[2015] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

SUPREME COURT CIVIL APPEAL NO 122/2012

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT and 1st counter-respondent**
AND	**DENNIS MEADOWS**	**1ST RESPONDENT and counter-appellant**
AND	**BETTY – ANN BLAINE**	**2ND RESPONDENT and counter-appellant**
AND	**CYRUS ROUSSEAU**	**3RD RESPONDENT and counter-appellant**
AND	**THE OFFICE OF UTILITIES REGULATION**	**2ND RESPONDENT on counter-appeal**
AND	**THE ATTORNEY GENERAL**	**3RD RESPONDENT on counter-appeal**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 132/2012

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**DENNIS MEADOWS**	**1ST RESPONDENT**
AND	**BETTY – ANN BLAINE**	**2ND RESPONDENT**
AND	**CYRUS ROUSSEAU**	**3RD RESPONDENT**

Michael Hylton QC and Sundiata Gibbs instructed by Hylton Powell for the appellant Jamaica Public Service Co Ltd

Hugh Wildman and Ms Barbara Hinds instructed by Marvalyn Taylor-Wright & Co for the respondents/counter-appellants Meadows, Blaine and Rousseau

Mrs Nicole Foster-Pusey QC, Solicitor-General and Ms Althea Jarrett instructed by the Director of State Proceedings for the Attorney General of Jamaica

Allan Wood QC and Mrs Daniella Gentles-Silvera instructed by Livingston Alexander and Levy for The Office of Utilities Regulation

10, 11, 12 March 2014 and 16 January 2015

PANTON P

[1] I have read, in draft, the reasons for judgment written by my brother Brooks JA. I fully agree with his reasoning and conclusion and have nothing to add.

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusions which have been set out so thoroughly and with such clarity that I am left with nothing useful to add.

BROOKS JA

[3] This is an appeal from the judgment of Sykes J, handed down on 30 July 2012. The learned judge ruled that the minister of government with responsibility for mining and energy was authorised to issue a licence to a single operator to supply electricity to consumers across the entire island. The learned judge decided, however, that the

minister was in error when the minister designated the licence as being exclusive. He held that the grant prevented any other licence being granted for the 20 year duration of the licence issued. Despite the latter finding, the learned judge ruled that the licence issued was not invalid.

[4] Neither the licensee, Jamaica Public Service Company Limited (JPS), nor the respondents, Mr Dennis Meadows, Mrs Betty Ann Blaine and Mr Cyrus Rousseau (the persons who had challenged the licence issued to JPS), is entirely happy with the learned judge's decision. Each side contends that the learned judge has misinterpreted the relevant legislation. They, however, do so for different reasons.

[5] JPS, supported by the Attorney General of Jamaica, contends that the statute does not preclude the minister's issue of an exclusive licence. On the other hand, the respondents, who are, or represent, dissatisfied customers of JPS, not only say that there is no basis for exclusivity, but assert that the statute does not allow for an all-island licence. As a result, there is both an appeal by JPS and the Attorney General on the one hand, and, on the other, a counter appeal by the respondents, against the learned judge's decision.

[6] A third issue raised by the respondents' counter appeal concerns a question of fact, namely, whether the utilities regulator, the Office of Utilities Regulation (OUR) had recommended the minister's grant of the exclusive licence. The learned judge found that it had not. The respondents contend that he was wrong to have so found.

[7] Each issue may be dealt with separately, starting with the issue of the all-island licence, next with the exclusivity issue, and finally with the OUR's recommendation. It is first necessary, however, to set out the relevant provision of the legislation and the portions of the licence that have given rise to this dispute.

The relevant legislation

[8] The main provision, about which the issues of interpretation turn, is section 3 of the Electric Lighting Act (ELA). It states:

> "3. 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**.
>
> (b) where, **in any area or part of an area** in which any undertakers are authorized to supply electricity under any licence, the undertakers are not themselves the Local Authority, the licence may contain any provisions and restrictions for enabling the Local Authority, within whose jurisdiction such area or part of an area may be, to exercise any of the powers of the undertakers under this Act with respect to the breaking up of any street repairable by such Local Authority within such area or part of an area, and the alteration of the position of any pipes or wires being under

> such street, and not being the pipes or wires of the undertakers, on behalf and at the expense of the undertakers, and for limiting the powers and liabilities of the undertakers in relation thereto, which the Minister may think expedient." (Emphasis supplied)

[9] The main question to be resolved in the appeals by JPS and the Attorney General is whether the regulations and conditions set out in the licence may, during its existence, fetter the Minister's, or a future Minister's, right to issue other licences. The counter appeal mainly concerns the question of whether the term "area" could encompass the entire island.

The licence granted

[10] The licence was granted on 30 March 2001. It was set out in several parts. Part 1 described the scope of the licence, including the geographical area to be covered by it. It said:

> "1. The Minister, in exercise of the powers conferred by section 3 of the Electric Lighting Act and **having regard to the recommendations of the Office of Utilities Regulation** ('the Office') pursuant to section 4 of the Office of Utilities Regulation Act, 2000 hereby grants to Jamaica Public Service Company Limited ('the Licensee') a licence authorising the Licensee to generate, transmit, distribute and supply electricity for public and private purposes **within Jamaica** subject to the conditions set out in Part II hereof ('the Conditions') and as noted herein.
>
> 2. This Licence shall be cited as the All-Island Electric Licence 2001." (Emphasis supplied)

[11] Condition 2 of the licence described the general conditions established by the licence. Condition 2 contained a number of paragraphs, but paragraphs 2, 3 and 4 may be conveniently quoted at this stage. They speak to the characteristics of exclusivity and the fact of the licence being for the whole island:

> "2. The Licensee is hereby granted the Licence, right and privilege (hereinafter called "this Licence") to generate, transmit, distributed and supply electricity for public and private purposes **in all parts of the Island of Jamaica**, subject however, to the provisions of this Licence and to regulation as herein provided.
>
> 3. Subject to the provisions of this Licence the Licensee shall provide an adequate, safe and efficient service based on modern standards, **to all parts of the Island of Jamaica** at reasonable rates so as to meet the demands of the Island and to contribute to economic development.
>
> 4. The Licensee shall have **the exclusive right to provide service** within the framework of an All-Island Electric Licence and the All-Island Electrical System. The exclusive right specified herein shall be as follows:
>
> (a) In the first three years from the effective date of this Licence, the Licensee shall have the exclusive right to develop new generation capacity. Upon the expiry of this period the Licensee shall have the right together with other *outside person(s)* to compete for the right to develop new generation capacity.
>
> (b) The Licensee shall have **the exclusive right** to transmit, distribute and supply electricity **throughout Jamaica** for a period of 20 years.
>
> Provided that no firm or corporation or the Government of Jamaica or other entity or person shall be prevented from providing a service for its or his own exclusive use." (Italics as in original, other emphasis supplied)

[12] In 2007 the Minister extended that term for a further seven years. In 2011, following a re-structuring of JPS' ownership, the licence was amended to include, among other things, the 2007 extension of the term. The licence, thus amended, was "restated". The terms set out above were retained in almost identical terms.

