Fee under paragraph 10 and the Per Professional Fee under paragraph 4 and that for that reason Mr. Rajkumarsingh's evidence should not be admitted.

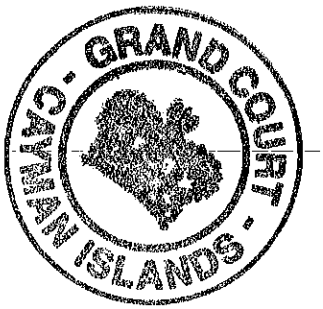
111. The Respondent submits that such a submission is misconceived for the following reasons:

(a) A license has been produced by Ms. Brady of a firm of architects that is required to pay both the Per Professional Fee and the Banded Firm

Fee, unless it is a small firm of 1-5 members. It is clear, it was argued, from that license that the firm had only one professional member (a fee of only $1500 having been paid), so would have been exempted from the Banded Firm Fee. The Respondent submits that this nevertheless supports its argument that such a firm is liable to pay both fees unless exempt as a small firm from paying the Banded Firm Fee. The argument is that it undermines the Applicants' case that a firm can only be required to pay either the Per Professional Fee or the Banded Firm Fee.

(b) The absence of any evidence of a firm of architects, engineers or surveyors that has *actually* had to pay both the Per Professional Fee and the Banded Firm Fee does not support the Applicant's position or undermine that of the Respondent because (i) there may have been no such firm with 6 or more professional members in the Cayman Islands during the relevant period; the only firms on the islands may have therefore been exempt from the Banded Firm Fee (like the firm referred to in Ms. Brady's affidavit) (ii) Mr. Rajkumarsingh's evidence is that to review every licence and payment made in order to establish whether such a firm has ever existed would be disproportionately time-consuming. Thus, unless bad faith is being asserted (for which there would need to be some evidential basis), that statement must either be accepted at face value or the Applicant must apply to cross-examine Mr. Rajkumarsingh, and no such application has been made. Reference was made to the case of ***R v Hull Visitors, ex p. St. Germain*** at page 1410H.(iii) The Respondent's case turns on the proper interpretation of the Schedule, paragraphs 1 and 2 (and 4 and 10); even if the Board had been applying ***the 2007 Law*** differently, the Court should determine that issue on the basis of what the Respondent submits to be the proper interpretation.

(c) The Respondent submits that it is not under any duty to carry out an evidence gathering exercise that imposes an unreasonable burden.



Learned Counsel indicates that whilst it is accepted that the Respondent has a duty of candour, he submits that duty does not require a public authority to do that which imposes an unreasonable burden. Reference was made to the decision in ***Graham v Police Service*** [2011] UKPC, where Sir John Laws, at paragraph 18 stated:

> *"It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are* ***reasonably*** *required for the court to arrive at an accurate decision."*

(d) It remains the case that the burden is on the Applicants to prove that the Respondent has acted unlawfully - ***Standard Commercial,*** paragraph.

Ruling on paragraphs of Mr. Jefferson's affidavit

112. In my judgment, with the exception of Mr. Jefferson's evidence as to his understanding of the speeches given in the Hansard references (upon some of which references the Applicants rely), it is appropriate for the disputed affidavit evidence to be admitted. Those Hansard references speak for themselves and do not require interpretation and I deal with the question of their admissibility elsewhere. I accept that Mr. Jefferson, who held the post of Assistant Financial Secretary at the time when ***the 2001 Law*** was in effect, and at the time when ***the 2002 Order*** was being discussed, and who also played a significant role in budgetary preparations, should be allowed to give evidence from his own knowledge and experience. His evidence is in my view useful in relation to the pre-enacting history as well as to the *contemporanea expositio.*

Ruling on the Admissibility of Rajkumarsingh 4

113. Mr. Rajkumarsingh's evidence on the meaning of ***the 2007 Law*** is not admissible, given that he first joined the DCI in 2010. However, his evidence as to his personal knowledge of how the DCI understood and in practice, set about their compliance and enforcement functions since his tenure there, is admissible.

114. However, in each instance, (regarding the other paragraphs of Mr. Jefferson's affidavit also), and Rajkumarsingh 4, it will be a matter of what weight the Court attaches to the evidence. At this juncture, that would seem to be the most convenient measure for the Court to adopt, rather than painstakingly dealing with each paragraph in respect of which the Applicant has raised varying objections.

The Application to reopen and admit Rajkumarsingh 5

115. In my judgment, the Respondent has provided an explanation as to why this evidence was not put before the Court previously. As regards Rajkumarsingh 5, it is plain that it is in the interest of justice for the errors made by Counsel speaking on behalf of the Respondent to be cleared up and I therefore grant the application to reopen. I do not see any need for the Applicants to file any affidavit evidence in response or to cross-examine Mr. Rajkumarsingh (a practice not often adopted in judicial review, and raised late in the day, and in my view, rightly, not with a great deal of conviction). Where there has been repetition or statements of opinion or legal submissions, the Court must be credited with sufficient discernment and experience to sift through what is needed and to discard expressions of opinion which cannot assist the Court. This is particularly so in a case that has proven to be as complex and convoluted as this one and which at heart is a case of statutory interpretation. The point is that the Court needed to have the errors corrected. I am of the view that the Applicants would not be prejudiced by allowing Rajkumarsingh 5 to be admitted.

Discussion and Analysis of the Grounds of Judicial Review

Grounds 2 and 3 - Unreasonableness and Breach of Natural Justice

116. In my view, it is convenient to deal with Grounds 2 and 3 of the application first. Ground 2 is that the decision was unreasonable. However, the real issue here is as to correctness and not unreasonableness. Thus, Ground 2 fails.

117. As regards Ground 3, breach of Natural Justice, on the wording of the relevant legislation in this case, there was nothing to require the Respondent to hold an oral hearing. It was entirely within its discretion to determine the matter on written submissions, which they

did receive from the Applicants. Those submissions were very detailed and thorough. The Applicants have now, in any event, had an extensive and fulsome opportunity to address the Court on the essential questions of statutory construction. Thus, any complaint about inadequacy of reasons is also academic. As I have said, the crux of the matter is the question of unlawfulness and statutory construction.

Approach to Question of Unlawfulness

118. I now turn to examine the central issue involved in this application for judicial review. Where an administrative body such as the Respondent is tasked with an assessment of law, it must carry out such assessment correctly. The test is not one of *Wednesbury* unreasonableness (a standard made famous in the well-known case of the same name). Correctness, rather than reasonableness is required. The Court must ensure that the decision made by the Respondent is correct in law and, if it concludes that the Respondent's decision was incorrect in law, the Court must come to its own view.

