Michaelmas Term
[2017] UKPC 29
Privy Council Appeal No 0036 of 2016

JUDGMENT

Meadows and others (Appellants) *v* The Attorney General and another (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Neuberger
Lord Kerr
Lord Wilson
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

19 October 2017

Heard on 12 July 2017

Appellants

Nicholas Padfield QC

(Instructed by Sheridans)

Respondent (The Attorney General and another)
Marlene Malahoo Forte QC
Althea Jarrett
(Instructed by Charles Russell Speechlys LLP)

Respondent (Jamaica Public Service Company Limited)
B. St Michael Hylton QC
Sundiata Gibbs
Shanique T Scott
(Instructed by Myers Fletcher & Gordon)

LORD CARNWATH:

Introduction

1. This appeal raises the question whether, under section 3 of the Electric Lighting Act 1890, the relevant Minister had power in 2001 to grant to the second respondent ("JPS") an exclusive licence for the supply of electricity for 20 years for the whole of the island of Jamaica. The appellants represent certain local interests concerned to secure cheaper electricity on the island. Their principal objection is that the grant of such a licence is contrary to the policy of the 1890 Act, by creating a monopoly rather than promoting competition.

2. Section 3 provides:

> "The Minister may from time to time license any Local Authority as defined by this Act, or any company or person, to supply electricity under this Act for any public or private purposes within any area, subject to the following provisions -
>
> > (a) the licence may make such regulations as to the limits within which, and the conditions under which, a supply of electricity is to be provided, and for enforcing the performance by the licensees of their duties in relation to such supply, and for the revocation of the licence where the licensees fail to perform such duties, and generally may contain such regulations and conditions as the Minister may think expedient; …"

Subsection (b) provides that, in "any area or part of an area" in which the undertakers are not the local authority, the licence may provide for the local authority for "such area or part of an area" to exercise the powers of the undertakers in respect of the breaking up of streets and so on.

3. The agreed facts can be shortly stated. Before March 2001 the Government of Jamaica held the controlling (80%) interest in JPS. In that month it sold its interest to Mirant Corporation ("Mirant"). It was a condition of the sale that the Minister would grant to the company an exclusive licence under the Act. Such a licence was granted on 30 March 2001 for 20 years. The draft licence had been attached to the share purchase

agreement. Exemption from the Fair Competition Act was granted by an order made by the Minister under section 3(h) of that Act. The licence has since been extended for a further period of seven years.

4. Aspects of the 2001 licence were the subject of unrelated proceedings by JPS itself, which came before the Board recently (*Jamaica Public Service Co Ltd v The All Island Electricity Appeal Tribunal* [2017] UKPC 20). As there explained in that judgment, the operations of JPS are regulated by the Office of Utilities Regulation ("OUR"), a statutory body established under the Office of Utilities Regulation Act. The licence (inter alia) provides for the charges for electricity to be set by OUR in accordance with a complex formula set out in Schedule 3 to the licence (*ibid* paras 1-4). No issue arose in that appeal as to the validity of the licence itself.

5. The present proceedings were begun in 2011 for a declaration that the grant of an exclusive licence was not authorised by section 3. In the Supreme Court on 30 July 2012 Sykes J upheld the challenge in part, holding that, while the Minister had power under section 3 to grant a licence for the whole of Jamaica, he had (in the words of his declaration) no power "to grant a licence on terms which prevent other applicants from having their applications being considered genuinely".

6. On 16 January 2015, the Court of Appeal (in a judgment given by Brooks JA, with whom Panton P and McIntosh JA agreed) allowed the Minister's appeal on the latter issue and set aside the declaration, holding that there was no evidence to support the judge's view that the Minister had closed his mind to other possible applications (paras 88-92). They dismissed a cross-appeal on the first issue, with the result that the validity of the licence as granted was confirmed. The appellants appeal to the Board, with final leave granted on 14 December 2015.

Previous history

7. The grant of the 2001 licence can be seen in the context of the historical background, including the development of electricity policy for the island, as described in the evidence (in affidavits by Mr Dan Theoc, JPS Vice President of Finance, and Mr Fitzroy Vidal on behalf of the Minister). This shows that the policy for the integration of electricity supply on the island, and the grant of licences on that basis, did not begin in 2001 but had been established for many years. This appears to have taken place without legal objection until the present proceedings.