Whether the ELA precluded the grant of an all-island licence

[13] In deciding that the ELA did not preclude the grant of an all-island licence, Sykes J noted that the ELA did not define the term "area", nor did it divide the island into areas. He found that the ELA, although promulgated over 100 years ago, was "always speaking", in that it had to consider modern realities. Those realities, he reasoned, included "changing methods of generating, distribution and supply of electricity" (paragraph 88 of the judgment).

[14] His interpretation of section 3 of the ELA, for the purposes of this issue, was set out in paragraph 86 of the judgment:

> "...The better interpretation, it seems [to] this court, is that the ELA makes provision for the possibility of more than one supplier in the same geographical area or contiguous areas but it did not preclude the possibility of one supplier for the whole island. It seems to this court that the ELA permitted multiple licensees whether for the whole island or parts of the island but did not prevent one all-island licensee. In the event that there was one all-island licensee section 3 permitted the Minister to include in the licence conditions and regulations without further legislation."

[15] It is with this interpretation that the respondents are dissatisfied. They filed three grounds in respect of their counter-appeal. The grounds that affect this issue are as follows:

"(b) The learned trial judge, by misconstruing the provisions of the Electric Lighting Act, erred in law in holding that the minister is empowered under the said Act to grant a licence to [JPS] for the supply of electricity over the entire island.

(c) The learned trial Judge erred in law in failing to admit and consider, as an aid in interpretation, the relevant provisions of the Hansard Report [in respect of the promulgation] of the 1882 Electric Lighting Act of the United Kingdom (a statute of *para materia*), in interpreting the [ELA]."

It is more convenient to deal with ground (c) before ground (b)

The English Hansard Report

[16] Sykes J refused an application by the respondents to refer to what was said to be the Hansard Report of the proceedings of the English Parliament in 1882 when the Electric Lighting Act of that country was being debated. The learned judge ruled that not only was the authenticity of the report not established, but that the requirements for referring to parliamentary debates on a bill (which was, in his view, in any event to be avoided), had not been satisfied.

[17] Mr Wildman, for the respondents, submitted that once the source of secondary evidence had been accounted for, as had been done in this case before Sykes J, it was admissible. He argued that the learned judge was wrong to have rejected the document on procedural grounds. In respect of the substance of the application to refer to the document, learned counsel argued that the rule in **Pepper (Inspector of Taxes) v Hart and Another** [1993] 1 All ER 42 allowed for reference to the relevant Hansard Report so as to aid the interpretation of section 3. He argued that "by refusing

to admit the Hansard Report, the learned judge failed to take into consideration relevant material/information which could have assisted the court in coming to a proper interpretation, which it is contended, would have shown that the licence was in fact illegal" (paragraph 69 of his skeletal submissions).

[18] Mr Wildman's submissions falter on the procedural defects in the attempt to place the material before the learned judge. The document had been exhibited by Mr Wildman's instructing attorney, who deposed that she had gotten it from him and that he had informed her that he had gotten it from Queen's Counsel in England. There was no affidavit from the English counsel as to where he had secured the document. The respondents had clearly fallen a long way short in proving the authenticity of the document.

[19] In addition, Mr Wildman's attempt to find refuge in the entitlement to provide information based on "information and belief" would have no relevance in the substantive hearing of a claim. That principle is restricted to "use in an application for summary judgment under Part 15 [of the Civil Procedure Rules (CPR)], or any procedural or interlocutory application" or where the CPR specifically authorises such use (rule 30.3(2) of the CPR). That use is not authorised in this context.

[20] The learned judge was correct in refusing the respondents' application to make reference to the document. There is no need, therefore, to enter into an examination of whether the debates of a legislature, outside of this country, in respect of legislation

similar to that which was passed in this country, could assist a local court in interpreting what the Parliament of this country intended when it passed the local legislation.

[21] Ground (c) therefore fails and ground (b) may now be assessed.

The extent of an "area"

[22] Mr Wildman argued that the policy and the objects of the ELA, in this regard, were evident from a fair reading of the relevant portions of the ELA. From the relevant sections, he argued, it was clear that the legislature intended to keep the supply of electricity "on a local footing". Learned counsel pointed out that, although "area" had not been defined in the ELA, the term "local authority", as defined in the ELA, provided the context in which section 3 was to be interpreted, for these purposes.

[23] His reasoning on this point may be (hopefully without injustice) set out this way:

a. Section 3 stipulates that local authorities are entitled to apply for and be granted a licence to be an undertaker to supply electricity. They are primarily identified as potential licensees.

b. Local authorities, as defined by section 47, mean the Kingston and Saint Andrew Corporation, in respect of the corporate area, and a parish council, in respect of parishes outside of the corporate area.

c. Local authorities are necessarily restricted to the areas of their jurisdiction.

d. An area, as the term is used in section 3, must, therefore, necessarily mean either the corporate area or a parish.

e. A company or private person cannot obtain a licence for an area greater than that to which a local authority would be entitled.

[24] Mr Wildman also relied on the references throughout the ELA to the term "undertakers". He stressed the use of the plural format of the term and submitted that the intention of the legislature was that there should be several undertakers throughout the island. That context was consistent, he argued, with the intention that there would be several "areas" throughout the island.

[25] Learned counsel referred to a number of authorities in support of his submissions including, **London Electric Supply Corporation Ltd v Westminster Electric Supply Corporation Ltd** [1913] LGR 1046 and **The Case of Monopolies (Darcy v Allein)** (1572) 77 ER 1260. He also cited an article extracted from the internet, outlining the history of a company named Balfour Beatty Limited, in which the author opined that "Parliament passed the [1882] Electric Lighting Act to keep the supply of electricity on a **local footing**" (emphasis supplied).

[26] Mr Wood QC, on behalf of the OUR, Mr Hylton QC, for JPS, and Mrs Foster-Pusey QC, for the Attorney General, all supported the learned judge's finding on this issue. Mrs Foster-Pusey did not, however, agree that the "always speaking" principle was relevant to arriving at a fair interpretation of section 3.

[27] Learned Queen's Counsel all submitted that both on the evidence adduced before the learned judge and the development of the legislation over the years, Sykes J was correct in finding that an all-island licence was not prohibited by the ELA. Mr Wood specifically argued that the revision of the ELA in 1958 in conjunction with legislation

establishing an Electricity Authority, and the latter's reference to the establishment of a supply system "capable of meeting the needs for electricity throughout the island", had resulted in a shift from a local footing for the supply of electricity to one that contemplated island-wide coverage.

[28] In addition, Mrs Foster-Pusey and Mr Hylton both submitted that, in interpreting section 3, the use of the principle of statutory interpretation termed, "the plain and ordinary meaning of the words used", would result in the conclusion that an all-island licence was not precluded by the ELA. Learned counsel stressed that the term "any", as interpreted in previous decisions, excluded limitation or qualification, and "should be given as wide a construction as possible" (per Williams J in **Victorian Chamber of Manufacturers v Commonwealth** (1943) 67 CLR 335 at 346). Learned counsel also pointed out that the term "area" was not defined in the ELA. They argued that the phrase "any area", as used in section 3, necessarily meant, "any area approved by the Minister" (paragraph 22 of JPS's submissions in response to the counter appeal).