119. As Popwell J summarised in the English case of ***R v Elmbridge BC, ex parte Health Care Corp.*** [1991] 3 PLR 63 at 68G, referred to by the Applicants:

> *"A court will interfere with a decision of a local authority if they have misapplied the facts or misapplied the law. In order to decide whether they have misapplied the law the court has to come to the conclusion as to what the law is. It cannot duck the issue by saying the law is very difficult and there are conflicting views and therefore the local authority are not unreasonable in taking one view. The court has to decide what the law is; if the local authority have applied the law, they cannot be challenged. If they have not applied the law, however reasonable it may have been to take a contrary view, a court will interfere."*

120. As Lord Mustill makes very clear in ***R(South Yorkshire Transport Ltd. v Monopolies & Mergers Commission*** [1993] W.L.R. 23 at 32 :

> *"Once the commission reached the stage of deciding on public interest and remedies it was exercising a broad judgment whose outcome could be overturned only on the ground of irrationality. The question of jurisdiction, by contrast, is a hard-edged question. There is no room for legitimate disagreement. Either the commission had jurisdiction or it had not. The fact that it is quite hard to discover the meaning of s. 64(3) makes no difference. It does have a correct meaning, and one meaning alone; and once this is ascertained a correct application of it to the facts of the case will always yield the same answer. If the commission has reached a different answer it is wrong, and the court can and must intervene."*

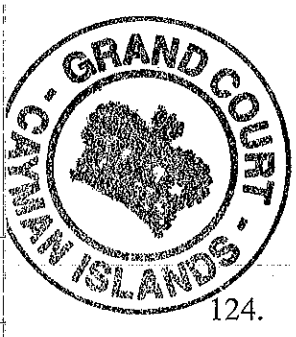
121. In Fordham's ***Judicial Review Handbook*** (2012, 6th Ed.), the learned author makes the principle pellucid:

> "[Hard edged questions] *can be thought of as questions which the public authority has to decide, but it is not permitted to get wrong. In reviewing such questions, the Court does precisely what is forbidden on "soft" review: it does "substitute its own view". This is because the role of the reviewing court here is to ensure objective "correctness"."*

122. In essence, therefore, the Court's task is to ensure that the Respondent arrived at the correct view of the Law and if it did not, the Court must substitute its own view. As recognized in a number of the cited cases and in Bennion at page 428, no matter how difficult the task, the Court must do the best it can, bearing in mind the duty to give efficacy to an enactment.

Correct Approach to Statutory Interpretation

123. In my judgment, the correct approach to the issue at hand, is that, as argued by the Respondent, with the exception of reports of proceedings in Parliament, including Hansard, which are subject to special rules laid down in ***Pepper v Hart*** (as qualified in later cases), both 'internal' and 'external' aids to construction may be considered



regardless of whether there is any 'ambiguity' in the grammatical or literal meaning of an enactment.

124. While the grammatical or literal meaning is the starting point, the court must construe the enactment in its wider context in order to determine the intention of the legislator, which is the 'paramount criterion'. Only then can the Court identify the *legal meaning* of the enactment.

125. It is only if the enactment is grammatically capable of one meaning only, and on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, will the legal meaning have the same meaning as the grammatical meaning (the 'plain meaning' rule- see *Bennion*, s. 195, p. 507). If, on the other hand, on an informed interpretation the wider context does raise a doubt as to whether that meaning is the one intended by the legislator- when it may be said the provision is ambiguous or leads to an absurdity-then the Court will need to weigh the competing considerations, including any relevant statutory presumptions, in determining the legal meaning. But it is not necessary for an 'ambiguity' to be identified before that wider context is considered. See *Bennion*, s. 193 page 504.

126. On an 'informed interpretation' the Court considers the wider context including internal aids, such as other provisions in the same Statute, and it may include external aids, such as the legislative history and other materials *in pari materia* which may provide guidance as to the underlying legislative intention. It is in my view not necessary (as the Applicants contend) for there to be some 'ambiguity' before those aids to construction may be considered. Thus, the Court can consider these aids to construction even where the grammatical or legal meaning of a provision is clear.

127. However, I appreciate that the clearer the meaning, the slower the Court should be in adopting another meaning on the basis of an external aid. In ***Spath Holme, R v Environment Secretary, ex p*** [2001] 2 A.C. 349, at page 398 C-E, Lord Nicholls explained that:

"Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirement of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament, in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations."

(My emphasis)

128. The 'purposive' approach to statutory interpretation has now displaced the literal approach. Further, the literal approach that was previously adopted in relation to tax statutes has since the decision of the House of Lords in ***WT Ramsay Ltd. v Inland Revenue Commissioners*** [1982] A.C. 300 been expressly disavowed; so that such statutes are construed in the same way as any other statute, i.e. purposively. See also ***Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)*** [2005] 1 A.C.684, paras. 28-29, and ***UBS AG v Revenue and Customs Commrs (SC (E)*** [2016] 1 W.L.R 1005, paras 61-62.

129. Further, section 4(b) of the ***Interpretation Law*** obliges the Court, when construing any other Law, to construe words in the singular as including the plural, *"unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided"*.

130. In my view, the judgment of the Judicial Committee of the Privy Council in ***Blue Metal Industries Ltd. v Dilley and anor*** [1970] A.C.827, supports the view that one has to consider the relevant provisions contextually, and within the setting of the legislation as a whole in order to determine whether there is something in the subject or context inconsistent with interpreting a word in the singular as including the plural. Lord Morris

of Borth-y-Gest delivering the judgment of the Board at page 846, discussed section 21 of the NSW Interpretation Act, 1899, (which is similar to our section 4(b)), as follows:

> *"The language of section 185 is consistently phrased in the singular. It speaks of "transferor company" and "transferee company". The section is in Part VII of the Act which is dealing with "Arrangements and Reconstructions". In the same part (vide section 187(7) and section 18391) there are references to a "scheme for the reconstruction of any company or companies."* ***But the mere fact that a word in the singular is used does not in any way solve the problem which now arises. It merely gives rise to it. It may be thought that in an enactment which provides a careful and detailed and precise code of the law relating to companies there would be found at least some indication of or some reference to take-over offers by groups of companies of some regulatory provisions if such offers were to be recognized. But this reflection affords no complete answer to the argument presented by the appellants. By section 21 of the Interpretation Act, 1899 (N.S.W.), it is enacted that in all Acts, unless the contrary appears, words in the singular shall include the plural and words in the plural shall include the singular. Such a provision is of manifest advantage. It assists the legislature to avoid cumbersome and over-elaborate wording. Prima facie it can be assumed that in the processes which lead to an enactment both draughtsman and legislators have such a provision in mind. It follows that the mere fact that the reading of the words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears. But in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole. (See Sin Poh Amalgamated (H.K.) Ltd. v Attorney-General of Hong Kong [1965] 1 W.L.R. 62.) In that case***

a test was indicated which often may be helpful. In the judgment of the board delivered by Lord Pearce it was said, at p. 67:

> *"The Interpretation Ordinance was intended to avoid a multiplicity of verbiage and to make the plural cover the single except in such cases as one finds in the context of the legislation reason to suppose that the legislature, if offered such amendment to the bill, would have rejected it."*

STATUTORY INTERPRETATION

Pre-enacting History

131. In his first affidavit, Mr. Jefferson explains that he was in 2001 Assistant Financial Secretary and a significant element of his duties was to assist the Government in the formulation of its annual budget to the Legislative Assembly. Mr. Jefferson indicates that the incoming Government in 2001 decided that the existing deficit needed to be addressed chiefly by significant revenue measures. In relation to revenue from Traders' and Business Licenses, this had to be increased by $2,500,000.00. Mr. Jefferson says that he was clear that the Per Firm Fee was intended to be an additional source of revenue, to be paid on top of the existing Per Accountant Fee. He indicated that at no time in preparing the budget had he calculated for the loss that would result from the Per Accountant Fee not continuing to be paid by members of accountancy firms.