8. JPS was originally formed in 1923, when it took over the assets of the West India Electric Company. Until 1975 it was controlled by Canadian shareholders. From 1923 until 1966 its licence was limited to certain parts of the island, others being supplied by

individual, parish-based companies. In the 1950s, as Brooks JA noted (para 68), there were other developments:

> "Between 1957 and 1958 the supervision of the use and distribution of electricity in the island underwent an overhaul. The Electricity (Frequency Conversion) Act passed in 1957 required the use of a standard frequency for electricity throughout the island. The Electricity Development Act, passed in 1958, established the Electric Authority. The Electric Authority was designed to consider 'the needs for electricity throughout the island' (section 4(1)(a))."

9. In 1966 (apparently while the company was still under Canadian control) it was granted for the first time an "All Island Electric Licence" for a period of 25 years. The preamble to the 1966 Licence referred to the "vital" need for an adequate supply of electricity available to all parts of the Island at reasonable rates, and the intention "to integrate under one ownership and management" all the properties and facilities used for that purpose as "an all-island integrated electrical system"; and declared that its operations were to be regulated by an independent Public Utility Commission established by statute. In June that year there was enacted the Public Utility Commission Act, which established the Public Utility Commission. (That body was in 1995 superseded by the OUR established under the Office of Utilities Regulation Act of that year.)

10. In 1975 the Electricity Authority, a government agency, acquired 93% of the shares in JPS, to which, in 1978, the Minister granted a new 39 year All-Island Electricity Licence. According to Mr Vidal, the previous licensing regime had resulted in a significant differential in frequency of electricity supplied to consumers as well as in the price paid by the consumers. Consumers in rural parishes in particular had tended to pay more for their electricity due to the higher cost to supply those rural areas as against urban areas.

11. In the 1990s, the need for increased generating capacity to meet growing demand, combined with the Government's fiscal and budgetary constraints on JPS's ability to meet it, led to pressure for privatisation (encouraged by the International Monetary Fund). That provided the background to the negotiations which led ultimately to the sale to Mirant in 2001.

Grounds of challenge

12. Mr Padfield QC for the appellants seeks to challenge the 2001 licence on a number of grounds, which he applies with equal or added force to the "exclusive"

condition and to the extension for a further seven years. He criticises the Court of Appeal for adopting a "purely literal" approach to the construction of section 3, rather than by reference to the purpose and intention of the statute as a whole, viewed in the context of its historical and common law background. He relies generally on what he calls the common law rule against the grant of monopolies, affirmed as long ago as the time of Queen Elizabeth I (*Darcy v Allen* (1603), also known as *The Case of Monopolies* 77 ER 1260; 11 Co Rep 84b).

13. More directly he points out that the Jamaican Act of 1890 follows closely the form and language of the English Electric Lighting Act 1882, considered by the House of Lords in *London Electric Supply Corpn Ltd v Westminster Electric Supply Corpn Ltd* (1913) Knight's Local Government Reports 1046, in which reference was made to the purpose of the legislature "to maintain competition and avoid monopoly" (p 1052, per Lord Haldane LC). The underlying policy of the 1882 Act, he submits, was to promote competition between a number of undertakers in different areas of supply, in the interests of consumer protection and cheaper prices. The same policy was endorsed by the Jamaican legislature in the 1890 Act.

14. He also criticises the Court of Appeal for relying on the "always speaking" rule of statutory construction (see *R v G* [2004] 1 AC 1034, para 29) to justify the grant of an exclusive licence, by reference to technological changes in electricity generation and supply since 1890. Such changes, so he says, cannot justify departing from the underlying purpose of the legislation.

Discussion

15. The Board is unable to support these grounds of appeal. Since its reasons are in substantial agreement with those of the Court of Appeal, and without disrespect to Mr Padfield's careful presentation, they can be stated relatively shortly.

16. In the first place the language of the relevant section is clear. The power is to grant a licence to supply electricity in "any area". It is not in dispute (by reference, inter alia, to section 3(b)) that the area may extend beyond the boundaries of a particular local authority. There is nothing in the section or its context to require that expression to be used in anything other than its ordinary sense, which would include the area constituting the whole island. Nor have any other rational criteria been suggested by which it could or should be restricted to any lesser area. It is not clear in any event how such an interpretation would assist the competition policy, so long as the licence could be limited to a single supplier for that area. An individual consumer within that area would still be limited to the single supplier, unless he was willing to move house.