[29] Before analysing these competing submissions it may be of interest that the approach to the areas to be supplied with electricity may be said to have changed since 1882. In his work The Law of Electric Lighting, Henry Cunynghame, in 1883 opined that prospective suppliers in England may have been well advised to restrict the area for which they applied. He said at page 3:

> "Before applying for a provisional order or license, the undertakers will of course consider the choice of an area, remembering that as the supply within the area is compulsory, they will do well to make it as compact as possible."

The general obligation to provide a supply of electricity to all who demand it, still obtains today. It seems, however, that advances in technology since 1883 have allowed the generation and supply of electricity to meet that demand, despite those customers being spread over greatly increased areas.

[30] It is perhaps easiest to address Mr Wildman's submission that applications by individuals and companies are limited to areas to which local authorities are restricted. The relevant portion of section 3 for these purposes states:

> "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."

Mr Wildman's submission is not supported by the legislation. Learned counsel is correct in his assertion that a local authority would be restricted to the area in which it has jurisdiction (for example, section 121(1) of the Parish Councils Act restricts the extent of regulations made by a parish council, "to the whole or any part of that parish"). Section 3 of the ELA does not, however, limit an application by a company or individual to the area restricted to a local authority. Indeed, the rules governing the applications for licences, stipulate that it is the applicant that defines the area for which it wishes to supply electricity.

[31] Section 4 of the ELA gives the relevant state entity (formerly the Governor, now the Minister) the right to establish rules to govern applications for licences. Rules were made in 1929 (The application for Licences Rules 1929) pursuant to that power. They

have been adjusted over the years but the relevant rule has remained largely unchanged since then. Rule 3 (formerly designated rule 2 in the 1929 rules) supports the assertion that it is the applicant that stipulates the area covered by the licence desired. The rule states, in part:

> "3. Every [application for a licence] shall define distinctly the area of supply and the boundaries thereof and shall be accompanied by two copies of a map [depicting the area of supply]."

Mr Wildman is, therefore, in error when he asserts the existence of a restriction in the area for which an individual or company may apply.

[32] Mr Wildman is also incorrect in his assertion that a licence must be restricted to an area less than the entire island. Rule 3 of the 1929 rules mentioned above, implicitly allowed for the areas covered by applications to include the jurisdiction of more than one local authority. The rule stated:

> "3. Every such application must be accompanied by documentary proof of the **consent of every local authority having jurisdiction within the area of supply or any part thereof**, and the conditions, if any, under which such consent has been given." (Emphasis supplied)

It is to be noted that there is no restriction on the number of local authorities that may have been affected by the area the applicant sought to supply with electricity. That rule mirrored the provisions of section 3 (a) of the ELA, as it existed up to 1958. Paragraph (a) stipulated that an applicant was required to seek and secure the consent of local authorities falling within the area of the applicant's application. In 1958 the paragraph was removed from the ELA. The original rule 3 is also absent from the

current formulation of the rules. As is the case with the ELA, there is no restriction expressed in the current rules as to the area for which an applicant may apply.

[33] It is also to be noted, as Mrs Foster-Pusey and Mr Hylton have submitted, that the term "any area", as used in section 3, admits of no restriction. The definition used by Williams J in **The Victorian Chamber of Manufacturers v The Commonwealth** is helpful in this context. The learned judge said:

> "... 'any' is a word which ordinarily excludes limitation or qualification and which should be given as wide a construction as possible. 'Any goods' therefore includes all goods except where this wide construction is limited by the subject matter and context of a particular statute." (Page 346)

There is no definition of "area" in the ELA, or restriction as to the use of the term. Although the word has been defined as meaning "a region or part of a town, country etc", it also bears common definitions such as, "a space allocated for a specific use" or, "the extent or measurement of a surface". All those are definitions set out in the Concise Oxford English Dictionary.

[34] In the absence of any limitation on the word "area", as used in the ELA, it would, therefore, not be incorrect to interpret the term "any area" as meaning any land space in the island. It would also not be incorrect to state that that land space may be the entire island. The learned judge quite correctly stated at paragraph 89 of his judgment that there is no "compelling reason to interpret *area* to mean only something less than the whole". The Minister may, therefore, have properly granted a single licence for the supply of electricity to the entire island if he deemed fit.

[35] Mr Wildman's reliance on **London Electric Supply Corporation Ltd v Westminster Electric Supply Corporation Ltd**, **The Case of Monopolies** and the extract from the website of a commercial entity, Balfour Beatty Limited, is not helpful in this regard. **London Electric Supply** dealt with the construction of the terms of an agreement between two suppliers of electricity, whose areas of supply overlapped. The question of the area for which a licence could have been granted, did not fall to be discussed in that case.

[36] It is true that their Lordships, in reviewing the evolution of the legislation, expressed the view that the object of the 1882 Electric Lighting Act "was to maintain competition and avoid monopoly" (as opined by Lord Haldane LC at page 1052). Similarly, **The Case of Monopolies** dealt with the common law's prohibition of monopolies. Neither case, however, assists in the analysis of the area for which an applicant may be licensed.

[37] The opinion expressed in the Balfour Beatty website that the supply of electricity was to be kept on a "local footing" is not supported by any authority or reasoning. There is also no indication of the qualification of the author to render such an opinion.

[38] Based on the above reasoning, the respondents' criticisms of the learned judge's finding in respect of the all-island licence, fail.

Whether the Act precluded the grant of an exclusive licence

[39] In addressing the question of the all-island nature of the licence, Sykes J, at paragraph 89 of his judgment, ruled that section 3 of the ELA permitted "the Minister to grant more than one all-island licence to generate, transmit and supply electricity". He then went on to discuss whether the Minister could grant an exclusive all-island licence, which would, he ruled, necessarily preclude the consideration of other applications for licences.

[40] After assessing the ELA in this context, and considering various administrative law principles, the learned judge found that the ELA "does not give power to the Minister to grant a licence on terms which effectively bar any other applicant from being considered" (paragraph 100). The learned judge further held, at paragraph 114, that the ELA created a legitimate expectation that applicants would have their applications genuinely considered and a decision made thereon. That expectation, he reasoned, imposed a duty on the Minister to fairly consider other applications. It was Sykes J's view that the grant of an exclusive licence amounted to a bar to any other application, and, therefore, fettered the Minister's statutory obligation to consider applications for the supply of electricity. He reasoned that although the grant of the exclusive licence purported to be an exercise of the Minister's power, it was a power that the Minister did not possess (paragraph 116).

[41] Based on those reasons, the formal order flowing from Sykes J's decision, in this regard, stated:

"2. The minister does not have the power to grant a licence on terms which prevent other applicants from having their applications being considered genuinely.

3. The minister does not have the power to grant a licence upon terms that bar the possibility of any other person entering the market for [the] transmission of electricity.

4. The term of [the] JPS's licence granting it exclusive right to transmit electricity is not valid."

[42] In challenging the learned judge's reasoning and findings, JPS complained, firstly that the learned judge not only failed to correctly interpret section 3 but also failed to consider that there were exceptions to the rule concerning the fettering of jurisdiction. JPS also contended, on the issue of interpretation, that the learned judge was inconsistent in applying the "always speaking" principle. Mr Hylton argued that the learned judge effectively rejected the principle, in respect of the exclusivity point, while having espoused it in considering the all-island aspect of the licence.