132. The Court did not have a breakdown on how this budget item was to be achieved. At any rate, there is no evidence to demonstrate that the Government could not have made its budget just from the Per Firm Fees alone (although Mr. Jefferson's evidence was that the potential loss from the Per Accountant Fee had not been calculated when preparing the Budget). For example, an accounting firm of 51 or more accountants would at $2,000 per accountant based upon the Per Accountant Fee, have to pay $102,000. Under the banded firm fee, they were now required to pay $400,000, nearly 4 times what the Per Accountant Fee would be. The Hansard (speech of Mr. Anglin) extracts referred to below illustrate that out of that $2,500,000, the lawyers' segment was to account for about $1,000,000. Therefore, the other income (or expected income) from Trade and Business

GRAND COURT · CAYMAN ISLANDS ·

Licenses was $1,500,000. The fees from Accountancy Firms under the Per Firm Fee could plainly be expected to be a significant portion of the increase.

133. Be that as it may, in any event, the fundamental over-arching point is that the Government or executive's intention is not the same as the legislative intention, though in appropriate circumstances, as here, one may put these considerations into the balance.

HANSARD

134. I now turn to the question of the admissibility of the Hansard extracts in this case. In my judgment the legislative provisions under consideration are ambiguous and their meaning is obscure and uncertain. There is no one clear grammatical meaning to the relevant provisions of the Law. Indeed, it must be said that the various interpretations of ***the 2007 Law*** by the parties over many years, and the complex and sometimes conflicting nature of the submissions made to the Court, amply demonstrate the extent of the obscurity.

135. In my view, the statements of the Mr. Anglin, which are relied upon by the Applicants, are admissible, as it seems clear what the Minister is saying. This extract satisfies the ***Pepper v Hart*** considerations. I agree with the Applicants that other aspects of Hansard dealing with more generalised points about previous Government overspending, budget crisis and the Financial Industry do not pass the ***Pepper v Hart*** gateway for admissibility. Mr. Anglin at pages 1351-1352 of the Official Hansard Report, Wednesday 12 December 2001, stated as follows:

> *"The next item is point 11 which deals with a* ***new proposal*** *which is to have certain professional service firms pay an annual licence fee in order to operate within the Cayman Islands.*
>
> *Firstly, accounting and auditing firms. It is proposed that* ***all these fees also be dealt with on a stratified basis.*** *However, in this specific industry where there are varying sizes of firms, it was felt that the more appropriate basis to utilize the exercise would have been the number of professionals who are employed to the firm. To clarify that point, it would*

be the number of relevant professionals within the firm. I say that to mean, for example, within a law firm it would not be expected that they would include their financial controller for instance in their count of relevant professionals. That would not necessarily include information technology persons who have a professional qualification. The basis of this will be whether or not that particular professional is providing professional service firms with services to the firm's clients and not to the firm themselves.

Further clarification, Madam Speaker - in my earlier examples, indeed the financial controller would be the controller for the firm itself and so would not be providing services to the firms' clients and would not be an income earning professional for the firm itself. I think that point is a very relevant and a very specific one because, certainly, some of the firms would employ, in fact all the firms would employ, other professionals who are not within their specific discipline.

However, if an accounting and audit firm, for example, had set up a trust company which was directly a part of the entire group, then those professionals would be included in the firm's count of professionals, in regard to their annual trade licence. If, for example, the firm provided liquidation services and had set up a separate and distinct company to provide those services, then, indeed, that specific company's professionals would form part of the count in regard to the actual trader licence fee. <u>This specific stratification based on the number of professionals deals with the group of companies</u>. In other words, if you have an individual firm that has a number of companies that form part of the overall group and they provide services, then all the professionals would be included. However, those professionals who provide services directly to the firm's internal purposes such as their accountant, if it is a law firm or an architecture firm, they would not be included in the count because they would not be a professional who directly impacts the revenue capability of the professional services firm.

It is proposed in regard to accounting or audit firms that if the firm has one to five accountants and other professionals qualified in other disciplines that impact directly on the revenue capability of the firm, that specific firm would be exempt from <u>any trader licence requirement.</u> The reason for the exemption is primarily due to the fact that the Government believes it necessary to encourage those Caymanians who wish to start their own practices to do so. This exemption seeks to give them that capability in the early years in which they seek to grow.

In other words, Madam Speaker, if a single lawyer were to desire to go out and practice, he would not have to pay <u>any trader licence fee</u> . What would happen is, as his firm continues to grow, up to five lawyers would be exempt. <u>The same would be for accounting firms. For six to ten accountants and for other professionals directly related to the group, the fee would be $15,000; 11 to 15 persons it would be $30,000; 16 to 20 would be $45,000; 21-25 would be $160,000, and 26 and over would be $300,000.</u>

In regard to other professional firms, which include any professional association of firms who work together and are required to have some specific professional designation in order to carry out their duties as architects, engineers, actuarial or any such professionals, again one to five professionals would be exempt from the annual trader licence fee requirement. Six to ten would be required to pay an annual fee of $15,000,11 to 15 would be $25,000; 16 to 20 would be $40,000; 21 to 25 , $50,000; 26 and above would be $100,000..."

(My emphasis)

136. The Respondent has also sought to rely upon a later speech by Mr. Glidden, the Leader of the Government Business on 19 December 2001 in a debate on the budget. The Applicants also rely upon the passage. I am of the view that this speech satisfies the guidance proferred in ***Pepper v Hart***, as modified in later cases.

137. Mr. Glidden stated as follows during the debate:

"I also need to speak about the bands that were established. There was much discussion about the bands that were established for the firms and how it appeared that those bands were intended to be a disincentive for the law firms or the accounting firms to increase in size. ***This is one of those points that I see as complementary, but just to make sure that everyone understands the reason for bands; there was some discussion or recommendations made that it should be on an individual basis. The problem with doing it on an individual basis is, if you have a company and you have five members and you have to move to six members there is going to be an increase in your trade and business licence of some $5,000 or $10,000, so you are going to think about that increase. Then when you want to move from six to seven you are going to have another $5,000 or $10,000 so you are also going to be thinking about that increase and for every increase there will be further consideration of the costs.***

What the band system will accomplish is that when the company grows from the size of five and they move to six and they pay that additional fee, very quickly they will realize that they have the leeway now from going from five to ten without worrying about any other increases. From a business perspective it makes sense for them to then go out and invest in more Caymanians and train more people to move from being at the start of that band to now being at the end of it, because they are paying the same amount anyway. What company would want to stay at six members knowing they could also be at ten and not pay anymore? If I had to pay additional for moving from six or seven, and from seven to eight, and from eight to nine, I can see that as being a disincentive... *"*

(My emphasis)

138. The extracts from the speeches of Messrs. Anglin and Glidden do seem to support the Applicants' contention as to the correct interpretation of the Law. In neither speech is there any mention that the Firms would continue to pay the Per Professional Fee. The

statements also suggest that small Accountancy Firms of 1-5 Accountants and other professionals would not have to pay any trader licence fee whatsoever.