17. As to the authorities on which Mr Padfield relies, the *Case on Monopolies* does not assist. That seminal case confirmed the limits of the Royal Prerogative but said nothing about the powers of the legislature or the principles of interpretation of statutes.

18. The *London Electricity* case is of more relevance, in that it concerned the construction of a statute which was the precursor of the 1890 Act, but it was concerned with a different section and very different facts. At issue was the interpretation of an agreement between two electrical supply companies operating in Westminster, one offering alternating and the other continuous (or direct) current. Thus the competition was not simply about prices or supply, but between competing technologies. The details of the agreement are complex and not material for present purposes.

19. The historical background was explained in the speech of Lord Moulton (p 1059ff). As he said, this was in the early days of public electric lighting, when the legislature was "very jealous of any association or union between electric lighting enterprises lest a monopoly should grow up to the detriment of the public". Further it was still uncertain which of the competing technologies, "as electrical invention progresses", would prove more efficient; and it would be "intolerable to think that the undertakers should have the power to give to favoured customers the more efficient form and to refuse it to others" (*ibid* p 1063, 1068).

20. The section directly in issue was section 11 of the 1882 Act (equivalent to section 7 of the Jamaican statute) which prohibited any authority or company licensed under the Act from, by contract or assignment, divesting itself of its powers under the licence other than with the consent of the Board of Trade. This did not stand alone, but was reinforced by Provisional Orders applicable to the two companies in question, prohibiting them from acquiring the undertakings of any other company supplying electricity under licence in London without Parliamentary authority (see p 1060). It was those provisions which were seen by their lordships as giving effect to the legislative intention of maintaining competition and avoiding monopoly, against which the agreement had to be construed. Their comments must be read in that specific context.

21. In the Board's view, this authority provides no assistance to Mr Padfield's argument. There is nothing in the speeches to support any general limitation on the scope of the Act, other than as reflected in section 11 and the Provisional Orders. Furthermore, the restrictions in that section were not absolute but were subject to release with the consent of the Board of Trade (in Jamaica, the Minister). There is no reference in the speeches to the scope of the power to grant licences for supply "within any area" (section 3, equivalent to section 3 of the Jamaica Act), let alone any suggestion that the words were to be used in any other than their ordinary meaning.

New grounds

22. In addition to the grounds relied on in the courts below, Mr Padfield sought permission to advance certain new points for the first time before the Board. First he argued that in granting the Licence, the Minister was motivated by an improper purpose, that is to give effect to the commercial arrangement made with Mirant for the sale of the government's majority shareholding in JPS, and without proper regard to the public interest or the interests of other potential applicants for licences. He argued further that the Minister failed to act on, or misrepresented, the recommendations of the OUR. Following objection from the respondents, the Board refused permission so to extend the grounds of appeal, for reasons to be given in this judgment.

23. Allegations of improper purpose, or failure to take account of relevant considerations, should be made at the earliest possible stage, in order to give the respondent an opportunity to respond with appropriate evidence, and to enable that to be examined by the trial judge. Furthermore the grant of the exclusive all-island licence in 2001 would need to be seen against the background of the earlier history referred to above, including the all-island integration policy and the previous all-island licences, going back apparently without legal objection for some 35 years.

24. No reason has been put forward by the appellants for not taking these points at an earlier stage. Indeed, as Mr Gibbs (junior counsel for JPS) points out, this appears to have been a considered decision. Sykes J (judgment para 8) noted the submission before him by Mr Wildman (then counsel for the appellants) that the grant of the licence was "illegal in the sense of not authorized by law", adding:

> "Mr Wildman was careful to make the point that this is not a challenge based on administrative law grounds such as bad faith, irrationality or irrelevant considerations. He is not saying that the Minister had the power but exercised it incorrectly; he is saying that the Minister does not have the power at all."

In the Board's view it would be contrary to principle, and unfair to the respondents, to allow such points to be taken for the first time at this level.

Conclusion

25. For these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed, and that (subject to any submissions from the appellants, to be filed within 14 days of the delivery of this judgment) the appellants should pay the costs of both respondents.