[43] Supported by Mrs Foster-Pusey, Mr Hylton expanded on those criticisms. Learned counsel submitted that basic principles of construction, the history of the ELA and relevant principles of administrative law all militated against the learned judge being correct. Learned counsel submitted that using the "plain and obvious meaning of the words" used in section 3, there was no restriction placed on the Minister as to the nature of the licence he had been authorised to issue. The learned judge should not, therefore, have implied a term which limited (beyond the normal restrictions of administrative law), the authority of the Minister in performing his duty. Mr Hylton relied on cases such as **Investors Compensation Scheme Ltd v West Bromwich**

Building Society [1998] 1 All ER 98, **Chartbrook Ltd v Persimmon Homes Ltd** [2009] 4 All ER 677 and **John Thompson v Goblin Hill** [2011] UKPC 8, in support of his submissions.

[44] On the question of the historical context of the legislation, Mr Hylton pointed out that when the various amendments to the English Electric Lighting Act are compared to the evolution of the ELA over the years, it is clear that, whereas the English parliament intended to prevent exclusivity, there was no such intent demonstrated by the local legislature. In this regard, learned counsel pointed out that whereas the original English statute, which was passed in 1882, was amended in 1888 to specifically ban exclusivity, the ELA, when it was passed in 1890, did not contain a provision dealing with exclusivity. This is despite the fact that the ELA did include some elements of the 1888 amendment. He further submitted that the exclusivity principle has not been adopted in any later amendment to the ELA. Mr Hylton concluded from this that the local legislature implicitly eschewed the ban on exclusivity.

[45] Again, on the basis of context, Mr Hylton argued that, based on the technological advances made since 1890, the court was entitled to say that the ELA is a statute that is "always speaking" or is subject to "an updating construction". Accordingly, learned counsel submitted, the current ability to transmit electricity across extensive areas, and the evidence that "the transmission of electricity [with the current technology] is a natural monopoly" (paragraph 22 of JPS' full submissions), entitled the court to find that an exclusive licence was not precluded by the ELA. He relied on a number of

decided cases to support these submissions, including, **R v Ireland** [1997] 4 All ER 225.

[46] Finally, on the question of whether the Minister had fettered his ability to discharge his duties under section 3, Mr Hylton argued that the learned judge failed to recognise that there were exceptions to the general principle precluding such a fetter. Learned counsel submitted that this was a case which required the application of an exception. The granting of an exclusive licence was, he submitted, in the context of the technology, a rational and reasonable exercise of the Minister's statutory function, and was done in furtherance of the legislative aim of the ELA.

[47] In support of his submissions, he relied on the cases of **British Oxygen Co Ltd v Minister of Technology** [1970] 3 All ER 165, **Carrigaline Community Television Broadcasting Co Ltd v Minister For Transport, Energy and Communications and Others** [1997] 1 ILRM 241, **Birkdale District Electricity Supply Company Limited v Corporation of Southport** [1926] AC 355 and others.

[48] In addition to advancing arguments similar to those argued by Mr Hylton, Mrs Foster-Pusey submitted that the premise on which the respondents had based much of their arguments, namely that exclusivity was inherently bad and competition was good, was a simplistic premise. She argued that the premise was flawed when applied to a special commodity such as is electricity, the supply of which is an essential service under the labour laws of the island. Learned counsel submitted that, for this

commodity, only the promise of exclusivity could attract applicants to invest the extensive capital and other resources needed to provide this essential service.

[49] Mr Wildman submitted that the learned judge was correct in finding that exclusivity was contrary to the ELA. Against the context of his submission that "monopolies are inherently harmful" and contrary to the common law, learned counsel argued that the grant of an exclusive licence was illegal. Such a grant, Mr Wildman submitted, effectively shut out prospective applicants. He argued that cases such as **London Electric Supply Corporation Ltd v Westminster Electric Supply Corporation Ltd**, **The Case of Monopolies**, **National Transport Co-operative Society Limited v Attorney General of Jamaica** [2009] UKPC 48, demonstrated the impropriety of the Minister's action in granting the licence.

[50] Mr Wildman submitted that the shutting out of prospective applicants was contrary to the contemplation of the statute that there should be multiple operators. In supporting his submission that the grant of an exclusive licence represented an improper fetter of the Minister's discretion to execute the duties imposed on him by the statute, Mr Wildman relied on **Practical Shooting Institute (NZ) Inc v Commissioner of Police** [1992] 1 NZLR 709.

[51] As would have been apparent from the submissions of counsel, the issue of the exclusive licence has three main elements. The first is whether, on a fair construction, including a reference to its context, the ELA precludes the existence of such a creature. The second is whether the common law's bias against competition renders the grant of

an exclusive licence unlawful. The third is whether, based on the principles of administrative law, the minister unlawfully fettered his execution of the duty imposed on him by the ELA. These elements will be considered in turn.

[52] It may first be noted, however, that Henry Cunynghame addressed the issue of a monopoly in electric supply in 1883. He pointed out that whereas a licence or a provisional order (two of the methods by which authorisation to supply electricity could have been secured in England) did not create a monopoly, it was unlikely that a competitor would have been allowed to enter an area licensed to an existing supplier. The learned author said at page 2 of his work:

> "Neither the license nor the provisional order when granted is exclusive or creates any monopoly, though it is natural to suppose that after one had been granted for one area to one set of undertakers, a rival would not be allowed to enter the area so long as the first did their duty."

He cited, as authority for his opinion, a memorandum from the Board of Trade issued on 26 February 1883. The memorandum noted that no clause allowing monopolies would have been included in provisional orders and licences issued in England for the supply of electricity at that time (pages 96-97 of Law of Electric Lighting).

a. Statutory construction

[53] Sykes J devoted a significant portion of his judgment to the issue of statutory interpretation. Learned counsel, on both sides of the divide in this court, did the same. The major principles of statutory interpretation, currently approved, include the use of the plain and ordinary meaning of words in the document, the application of the

context of the document and the rejection of any interpretation that makes nonsense of the document.

[54] The learned editors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. They stressed the use of the natural or ordinary meaning of words and cautioned against "judicial legislation" by reading words into statutes. At page 49 of their work, they set out their summary thus:

> "1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
>
> 2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.
>
> 3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute**…." (Emphasis supplied)

This summary is an accurate reflection of the major principles governing statutory interpretation.

[55] Rule three mentioned in Cross, has particular meaning for the present case. It speaks to the interpretation to be applied where a document is silent in respect of the particular point that is in issue. In this regard, the authorities caution that any term

which the court considers to be implied by the document in the context of the issue, must be in harmony with the document as a whole, so that it may be said that the document must have meant to include that term.

[56] The Privy Council in **Attorney General of Belize and Others v Belize Telecom Ltd and Another** [2009] UKPC 10; [2009] 2 All ER 1127 (referred to in **Thompson v Goblin Hill**) gave guidance as to the approach that the court should take where a document is silent. Their Lordships opined that the court was not authorised to introduce terms that would make the document more fair or reasonable. The aim of the court, the Board said, is to discover what the document actually means. Lord Hoffmann, delivering the opinion of the Board, said at paragraph 16:

> "...The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896, 912–913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument."

That reasoning is entirely consistent with the Board's approach in **Baker and Another v R** (1975) 13 JLR 169 at page 174C.