139. These statements are, of course, simply part of the legislative background.

140. As Lord Nicholls of Birkenhead cautioned at page 399 of ***Spath Holme***:

> *"If, however, the statements are clear, and were made by a minister or other promoter of the Bill, they qualify as an external aid. In such a case the statements are a factor the court will take into account in construing legislation which is ambiguous or obscure or productive of absurdity. They are then as much a part of the background to the legislation as, say, Government white papers. They are part of the legislative background,* ***but they are no more than this****. This cannot be emphasized too strongly. Government statements, however they are made and however explicit they may be, cannot control the meaning of an Act of Parliament. As with other extraneous material, it is for the court, when determining what was the intention of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a Government statement.* ***The weight will depend on all the circumstances.*** *For instance, the statement might conflict with the principle of interpretation that penal legislation is to be construed strictly."* (My emphasis)

GRAND COURT - CAYMAN ISLANDS

The Legal Practitioners' Law - Whether Acts *in pari materia* or whether similar principle can be applied

141. The Applicants submitted that the position of lawyers under ***the 2002 Order*** and, subsequently, ***the Legal Practitioners' Law*** is insufficiently similar for these principles to apply. Whilst the Respondent accepts that there may be some fundamental differences between the pieces of legislation, Mr. Bowen QC nevertheless submits that some weight may be placed on the *in pari materia* principle. It was submitted that this is so because lawyers are in a materially identical position to accountants, in that they both pay an "*Annual fee*" (which the Respondent says is the equivalent of the Per Accountant Fee) and an Annual Licence Fee (the equivalent of the Per Firm Fee). It was submitted that the

GRAND COURT · CAYMAN ISLANDS ·

Hansard debates confirm that the legislative intention was to treat lawyers and accountants in the same fashion both at the time that the Banded Firm Fee was introduced in ***the 2002 Order*** and (when it became apparent that it was not enforceable against lawyers), when the ***Legal Practitioners' Law*** was amended by the ***Legal Practitioners (Amendment) Law 2002***.

142. In my judgment, it is relevant to have regard to the fact that the Legislature originally intended to deal with both lawyers and accountants under ***the 2002 Order***, where the Banded Firm Fee was first introduced. Reference was made by the Respondent to the Statements of the Mover of the new ***Legal Practitioner's (Amendment) Law*** in the Legislative Assembly, MLA Hon. Mr. David Ballantyne. However, having looked at this speech, I am of the view that it is not clear what is being stated and therefore it does not satisfy the test in ***Pepper v Hart.*** To be of assistance as an external aid, the parliamentary statement relied upon must be clear and unequivocal, and that is not, respectfully, the case with Hon. Mr. Ballantyne's speech. I therefore exclude it from consideration.

143. The statement of Mr. Anglin at pages 810 -811 of Hansard, who also spoke on the subject, does however, in my view, meet the required standard and is admissible as an external aid. Mr. Anglin stated:

> *"Certainly, it is attractive and much simpler to have a fixed fee, but as all Honourable members know in this process, first of all you have to determine the amount of money the Government seeks to raise with this particular revenue measure; that is your base. There is also a base of the numbers of attorneys that are here.* ***When you take the amounts being sought to be raised, which is just over a million dollars*** *....*
>
> *...*
>
> *The Government looked at this. We went through the pains of working out precisely how much money we needed to raise and how much money firms would have to pay going on a fixed-fee basis or going on a banding basis. Now, I know that it has been said that this Government has not said things in their budgets, but anyone who knows economics, or anything about*

business and how the real world operates, would see that yes, you see just a bunch of numbers but there is a specific policy behind going this route. ***It is to encourage Caymanian law firms to start out without having to pay a fee up to their first 5 attorneys, and all the way up to 20 attorneys you are at a distinct advantage in terms of this banding system. That is purposely done.***"

(My emphasis)

144. In my judgment, this extract suggests that there appears to have been an intention to treat Accounting Firms and Firms of lawyers in the same way in relation to Banded Fees. Indeed, the Operational Licence Fee for law firms appears to be very similar to the Per Firm Fee for Accountancy firms.

145. The Respondent has sought to argue that the position of the two fees for the Accountants was the same as had been contemplated for the lawyers. However, it is noteworthy, that in the ***2002 Order***, there was no attempt to have both a Per Professional Fee as well as a Banded Firm Fee for lawyers; only a banded fee for law firms was added. It is in my view untenable to say that this was because it was contemplated that law firms already paid a Per Professional Fee under the ***Legal Practitioners Law (1999 Revision).*** This is because one would then have expected the Legislature to appreciate at the time of ***the 2002 Order*** that section 3(a) of ***the 2001 Law*** stated that the Law did not apply to any trade or business licences to be carried on under any other law without reference to ***the 2001 Law***. Therefore it is not unreasonable to infer that the draftsman would at the same time appreciate that law firms could not be included in ***the 2002 Order***. Further, there are a number of differences between the Per Accountant Fee and the Practicing Fee for lawyers. This includes the fact that under the ***Legal Practitioner's Law***, a law firm is liable only for its operational licence fee (i.e. not the individual Attorney's Practicing Fee), the payment of which would entitle the law firm to an operating licence. The failure of an attorney to pay its Practicing Fee does not invalidate a law firm's Operational Licence. However, by contrast, failure of a business to pay any applicable licence fee under ***the 2007 Law*** would invalidate or adversely affect the business' trade

and business licence. Under the ***Legal Practitioner's Law***, the individual lawyer pays the practicing fee to the Clerk of the Court.

Public Accountants Law

146. Indeed, the Applicants submit that the Practicing Fee under the ***Legal Practitioners' Law*** is much closer in nature to the annual licence fee which was payable by public accountants under the ***Public Accountants Law (2009 Revision)*** (***"the Public Accountants Law")*** and which imposed this requirement upon individual public accountants at the material time.

147. "*Public accountants*" are those engaged in public practice. "*Public accounting services*" means "*the signing, affixing or associating of one's name or the name of the firm of public accountants of which one is a partner, director or the holder of an equivalent position to any report or certificate expressing any opinion on a financial statement based on an audit or other examination*" (subject to certain exceptions).

148. Part III of the ***Public Accountants Law*** dealt with registration and licensing of public accountants. Qualified members were required to pay annual registration fees of $100 under the ***Public Accountants (Membership and Licences) Regulations (2008 Revision)***. Additionally, those members of senior standing, being sole practitioner public accountants, or partners, directors or persons holding an equivalent position in a firm of public accountants, wishing to practice as "*public accountants*" were required to be licensed under the ***Public Accountants Law***, registered as such, and were required to pay a fee for such license of CI$3,000 per year. These fees have since been increased and are now payable pursuant to the ***Accountants Law 2016***.

149. Accordingly, in addition to the trade and business license fee for Accountancy firms, members of the Cayman Islands Society of Professional Accountants (**"CISPA"**) who were registered as public accountants also paid licensing fees under the ***Public Accountants Law.*** This fee is payable to CISPA, which serves as the regulator for accountants in the Cayman Islands – see the Second Affidavit of Stuart Sybersma, paragraph 14.5.

150. Under the ***Legal Practitioners Law*** upon payment of the Practicing Fee to the Clerk of Court, the individual Attorney is issued a practicing certificate which entitles them to practice as an attorney-at-law.

151. In my judgment, the fee that public accountants had to pay under the ***Public Accountants Law*** was more analogous to that which lawyers pay under the ***Legal Practitioner's Law*** than is the Per Accountant Fee under ***the 2007 Law***.

152. However, I do not think this takes the matter much further. In any event, section 28 of the ***Public Accountants Law*** provides that nothing in Part III derogates from the provisions of ***the 2007 Law***.

Contemporaneo Expositio

153. In my judgment, there are aspects of the post-enactment history of ***the 2002 Order***, the *contemporanea expositio* that should be taken into account.

154. Section 231, as referred to at Bennion pages 653-654, is discussed as follows:

> *"**POST-ENACTING HISTORY***
>
> *Section 231. The basic rule regarding post-enacting history.*
>
> *In the period immediately following its enactment, the history of how an enactment is understood by the profession forms part of the contemporanea expositio, and may be held to throw light on the legislative intention. The later history may, under the doctrine that an ongoing Act is always speaking, indicate how the enactment is regarded in the light of developments from time to time.*
>
> *Comment on Code section 231.*
>
> *Nothing that happens after an Act is passed can affect the actual legislative intention at the time it was enacted. Nevertheless there are two post-enactment factors, examined in this section, that may affect interpretation.*

Contemporanea expositio. The concept of legislative intention is a difficult one. Contemporanea expositio helps to show what people thought the Act meant in the period immediately after it was passed. ..."

155. With the exception of the Second Applicant, Deloitte and Touche, it appears that all of the parties - the Government, and those responsible for paying the fees - took the view that both the PPF and the Banded Firm fee were payable. Indeed, although the Board attached payment of the Per Accountant Fee as a condition to the licence renewals (but did not really seek immediately to enforce as a condition as such), the Respondent relies upon evidence that it attached such conditions. Reliance is also placed by the Respondent on an email from Mr. Jefferson to Ms. Dixon, expressing his view that two fees were payable.

156. I am of the view that all of these elements comprise evidence admissible as part of the *contemporanea expositio*.

157. It does seem somewhat strange to me that well-resourced accountancy firms such as the Applicants would have continued to pay the two sets of fees for years without getting definitive legal advice. The answer by the Applicants is that the firms did not take legal advice, or fulsome advice for years - see the Applicants' Skeleton Argument paragraph 21.3, and the letters from KPMG to Mr. Jefferson dated 3 February 2008 and to the Board dated 3 February 2009.

158. However, as is pointed out in *Bennion*, whilst this evidence may throw light on legislative intention, it cannot of course affect the actual legislative intention at the time that the Law was enacted. What people thought ***the 2007 Law*** meant is only examined in order to throw some light on the search for the one right meaning that this Court is embarked upon. It may well be that the degree of difficulty of the question of statutory construction involved in this case contributed to the level of disagreement, uncertainty, and long-lasting nature of the dispute.

The Differential Treatment Argument

159. In my view, the Applicants did not in a timely and proper manner raise the issue of allegedly being treated differently than other occupations or businesses, and thus I raise it here to eliminate it from my overall consideration of the main issue. This was not one of the grounds the Applicants relied upon when seeking leave to apply for judicial review. Although some considerable time has in fact been spent addressing this issue by both sides (including the application to reopen), upon reflection, this is not a point that should be, or is in any position to be adjudicated upon. In any event, it really seems to have been added by the Applicants more in the nature of an afterthought.

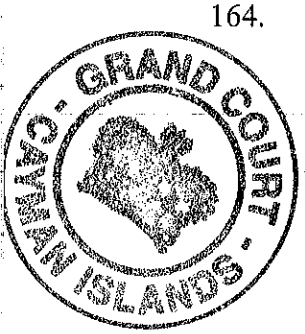
160. In my judgment, the evidence from the Respondent that they did a search and only found one license for a firm of architects which referred to two fees being payable, but which firm seems to have been exempt from paying the Banded Fee because of its small size, does not assist in taking the matter of proper construction of ***the 2007 Law*** any further. However, it is true to say that even if the Respondent was not under a duty to carry out more extensive searches than it did, those which it did carry out do not support a case that architects paid both the Per Professional Fee and Per Firm Fee.

161. At the end of the hearing there was some attempt to say that the Court itself would not be handling the issues fairly if I were to deal with this differential treatment point in the absence of other professionals such as architects. I therefore wish to make it clear that I have not sought to make any ruling about this issue.

162. The point is that the evidence addressing this issue has not assisted me in arriving at a resolution of the issues properly raised, (and in respect of which leave was granted), to the Applicants in this case.

163. More importantly, the real question is whether the interpretation by the Respondent that the Applicants should pay the two sets of fees is correct.

The Proper Construction of the relevant provisions of *the 2007 Law*



164. Prior to ***the 2002 Order*** adding "*Accountancy Firms*", and banded fees, it was the case that the Schedule was divided into sections, the first of which was headed "*Professional*". Under this head were numbered paragraphs (Items) separately identified as trades or businesses. They were in alphabetical order with their associated fee. The Schedule then continued with the same basic format under the headings "*Trade and Technical*" followed by "*Commerce*" "*Industry Agriculture and Primary Activities*" and concluding with "*Miscellaneous*".

165. After ***the 2002 Order*** adding *"Accountancy firms"* and banded fees, and as it appears in ***the 2007 Law***, the Schedule retained its general basic format of being divided into sections, and so forth as described in paragraph 164 above.

166. Further, ***the 2002 Order*** did not make any changes to sections 12 and 14 as they existed under ***the 2001 Law***. Those sections continued to have the same wording in ***the 2007 Law.***

167. I am of the view that the context of the Law does suggest that the use of the phrase "*the fee*" in section 14 was intended to be singular and not plural, as it is being used to identify that for each business "*mentioned in the Schedule*", (section 12) there is a single applicable fee which must be paid (section 14). It is to be noted that section 12 does not speak about "*<u>any</u> trade or business mentioned in the Schedule*", or "*respective trades or businesses*", or "*each type of trade or business*"; it speaks about "*<u>a</u> trade or business mentioned in the Schedule*".

168. In my judgment, the scheme of the legislation plainly contemplated that it was necessary to ascertain which business activity in the relevant category of the Schedule one falls under and then pay the fee applicable to that numbered business activity. There is nothing in the body of ***the 2007 Law*** to suggest that one would be required to pay the fees applicable to more than one business activity unless one was carrying on two separate businesses.

169. Sub-section 14(4) of ***the 2007 Law*** empowered the Board to examine whether an applicant's trade or business has been correctly described, "*or that the appropriate <u>fee</u>*

GRAND COURT · CAYMAN ISLANDS ·

has been tendered." (My emphasis) It is plain that if the Scheme of the Law intended that one trade or business could attract two fees and not one, this would have been the place to say so.

170. The portion of the Schedule under the heading *"Miscellaneous"* that states *"Any other business or trade not specified herein in which a service is offered for reward - $300"* also supports that interpretation.