[57] Their Lordships in, **Attorney General of Belize and Others v Belize Telecom Ltd and Another**, referred to a variety of ways by which courts have sought to determine whether terms may properly be implied in documents. Lord Hoffmann referred to a case in which those ways were summarised. He said at paragraph 26:

> "26. In **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** (1977) 180 CLR 266, 282–283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was 'not … necessary to review exhaustively the authorities on the implication of a term in a contract' but that the following conditions ('which may overlap') must be satisfied:
>
> '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying" (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'"

[58] In applying these principles to the issue of whether the ELA proscribes exclusivity, it must first be acknowledged that nowhere does the ELA expressly state that there may not be only one operator or undertaker. Contrary to Mr Wildman's submissions on the point, the use of the term "undertakers" in the ELA does not prevent a reference to a single undertaker. Section 4 of the Interpretation Act allows a reference to the plural to include a reference to the singular. The section states:

> "4. In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided-
>
> (a) ...

(b) words in the singular include the plural, and **words in the plural include the singular**." (Emphasis supplied)

As a result of applying that section, the use of the term "undertakers" in the phrase:

> "The undertakers shall be subject to such regulations and conditions as may be inserted in any licence…"

as used in section 5 of the ELA, or, the phrase:

> "Where any undertakers are authorized by a licence or special Statute to supply electricity within any area, the Electricity Authority may…"

as used in section 26, does not preclude the reference to a single undertaker.

[59] The various occurrences of the term does not allow for a restriction of the interpretation of the term as was done in **Blue Metal Industries Ltd and Another v Dilley and Another** [1970] AC 827. In that case their Lordships of the Privy Council, rejected an invitation to apply a provision of the Interpretation Act of New South Wales that allowed singular terms to be considered as a reference to plurals and vice versa. The Board found that the use of the term "company", because of the context in which it was used, did not include a reference to the plural of that term (see page 850 D-G).

[60] It may be said that there are two ways of approaching the question of implication of a term into section 3. One approach may stipulate that the appropriate question to be asked in the context of this case is whether the ELA precluded the grant of an exclusive licence. Put another way, could it be implied that the ELA included an additional provision to section 3, such as:

"the licence may not prevent the grant of other licences for the same area to other undertakers."

[61] The second approach would ask whether a provision expressly allowing exclusive licences could be implied. A possible formulation for such a provision would be:

"the Minister may grant an exclusive licence to any undertaker in respect of the area for which the undertaker is licensed."

[62] It would be more appropriate, it seems, to ask whether an exclusive licence was precluded, rather than ask whether it is prescribed for. The draftsman should not be expected to have provided for every conceivable eventuality. It is, therefore, the former question that will be assessed and answered below.

[63] A construction of the plain and ordinary meaning of section 3 does not allow for an interpretation that the Minister is prohibited from granting a single exclusive licence. The operative portion of the section states that "[t]he 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" (Emphasis supplied). The provisions set out in the section do not treat with the issues of competition or exclusivity. Neither are those features contemplated elsewhere in the ELA.

[64] The implication of a clause precluding exclusivity would not satisfy the main tests quoted from **BP Refinery (Westernport) Pty Ltd v Shire of Hastings**. Although it

may be argued that the provision would be "reasonable and equitable", be "capable of clear expression" and would not "contradict any express term of the [ELA]", it cannot be said that "it must be necessary to give business efficacy to the contract". It also cannot be said to be "so obvious that it goes without saying" that a ban on exclusivity is required by the ELA.

[65] Apart from looking at the context of the statute as a whole, the task of interpretation also requires the court to look at the wider context in which the legislation was passed and amended over the years. **London Electric** does not assist in this regard for, as mentioned above, neither the question of validity of the licence granted nor the issue of exclusivity were discussed in that case.

[66] Mr Hylton's comparison of the 1882 and 1888 statutes in England is not of assistance either. Whereas it is apparent that some of the provisions in the ELA are identical in terminology to certain portions of the 1888 statute, there is no reference to exclusivity in either the 1882 or the 1888 statute. It cannot properly be said, therefore, that the local legislature abstained from implementing a ban on exclusivity that had been included in the 1888 statute.

[67] Mr Wood's reference to the developments in 1958, and since that time, does assist the construction exercise in two respects. Firstly, it introduces the concept of the ELA being legislation which is "always speaking". Secondly, it identifies the context in which the 2001 licence was granted.

[68] 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)).

[69] Another major development took place in 1978. At about that time, the government became the majority shareholder in JPS. JPS had also purchased the undertakings of the other electricity suppliers in the island. The then minister issued an all-island exclusive licence to JPS. It has been argued that by that time there had been significant advances in the technology in respect of the generation, transmission and supply of electricity. The evidence before Sykes J was that the 2001 licence was granted to JPS when the government had sold the bulk of its shareholding in JPS to a private entity. It was said that the grant was a term of the agreement between the government and the purchaser.

[70] All those events allow the court to find, if necessary, that the ELA was a statute which was "always speaking", in the sense that it would accommodate the changes modern life brought. In seeking to apply the principle to be derived from **R v Ireland** and **R (on the application of Smeaton) v Secretary of State for Health** [2002] All ER (D) 115 (Apr) (paragraphs 338 and 339), it may be said that the focus of, particularly, section 3 of the ELA, is the grant of licences by the minister.

[71] The question that arises is whether the developments in technology and the background of a pre-existing exclusive all-island licence allowed, in 2001, the granting of an exclusive all-island licence. The answer would be that there is nothing in the statute which prevents such a grant. In that sense, Mrs Foster-Pusey is correct in stating that there is no necessity to construe the ELA other than by using the ordinary meaning of its terms. It is equally true to say that the modern context does no violence to the ELA.

[72] This court could, therefore, adopt, in the context of the exclusivity issue, the position taken by Sykes J in respect of the all-island issue, namely, that the ELA is "always speaking" (paragraphs 66-68 of his judgment). It is not essential, however, to rely on that principle in resolving the question of whether the minister was prevented from granting an exclusive licence. A fair reading of the section shows that the minister was not precluded from so doing.

[73] The next aspect of the context of the ELA is the question of whether monopolies are necessarily unlawful.

b. Monopolies

[74] In **The Case of Monopolies** the court held that monopolies are unlawful at common law and even contrary to some statutory law of that era (1572). It would not be correct to say, however, that all monopolies are unlawful. Halsbury's Laws of England indicate that some monopolies do legitimately exist. At volume 18 (5th edition) paragraph 361 the learned editors state the general position thus:

> **"361. Meaning and sources of 'monopoly'.**
>
> It is a monopoly and against the policy of the law for any person or group of persons to secure the sole exercise of any known trade throughout the country, unless permitted by Crown prerogative or statute.
>
> A monopoly may come into being by Crown grant or by statute, by the exercise of intellectual property rights, or from the activities of private persons or combinations of private persons."

At paragraph 364, they give examples of some statutory monopolies:

> **"364. Statutory monopolies.**
>
> There are certain monopolies in existence which have been authorised by statute, for example the provision of postal services and the issue of bank notes in England and Wales by the Bank of England. A number of statutory monopolies in former publicly owned industries have in recent years been abolished."