171. In my judgment, section 4 (b) of the ***Interpretation Law*** cannot therefore be used to pluralize the word *"fee"* in section 14 because the subject, or alternatively the context of ***the 2007 Law***, is inconsistent with such construction.

172. It does seem to me that in those circumstances, and against that background, if the intention of the Legislature was to register a change to the scheme of the Law by requiring that one specified business, an *"Accountancy firm"* is also required to pay a fee for a separately specified business *"Accountant"*, then clear wording was required. Once the specialised business of *"Accounting firm"* made its appearance in the Schedule, then those Accounting firms that fell within the Bands for paying the Per Firm Fee, would be entitled to construe ***the 2007 Law*** as requiring them to pay this Fee, and not to pay under the less specific head of *"Accountant"* in Item 1, as they had in the past.

173. Although not their strongest point, there is, on balance, some merit to the Applicants' argument that the word *"firm"* was used to distinguish from the word *"business"* where other accountants are employed. Thus whilst the word firm is defined as meaning *"a company, a partnership or other business enterprise"*, the case that two fees are payable would certainly have been clearer if Item 1 had been amended at the same time as the addition of the term *"Accountancy Firms"* in Item 2, to say in Item 1 *"that a fee of $2,000 is payable for each professional member of the business or Accountancy Firm"*.

174. There is yet another feature of ***the 2007 Law*** that in my view sets the category that became Item 2 in ***the 2007 Law*** apart from the category of *"Accountant"* in No. 1, or indeed, any other category of professionals. It is only under category 2 that the term *"other professionals"*, which was defined for the first time in ***the 2003 Law***, (apart from

the firm of lawyers before that expression was removed), are included in the count for the Banded Fee, or indeed, any other Item. Those other professionals, for example could be a trust company or professionals providing liquidation services, referenced by Mr. Anglin in Hansard 1351-1352 (See above at paragraph 135). In my judgment, there is a distinction between the term "*other professionals*" in Item 2, who comprise part of the head count for Accountancy firms for the Per Firm Fee, and the term "*each professional*", in Item 1. The concept of Accounting Firm as being different from that of Accountant in Item 1 gains some traction from this difference in language and composition of the headcount for the purposes of the Banded Fee. This also points away from construing the ***2007 Law*** as meaning that the Applicants had two fees to be paid, both under Item 1 and under Item 2.

175. On the other side of the equation is the fact that Item 1, "*Accountant*" was not removed from ***the 2007 Law*** and its wording remained the same/unaltered. Prior to the ***2002*** Order, this item "*Accountant*" was formerly the head of business under which Accountancy firms paid their fee for their annual licence. However, the term "*Accountant*" was not defined. The law simply stated what it included, even for example, terms or occupations which are not a natural or normal fit, indeed, which were an exceptional meaning, such as "*Actuary*".

176. The Banded Firm Fee was initially introduced under ***the 2002 Order*** as Item 1A, which means it was introduced into the same paragraph as "*Item 1*" – which mentioned "*Accountant*".

177. Additionally, the Per Professional Fee was increased from $750 to $1500 in June 2001 by the ***Trade and Business Licensing (Variation of Fees) Order, 2001,*** and from $1500 to $2,000 by the ***Trade and Business Licensing Order, 2006***. This would support an argument that both Item 1 and 1A (subsequently, it seems, rebranded Item 2 in ***the 2007 Law***) were intended to be of some efficacy.

178. However, there are additional reasons why I say that the terms of ***the 2007 Law*** are quite unclear. There are a number of changes that ***the 2002 Order*** made to the Law. It added the term "*Accountancy firm*" but did not define it. Whilst the term "*Accountancy firm*" is

GRAND COURT · CAYMAN ISLANDS ·

not defined in the Law, it seems obvious to me that it is a term that has an ordinary, common and natural meaning; it has a proper and most known signification. It is a specialised term signifying certain types of professionals. In my view, the Hansard extract discussing the introduction of the Per Firm Fee support this specialised most known, meaning in reference to Accountancy firms within the financial services industry.

179. The word "*Accountant*" on the other hand, in regular parlance has a far less fixed, specialist or specific meaning. Indeed the expanded meaning in Item 1 applied itself, it would seem, without too much difficulty for some time, to the term "Accountant".

180. It is probably easier to identify what is not the ordinary and natural meaning of the term "*Accountancy firm*". In my judgment, the ordinary and natural meaning of the term "*Accountancy firm*" is not a simple grouping of the persons described as being included in the term "*Accountant*" under Item 1 of ***the 2007 Law***. This is supported by the fact that the definition of *"professional"* includes *"accountant"*, but yet also, for example, includes "*actuary*". In my judgment, that supports a construction whereby one term is not just a sub-set of another.

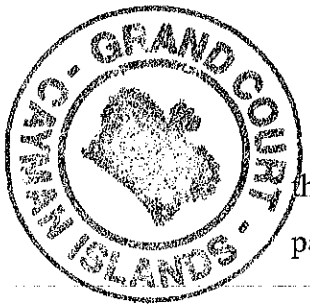
181. In other words, there is all the difference in the world between saying what a term "*includes*" and saying what it *"means"*. One cannot therefore say, for example, that since in the mention of A*ccountant*" in Item 1, the word *"Accountant"* includes actuary, the word *"Accountant*" in Item 2 or the term "*Accountancy firm"* mean or include *"Actuary"* or a firm of Actuaries respectively.

182. I accept Mr. Imrie's submission that a firm of actuaries cannot reasonably be considered an Accountancy firm under Item 2; that would be very strange and unnatural, and it seems illogical to consider that to be proper construction of ***the 2007 Law***. A firm of actuaries would in my judgment, though it is not necessary to so decide for present purposes, if the number of them exceeds 5, have been obliged to pay the lower banded fees set out at Item 10, and not the banded fees set out at Item 2. If it was the DCI's view, as stated at paragraph 10 of Rajkumarsingh 4, that a firm of actuaries is an Accountancy firm within Item 2, I say, respectfully, that that is plainly the wrong interpretation.

183. In my view, the word "*Accountant*" in Item 2 discussing "*Accountancy firms*" must be given the meaning of Accountant in an Accountancy firm and not the expanded meaning such as is set out in Item 1. The word "*Accountant*", used when describing the numbers of accountants for the purposes of calculation of the Per Firm Fee, means an Accountant in an accountancy firm. The fact that ***the 2007 Law*** tells us what the word "*Accountant*" includes in Item 1 (which inclusion was mentioned from an earlier version of the Law - ***the 2001 Law***) is not the same thing as saying that wherever the word "*Accountant*" is used, particularly in later renditions of the Law ***(the 2002 Order)***, it means all of the terms it includes in Item 1. (My emphasis)

184. In other words, reference to the word *"Accountant"* and to the different term *"Accountancy firm"* is in my judgment, highly contextual. There are a number of indicators as to the existence of different contexts and the fact that the words have to be construed accordingly in ***the 2007 Law***. Some of these that I have identified are (a) the fact that Item 1 states what the term *"Accountant"* includes, but not what it means. It does not purport to provide a definition; (b) the fact that *"Accountant"* in Item 1 includes terms that do not naturally fall within the meaning of the word "*Accountant*", for example "*Actuary*"; (c) the differences in terms, "*Accountant*" and "*Accountancy firm"* as well as *"business"* as opposed to "*firm*"; (d) the element of timing - the fact that the terms included in the term *"Accountant"* in Item 1 consist of language that pre-existed ***the 2002 Order*** ; (e) the fact that ***the 2002 Order*** introduced a brand new concept of banded fees; (f) the fact that the banded fees introduced very large increases over the previous Per Accountant Fee regime, particularly, and progressively, for the larger Accountancy firms; (g) the fact that there was an exemption created for Accountancy firms of 1-5 Accountants and other professionals in relation to newly created Item 2, but no express exemption in relation to the pre-existing Item 1; (h) the definition of "*other professional"* under ***the 2003 Law***; (i) the fact that ***the 2002 Order*** introduced the Banded Fees for Accountancy Firms, as a "*new"* item, and not an "*additional"* one.