[75] In this country there are similar statutory monopolies. Section 6 of the Post Office Act grants to the Postmaster-General, with certain specified exceptions, "the exclusive privilege of conveying" letters. **National Transport Co-operative Society Limited v Attorney General of Jamaica** [2009] UKPC 48, cited by Mr Wildman, considered legislation that allowed for the grant of an exclusive licence for supplying public transportation, by omnibus, in the Kingston Metropolitan Transport Region. In paragraph 21 of their Lordships judgment they quoted section 3(1) of the Public Passenger Transport (Corporate Area) Act which stated:

> "The Minister may grant to any person **an exclusive licence** on such conditions as may be specified therein to provide public passenger transport services within and throughout the Corporate Area by means of stage carriages or express carriages or both." (Emphasis supplied)

No complaint was made about the authority to grant an exclusive licence.

[76] Section 3 of the ELA stipulates that the Minister may include regulations in any licence that is issued to an undertaker. The licence is not, therefore, in itself, a regulation. It is to be noted, also, that the ELA seems to draw a distinction between the regulations made by the Minister in licences and rules made by the Minister concerning applications for licences. Whereas section 3 stipulates that licences issued by the Minister may contain regulations, the section does not go on to give the imprimatur of the legislature as section 4 does in respect of rules made by the Minister for applications for licences. Section 4 states that those rules "shall be deemed to be within the powers conferred by this Act, and **shall be of the same force as if enacted in this Act**…" (emphasis supplied). It may be argued, therefore, that the licence granted to JPS does not have the same status as a statutory creation.

[77] Nonetheless, the licence has the authority of the legislature. By section 3, the legislature has given the minister the authority to grant licences with such conditions as he may think expedient. At paragraphs 1499 and 1510 of volume 44(1) of Halsbury's Laws of England (4th edition), the learned editors opine that an act validly done with the authority of an Act of parliament has the same force and effect as if provided for in the Act. Authority for the principle may be found in **Dale's Case, Enraght's Case** (1881) 6 QBD 376, where Lord Coleridge CJ stated, in part, at page 398:

> "...I am of opinion that, so far as the rules and orders, including the forms, conform to the statute and are not inconsistent with it, the rules, orders, and forms have parliamentary authority...."

It is fair to conclude, therefore, subject to challenge in the courts (including challenges on the principles of administrative law dealing with unreasonableness), that the minister is authorised to grant an exclusive licence in appropriate circumstances.

c. Fettering the discretion

[78] The mention of unreasonableness and administrative law brings to the fore the issue of whether the minister created an unlawful fetter on his, and future ministers', discretion to grant licences under the ELA. There is a general principle that an executive carrying out a function delegated by the legislature should not fetter a future exercise of that authority. Hilaire Barnett, the learned author of Constitutional and Administrative Law, expressed the principle in this way:

> "An authority may act *ultra vires* if, in the exercise of its powers, it adopts a policy which effectively means that it is not truly exercising its discretion at all." (Page 770)

Authority for the principle may be found in the judgment of Reid LJ in **British Oxygen**.

[79] The principle is also set out at paragraph 620 of volume 61 of Halsbury's Laws of England 5th ed (2010) where the learned editors state:

> "620. Fettering of discretion.
>
> Where a public body has discretion in exercising its public functions, it must not fetter that discretion by adopting an over-rigid policy. **There is a balance to be struck between certainty, rigidity and individual consideration**. It is generally lawful, and can be desirable, for a public body to have a policy which allows for exceptions, so long as there is genuine flexibility in practice. In limited circumstances, even a policy without exceptions may be lawful. A policy must not take into account irrelevant considerations or exceed the statutory purpose. A policy can

> in some circumstances create a legitimate expectation." (Emphasis supplied)

[80] In **British Oxygen** the House of Lords touched on the question of whether, in creating a rule establishing a lower monetary limit for entitlement to grants of public funds, the Board of Trade had refused to consider applications for smaller amounts. Their Lordships ruled that it had not. Reid LJ included the more poetic language of Bankes LJ in **R v Port of London Authority, ex parte Kynoch Ltd** [1919] 1 KB 176 to describe the general principle concerning the exercise of authority. Reid LJ said in his judgment, at page 170:

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut (his) ears to the application'....**What the authority must not do is to refuse to listen at all**....There can be no objection to [the authority creating a rule] provided that the authority is always willing to listen to anyone with something new to say..." (Emphasis supplied)

[81] It seems, however, that their Lordships were impressed by the Board of Trade's assertion that it had not refused to consider applications for lower amounts and that it did indeed consider British Oxygen's. Their Lordships did not, therefore, have to decide the issue that arises in this case. Viscount Dilhorne so stated at page 175 of the report, but went on to venture a comment on the statement by Bankes LJ. He went further than did Reid LJ, with whom the rest of the House agreed. Viscount Dilhorne said:

> "...In these circumstances it is not necessary to decide in this case whether, if it had refused to consider an application on the ground that it related to an item costing less than £25, it would have acted wrongly.
>
> I must confess that I feel some doubt whether the words used by Bankes LJ in the passage cited above are really

> applicable to a case of this kind. **It seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail. Representations could of course be made that the policy should be changed.**
>
> **I cannot see any ground on which it could be said that it was ultra vires of the Board to decide not to make grants on items costing less than £25** nor on which it could be said to be ultra vires to decide not to make a grant in respect of plant used for a dual purpose, one of which qualifies, if in its opinion the main purpose of the plant was for making delivery to customers. **The Act gives no guidance to the Board nor to the Minister as to the policy to be pursued in deciding whether or not to make a grant. It is left to the Board to decide how to exercise the power given to it.** No doubt that exercise will be in accordance with the policy of the government of the day." (Emphasis supplied)

[82] There does not seem to have been any general support for Viscount Dilhorne's stance. Instead, Reid LJ's stance continues to be upheld as the explanation of the principle. Kenneth Parker QC, in **R (on the application of Nicholds and Others) v Security Industry Authority and Another** [2006] EWHC 1792 (Admin), however, ruled that there are exceptions to the rule set out by Reid LJ. The learned deputy judge not only seemed to give support to Viscount Dilhorne's position, but also held that that "general rule", as explained by Reid LJ, does not apply invariably. In respect of the general rule, he said, at paragraph [61] of his judgment in that case:

> "[61] It seems to me that there is also a further reason why [counsel for the claimants] third ground of challenge is misconceived. His argument rests upon the premise that the "no fetter" principle applies *invariably* wherever a discretionary power is conferred, whatever the statutory context. This argument not only infringes the prescription of the "no fetter" principle itself (as he reads it), **which**

> **assumes that there is an exception to every case**, but, more importantly, it is not, in my view, supported by authority or legal policy. Lord Reid was careful, in the passage cited from **British Oxygen**, to refer to "the general rule"." (Italics as in original, emphasis supplied)

In respect of the application of the rule the learned deputy judge continued by saying:

> "In most instances where a discretionary power is conferred it would be wrong for the decision maker to frame a rule in absolute terms because to do so would defeat the statutory purpose. However, it seems to me that there are certain exceptional statutory contexts where a policy may lawfully exclude exceptions to the rule *because to allow exceptions would substantially undermine an important legislative aim which underpins the grant of discretionary power to the authority.* There is, for example, a well-known line of cases concerning "taxi" licensing where licensing rules, which admitted of no exceptions for any "special" circumstances, were held lawful...[62]...In my view, the statutory context must be examined with great care...." (Italics as in original)

He found that licensing criteria prepared and published by the Security Industry Authority, were within the contemplation of the statute, rational and valid. This is notwithstanding that the criteria automatically debarred persons with "a conviction for a relevant criminal offence" from qualifying for the position of a door supervisor.

[83] The main issues, joined in the present case between JPS and the Attorney General on the one hand, and the respondents on the other, is whether the grant of this exclusive licence barred the consideration of any future application for an electricity licence and, if so, whether the circumstances warranted such a grant by way of an exception to the general rule set out by Reid LJ. Two cases featured significantly in Sykes' judgment and in the submissions by counsel in this court, in this aspect of the

case, namely, **Carrigaline Community TV** and **Practical Shooting Institute**, both mentioned above.

[84] In **Carrigaline Community TV**, Keane J held that the relevant minister had failed to act impartially and fairly when he refused to investigate the possibility of licensing the applicant's system for rebroadcasting television programmes. The minister had earlier granted an exclusive licence to another entity for the transmission of television signals using a different type of technology (MMDS system). As part of his conclusions, Keane J found that the issue of the exclusive licence was justified because the MMDS system presented the features of a natural monopoly (pages 78-79 of the transcript). He, however, found that, based on the technical evidence, the applicant's system would not necessarily have interfered with the MMDS transmissions (page 76). He ruled that the minister was, therefore, wrong in not having given consideration to the co-existence of the systems (pages 77 and 79). The judgment was comprehensive in its examination of the relevant law and its application to the facts. There was no appeal from it.

[85] The judgment in **Practical Shooting Institute** also thoroughly dealt with the issue of the fetter of discretion. In that case, statutory authority had been given to the commissioner of police for New Zealand, to grant or refuse import permits for firearms. The commissioner, in purported exercise of his authority, issued a ban on the importation of certain types of weapons. Tipping J held that the commissioner had acted beyond his powers in purporting to ban the weapons. The ban, he found,

amounted to legislation by the commissioner in the face of the statute requiring the commissioner to make a decision after the consideration of an application.

[86] It is to be noted that Tipping J recognised the difference between the dicta of Reid LJ and Viscount Dilhorne. He opined that Viscount Dilhorne's view was not consistent with either the earlier or the later (up to then) authorities. He said, at page 714:

> "I am of the view that these observations of Viscount Dilhorne [dealing with the consideration of some applications being pointless] are not consistent with the approach taken by Lord Reid following the trend of earlier authority, which approach was expressly concurred by the other members of the House, Lord Morris, Lord Wilberforce and Lord Diplock. None of the other members concurred in Viscount Dilhorne's speech. What Viscount Dilhorne said is not in harmony with [**Attorney-General, ex rel Tilley v Wandsworth London Borough Council** [1981] 1 All ER 1162], or with the later decision of the House of Lords in **Findlay v Secretary of State for the Home Department** [1984] 3 All ER 801."

Mr Hylton's reliance on the dictum of Kenneth Parker QC, in **R (on the application of Nicholds and Others)**, dealing with exceptions, is not on sure footing. In any event, Mr Parker seems to posit his concept of the existence of an exception, on statutory authority. This may be taken from his dictum at paragraph [61] that:

> "…there are certain exceptional statutory contexts where a policy may lawfully exclude exceptions to the [statutory] rule *because to allow exceptions would substantially undermine an important legislative aim which underpins the grant of discretionary power to the authority.*" (Italics as in original)

[87] Certain principles may be distilled from the relevant cases, including **Practical Shooting Institute**. They may be set out as follows:

a. In assessing whether the action complained of is an improper fetter of the authority granted to the decision maker it is first necessary to examine the statutory setting for the authority. (page 716 of **Practical Shooting Institute**)

b. Discretionary powers may be placed in two, or possibly three categories, namely:

    i. those which require an individual case by case examination without any predetermined fetter on the exercise of a discretion, other than that set out or implied by the enabling instrument;
    ii. those which by the nature of the subject matter justify the establishment of a carefully formulated policy;
    iii. possibly those which allow the decision maker to establish an immutable policy admitting of no exceptions. (page 718 of **Practical Shooting Institute**)

c. Where the decision maker establishes a policy to guide the exercise of discretionary powers, "it must not disable itself from exercising a genuine discretion in a particular

case directly involving individual interests; hence it must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment" (paragraph 32 of Halsbury's Laws of England 4th ed vol 1(1).

d. "Contracts and covenants entered into by [the decision maker] are not to be construed as being subject to implied terms that would exclude the exercise of general discretionary powers for the public good; on the contrary they are to be construed as incorporating as implied term that such powers remain exercisable." (deSmith's Judicial Review of Administrative Action 4th ed page 319)

e. "If a public authority lawfully repudiates or departs from the terms of a binding contract in order to exercise its overriding discretionary powers, or if it is held never to have been bound…because the undertakings would improperly fetter its general discretionary powers, the other party to the agreement has no right whatsoever to damages or compensation under the general law…" (deSmith's pages 319-320)

[88] In considering the present case against the background of those principles, there is a factor which is particularly striking. Whereas in almost all of the decided cases, an application was made and refused, that situation does not exist in this case. What the respondents have asserted (and the learned judge found) is that the very existence of an exclusive licence necessarily means that the Minister has closed his ears and his mind to any other application for a licence. The respondents provided no technical evidence to support their position. They made no response to the technical evidence provided by JPS and the OUR concerning the rationale and reasonableness of the grant of the licence.

[89] Because there had been no application for a licence by the respondents or any other person, the response by the Minister's representative, Mr Fitzroy Vidal, the Director of the Energy Division of the Ministry of Science, Technology, Energy and Mining, did not need to provide any reason for a refusal of an application. Perhaps for that reason also, Mr Vidal's affidavit did not address the Minister's approach or policy concerning other applications that may be made for licences to supply electricity. Mr Vidal restricted his affidavit to outlining a history of the developments over the years and to setting out the government's motivation for selling its shareholding in JPS.

[90] Against this dearth of evidence, it may be said that the respondents have not demonstrated that the Minister, by granting an exclusive licence, has created an absolute ban on any other application being made. Nor have they shown that the Minister, by such a licence, has adopted a policy that he will not consider any other application during the currency of the licence to JPS.

[91] As was mentioned in the principles set out above, there is no presumption that the licence prevents the Minister from fulfilling his duties under section 3 of the ELA. The licence cannot, by implication, deprive the Minister of his duty imposed by the section. It has no express warranty by the Minister that he will not consider any other application. It may well be that the Minister would be, based on a particular policy, inclined to refuse any new application, unless it proposes some revolutionary technology or process that would make the continuation of JPS' licence untenable. The principle raised by the cases is that the Minister should not refuse to consider an application. There is no evidence that the Minister has done so or that he has adopted a policy to that effect. In that vein, the issue of dashed legitimate expectations does not arise.

[92] On those bases, it is opined, respectful of the care that he put into his judgment, that Sykes J erred in finding that the Minister, in granting an exclusive licence, did adopt a "closed-ear-closed-mind stance" to any other application, or, as he said in paragraph 110 of his judgment:

> "The Minister has committed himself and his successors to a situation in which there is no possibility of change for the required twenty years...even if new technology or a new company has a better and cheaper way of doing some of what JPS is now doing."