185. These indicators of context in my judgment support the Applicants' case that after the introduction of the Per Firm Fee, they were liable for one, and not two fees in respect of



their trade and business licenses, and that it was the Per Firm Fee under Item 2 that was payable.

186. I appreciate that this calls for there being two different concepts or meanings of the word "*Accountant*" in the same Schedule of ***the 2007 Law***. However, that can be warranted if the meaning of the provisions under consideration are ambiguous and obscure and where it is untenable to treat the word as bearing the same meaning for both Item 1 and Item 2 in all contexts. See for example the judgment of the Judicial Committee of the Privy Council on appeal from a decision of the Court of Appeal of the Cayman Islands, in ***Michael Pearson v Primeo Fund (In Official Liquidation)*** [2017] UKPC 19, delivered July 2017 and the discussion (some of it obiter) at paragraphs 31-35 (inclusive). It is also more readily warranted when there is no definition of the term, but only a provision as to what the term includes in one provision of the legislation. The core of the matter is that context is crucially important.

Small Accountancy Firms 1-5

187. It is necessary to consider whether the Accountants that were in Accountancy firms of 1-5 Accountants and other professionals would have to pay the Item1 Per Accountant Fee, and if so, whether that would defeat the Applicants' arguments.

188. I have noted that under ***the 2007 Law***, persons such as barbers, tailors and others carrying on a business of their own, have to take out an annual license and have to pay some fee (albeit in a much smaller range – both barbers and tailors $150 each)) in order to carry out their trade in the Cayman Islands. It therefore seems to me, that even if the Government wanted to encourage small Caymanian firms to grow and expand and not be burdened with high fees, that could still be achieved, (as Mr. Jefferson opined in his affidavit), even if those firms consisting of 1-5 Accountants and other professionals had to pay the Per Accountant Fee under Item 1. In my judgment, it seems reasonable to construe the Law, as Mr. Jefferson had, as meaning that the Per Accountant Fee would have to continue to be paid in respect of Accountants in relation to small firms that were exempted from paying the Per Firm Fee for Accountancy Firms. Whilst the Hansard discussion took place along different lines, I do not attach much weight to those

GRAND COURT - CAYMAN ISLANDS

statements as an external aid. This is because it is plain that the overwhelming focus was on the new innovative banded Per Firm Fee regime.

189. Section 12 of ***the 2007 Law*** indicated that every person carrying on a trade or business shall take out a licence unless exempted under section 3. (My emphasis)

190. The small Accountancy firms were exempted from paying the Banded fee under Item 2 of the Schedule. However, they were not exempted under section 3 from taking out a license. Nor were they exempted from applying for renewals of their licence, which would require payment of a fee set out in the Schedule.

191. The small Accountancy firms were not exempted from paying a fee under Item 1, under which they had formerly paid the fee, and ***the 2007 Law*** plainly required licence renewal.

192. In my judgment, since carrying on a trade or business attracted a fee, the small firms were intended by the Legislature to continue to pay the Per Accountant Fee. Otherwise one would either by interpreting the Law as meaning they did not need a licence, or they would get renewed licences for free. That seems untenable to me.

193. Accountancy firms prior to ***the 2002 Order*** paid a fee under Item 1 of the Schedule. At that time, there was no more appropriate Item to match their business. Since they would have to have a licence to carry on their business, then it was appropriate to treat such firms as attracting a fee under Item 1. However, if it is accepted that the Scheme of the legislation was one fee per business or trade, once an Item was added which more appropriately matched their trade or business, then Accountancy firms in respect of whom the Per Firm Fee was payable under Item 2, could no longer, in my judgment, be construed as having an obligation to pay a fee under Item 1. Nevertheless, those Accountancy firms, the small firms of 1 – 5 Accountants and other professionals who were exempt from paying a fee under Item 2, would still be liable to pay a licence fee for their businesses since they were not exempt under section 3. The only Item which could apply to their Accountancy businesses was that which indeed had applied in the past, and under which they had paid a fee, and that was Item 1.

194. In my judgment, to so interpret ***the 2007 Law*** does not defeat the Applicants' arguments because the provisions are ambiguous and obscure. Although these small Accountancy firms were Accountancy firms, since they were exempt from the Per Firm Fee under Item 2, they would continue to be included under the expanded meaning of "*Accountants*" in Item 1. Reasonable statutory interpretation and commerciality say that they must be covered under some Item in the Schedule. This interpretation is complex, but the Court simply has to do the best it can, bearing in mind commerciality and reasonableness, and paying proper regard to the provisions construed in context.

Other Businesses under Item 1 – Not Deprived of Meaning

195. However it is that the DCI may have, in practice, interpreted ***the 2007 Law***, I am of the view that businesses that are not Accountancy firms but which nevertheless employ accountants, auditors, actuaries, bookkeepers or statisticians who are charged out to clients, and which do not require another form of licensing or regulation under another Statute, would be liable for payment of the fee set out in Item 1. I am also of the view that firms of professionals other than Accountancy firms, consisting of professionals who are included within the expanded definition of "*Accountant*" in Item 1, for example actuary, statistician, but whose firm is exempt from Item 10 because they only number 1-5, would also be liable to pay the Fee under Item 1. Item 1 therefore plainly still was designed to bring in licensing revenue and would not be deprived of meaning if the Applicants' interpretation is correct.

Principle of Doubtful Penalization

196. In the ***Barclays Mercantile*** case it was held that a taxing statute was to be applied by reference to the ordinary principles of statutory construction by giving the provision a purposive construction in order to identify its requirements.

197. In ***R (Edison v Central Valuation Officer)*** [2003] UKHL 20, at paragraphs 116 and 117 Lord Millett discussed the presumption against double taxation as follows:

> *"[116] This shows that the presumption against double taxation is not a strong presumption which gives effect to a high constitutional norm, like*

the presumptions against the abrogation of the privilege against self-incrimination or legal professional privilege. It is rather a species of a wider genus, viz the presumption that Parliament intends to act reasonably (see IRC v Hinchy [1960] 1 All ER 505 at 512... per Lord Reid). The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.

[117] But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it...I do not, therefore, find it profitable to discuss whether the effect of the 1994 order amounts to 'double taxation' or 'double assessment' (whether straightforward or not) or the rather less objectionable 'double recovery'. I would prefer to go straight to the real question: ***whether the scheme established by the 1994 order is so oppressive, objectionable or unfair that it could only be authorized by Parliament by express words or necessary implication."***

(My emphasis)

198. At paragraphs 137 and 138 Lord Scott discussed the fundamental right of legal professional privilege. In contrast, he discussed the presumption against double taxation in paragraph 139 as follows:

> *"There are no doubt other rights whose fundamental importance may justify similar reverence but I need not try and identify them for it is surely clear that the so-called presumption against double taxation or double recovery does not derive from a fundamental right of that character.* ***There is no fundamental right not to be taxed, or not to be taxed in a particular way or at a particular time. The so called presumption against double taxation is in reality no more, and no less, than the formulation in a taxation context of the broader interpretative presumption that***

GRAND COURT · CAYMAN ISLANDS ·

Parliament does not intend that legislation should bring about results that are unreasonable or unfair or arbitrary."
(My emphasis)

199. As so aptly expressed in the case above, there is no fundamental right not to be taxed in a particular way and at a particular time. However, in my judgment, it would be surprising, arbitrary and illogical, to introduce a new system of bands, which requires Accountancy firms to pay much higher fees as a result of the Per Firm Fee regime, and to expect that the Per Accountant Fee would still remain payable by these firms in respect of Accountants already included in the headcount under Item 2, without express words saying so. Without express words thereby moving from a single fee per trade or business legislative scheme to one of multiple fees.

The 2014 Law

200. In ***the 2014 Law***, the Legislature has made it clear, and it is accepted on all sides, that both fees are payable. However, it has used express and explicit language to do so. In my judgment, it is not permissible to refer to Hon. Mr. Panton's statement about the effect of ***the 2014 Law*** or Mr. Rajkumarsingh's comments thereon because to have regard to the expressed intentions about what was or was not the intention of the proposed ***2014 Law*** would beg the question as to the correct interpretation of ***the 2007 Law.*** Therefore, that exercise would not assist the Court. That is particularly so because the dispute between the Respondent and the Applicants was already extant at the time of the discussions about passing ***the 2014 Law***.

201. In ***the 2014 Law***, the first words in Item 2 of the relevant section of the Schedule (Schedule B), make it plain that both fees are payable. It is expressly there stated that *"the fee in No. 1 for each accountant employed to the firm is in addition to the fee set out below-*

"(a) A firm of 1-5 accountants and other professionals	*Exempt*
(b) A firm of 6-10 accountants and other professionals	*$20,000*
(c)	

GRAND COURT - CAYMAN ISLANDS

..."

202. However, it is important to note that the sections dealing with the requirement for a license, and applications for a license, have also changed. This wording should be compared to the wording of sections 12 and 14 of ***the 2007 Law***.

203. Subsections 17(1) and 18(1) provide as follows:

> *"Part 3 - Licensing*
>
> *Requirement for license*
>
> *17(1) A person shall not carry on a trade or business in or from within the Islands unless that person holds a valid license issued under this Law* ***for each type of trade or business that the licensee is carrying on*** *and in respect of each location from which such trade or business is being carried on, except where the provisions of this Law do not apply to the person.*
>
> .....
>
> *Application for grant or renewal of a license*
>
> *18(1) Any person carrying on a trade or business shall, unless excluded from the application of this Law, apply to the Board for the grant or renewal of a license* ***in accordance with the respective categories of trade or business set out in Part B of Schedule 1.***"
>
> (My emphasis)

204. In my judgment, this is an example of the type of language that could have been used, and should have been used if the Legislative intention was to charge Accountancy firms two fees under both Items 1 and 2.

Disposition

205. I have had regard to the relevant statutory provisions construed in their context, and have considered closely the statutory purpose of ***the 2007 Law*** as a whole, and the specific

provisions in particular, Items 1 and 2 of the Schedule to ***the 2007 Law***. Having regard to all internal and external aids, including admissible Hansard Reports, it is my judgment that it was the legislative intention to charge the Accountancy Firms that were not exempt only one fee for their trade or business and that it was the Per Firm Fee set out in Item 2 of the Schedule. Unless the term "*Accountant*" in item 1 of ***the 2007 Law*** is construed as not including Accountants who have already been counted within the number of Accountants or other professionals for determining the Per Firm Fee payable by Accountancy Firms in accordance with Item 2 (consisting of more than five Accountants and other professionals), that would give a meaning that would be contrary to the Scheme of the Law as it then existed. Further, an interpretation of ***the 2002 Order*** and ***the 2007 Law*** as imposing such substantial increases by way of the Bands, yet at the same time, without express language such as exists in ***the 2014 Law*** making it clear that the Per Accountant Fee was also payable, would be illogical and arbitrary.

206. I am of the view that the points of law and statutory interpretation involved in the appeals were of the utmost difficulty. One can well understand how conflicting views occurred, and how the Respondent may have arrived at the views it did. There was more than ample room for reasonable people to be in disagreement. Indeed, this dispute has survived and been roaming for many years. However, in light of my views expressed above, I have determined that the Respondent erred in its construction of the correct meaning of ***the 2007 Law*** and of the fees payable by the Applicants. The Decision was therefore unlawful and this Court is duty bound to interfere.

Declaration 11 (d) – Re: Requirement to Pay Further Sums or Entitlement to Refund for Overpayment

207. I refer to the declaration sought in the Notice of Motion set out at paragraph 11(d) above. In September 2014, the DCI by letter requested arrears of the Per Accountant Fee from all of the Applicants – see paragraph 21 of Rajkumarsingh 1. The DCI appear to be reserving their position with regard to amounts potentially recoverable by the Applicants from the Board, in the event that the Applicants succeed on this Application. At paragraph 26 of Rajkumarsingh 1, it is stated that "*no restitutionary claims have been made and the Board reserves its position in the event that such claims are made*". On the

other hand, paragraph 27 states that if the Application for judicial review is unsuccessful, (subject to any appeals), the Board will seek to recover the arrears requested in September 2014, together with further arrears accruing since 2014 and 2015.

208. At paragraph 12 of his Second Affidavit, Mr. Sybersma responds on behalf of the Applicants and indicates that they do not accept the Board's evidence as it relates to any payments that may result from the Court's determination of these proceedings. He states that the issue of such payments will be addressed on an individual basis, as may be necessary, following the conclusion of these proceedings (subject to any appeals).

209. In the circumstances, I am prepared to declare that the Applicants are not required to pay any additional fees. However, I am not minded to make a declaration in respect of refunds of overpayments, as sought in the latter part of the declaration.

COMMENT

210. The Board under ***the 2014 Law*** has even more extensive powers than it had under the 2007 Law to deal with issues arising in relation to Licensing and fees. I trust that this will assist in ensuring that long-standing disputes such as the one in this matter become a thing of the past.

DECISION OF THE RESPONDENT QUASHED AND DECLARATIONS MADE

211. The Decision being unlawful, and there being no discretionary bars to the grant of relief, I grant the order of Certiorari quashing the Decision, and the declarations and costs, as set out at sub-paragraphs 11 (a) – (c) and (e). In respect of (d), I declare that the Applicants are not required to pay any additional fees in respect of their trade and business licence renewals between 2002 and 2012.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

GRAND COURT · CAYMAN ISLANDS ·