The difference between the conclusion in this judgment and that in the judgment of Sykes J turns more on the evidence that was presented, or rather not presented, than on a difference in approach to the legal principles involved.

[93] Although the finding, that the licence did not fetter the Minister's discretion, would obviate the need to consider the respondents' complaint about the inconsistency in the learned judge's judgment, that issue will, nonetheless, be addressed. This is partly out of respect for the learned judge's careful judgment and partly in recognition of the narrow basis on which this opinion differs from his.

[94] The next section of the judgment is, therefore, posited on the possibility that the learned judge was correct in finding that the Minister had improperly fettered his discretion given under section 3 of the ELA.

Whether the exclusivity of the licence was inconsistent with its validity

[95] The respondents also complained, in their grounds of appeal, that there was a fatal inconsistency in the learned judge's findings concerning the licence. The relevant ground states:

> "(a) The learned trial judge erred in law in that, having correctly held that the minister had no power under the Electric Lighting Act to grant an exclusive licence to [JPS], for the supply of electricity, failed to hold that the said licence is illegal, null and void and *ultra vires* the provisions of the said Act and accordingly, had no legal effect."

[96] Mr Wildman submitted that the learned judge was in error when he found that the licence was valid despite the fact that the Minister had no power to grant exclusivity. Learned counsel argued that there could be no half-way position. He submitted that the offending clause could not be severed in order to save the licence. He relied on the cases of **McLaughlin v Governor of the**

Cayman Islands [2007] UKPC 50; [2007] All ER D 360 (Jul), **Hall and Company Limited v Shoreham-by-Sea UDC and Another** [1964] 1 WLR 240 and **Chertsey UDC v Mixnam's Properties Limited** [1965] AC 735 in support of his submissions.

[97] The learned judge did not specifically examine the issue of severance of the exclusivity clause in the licence. It is evident that he was of the view that it could be severed without affecting the remainder of the licence. Contrary to what Mr Wildman has submitted, the fact that an executive instrument contains clauses that are outside of its mandate does not automatically render the whole instrument invalid.

[98] The only one of the authorities that addresses the point of severance is **Hall and Company Limited**. In that case the court, having ruled that certain conditions contained in planning approval were invalid, went on to consider the issue of severance. The proposed developer advocated the severing of the offending conditions. The court did not agree. It held that the offending conditions were so fundamental to the grant of planning permission that the entire instrument was void. The reason for this finding was that without those conditions the permission might well not have been granted. The court did not dismiss, however, the argument that, where permission contains a large number of conditions, "if one or two quite trivial conditions were held to be *ultra vires*, it could well be difficult to justify saying that the whole permission must fail" (see the judgment of Willmer LJ at pages 251-252). It was of the view that the argument did not arise in that case.

[99] **McLaughlin v Governor of the Cayman Islands** dealt with a wholly different situation. In that case the Privy Council held that a declaration by the Court of Appeal of the Cayman Islands that a purported termination of a government officer's employment was void, could have no other effect but that the officer remained in the government's service. In **Chertsey UDC v Mixnam's Properties Limited,** a licensee objected to the inclusion of certain conditions in its licence. The question assessed was whether those conditions were unlawful and therefore void. The validity of the licence, without those conditions, was not in issue.

[100] Whereas in **Hall and Company Limited** the court found that the planning authority may not have granted permission without the impugned conditions, the same could not be said of the grant of the licence to JPS. The exclusivity was for JPS' benefit. It may be that without the grant of an exclusive licence, the prospective purchaser of the government's shares would not have been inclined to make the purchase and to make the required investment that the operation required. That eventuality is now mere speculation. The purchaser and its successors have already made substantial investments. If it were found that the condition of exclusivity was void, JPS could continue to perform its duties thereunder, without detriment to the Minister's obligations under the ELA. There would be no detriment to the public arising from such a finding. The conditions providing for exclusivity are therefore severable. The learned judge was entitled to find that the licence was valid despite his finding that the condition of exclusivity was unlawful.

The OUR's involvement and the question of its costs

[101] The final issue raised by the respondents is the question of fact as to whether the OUR recommended the inclusion of the exclusivity clause in the licence. It was argued in the court below that such a recommendation was in breach of the Office of Utilities Regulation Act "because it was not a recommendation that encouraged competition in the public utility services" (paragraph 119 of Sykes J's judgment).

[102] The learned judge ruled that there was no factual foundation for the complaint. Sykes J not only found that there was no record of any recommendation made to the Minister concerning the licence, but also recognised that there was direct evidence from the OUR that it did not recommend exclusivity to the Minister. Having so ruled, Sykes J ordered that the respondents pay the OUR's costs of the claim.

[103] Mr Wildman submitted that the learned judge erred in his findings. Learned counsel relied on the preamble to the licence that stated that it was "on the recommendation of the OUR" that the licence had been granted. That statement having been made, Mr Wildman argued, the burden of proof then shifted to the OUR to show otherwise. He contended that it had not. He submitted that this court should substitute a finding that the OUR did recommend that an exclusive licence be granted. He relied on **R v Edwards** [1979] 2 All ER 1085 and other cases in support of his submissions.

[104] Mr Wildman is not on good ground with these submissions. The learned judge's findings and reasoning are in accordance with the evidence and are unassailable. The

respondents provided no evidence as to the recommendations the OUR had made. Even if the preamble shifted the burden of proof to the OUR, there was direct evidence from the affidavit of Mr J Paul Morgan, the former Director-General of the OUR, that the "OUR did not advise on the granting of an exclusive licence to JPS".

[105] It is true that the OUR drafted the licence and the licence included the exclusivity provisions. The drafting was, however, on the instructions of the team negotiating the agreement with the prospective purchasers of the government's shares in JPS. A letter dated 2 February 2001, from the National Investment Bank of Jamaica Limited to the OUR, exhibited by Mr Morgan, confirmed, in part, as follows:

> "…that the GOJ Negotiation Team has agreed the following three points with Mirant Corporation…which have a direct bearing on the new Licence to be granted to JPSCo:
>
> - JPSCo shall continute to enjoy its exclusive rights under the current licence for a period of 20 years as of the date that Mirant takes control of JPSCo.
> - …"
>
> (See page 480 of Volume 3 of the record of appeal)

[106] There is, therefore, no basis for overturning the learned judge's finding. There is, similarly, no basis for disturbing his finding that the respondents should pay the OUR's costs. The learned judge was applying the general principle that costs should follow the event (rule 64.6(1) of the CPR). The award of costs is left to the discretion of the presiding judge and this court will not lightly interfere with a ruling in that regard. Sykes J's reasoning on this point is similarly unassailable.

Costs

[107] The Attorney General also raised an issue of costs. Mrs Foster Pusey argued that, as the respondents had been only partially successful before Sykes J, the learned judge should have ordered that they should only secure a portion of their costs. Learned Queen's Counsel relied on the provisions of the CPR that speak to that issue, namely, rule 64.6 paragraphs (1), (2), (3), (4 (b)) and (5 (a)). She argued that the learned judge, not having made any reference to these provisions, particularly paragraphs 4(b) and 5(a), for arriving at his decision, must be taken to have ignored them. She therefore submitted that his ruling in this regard should be set aside and a ruling reflecting partial success be substituted. Those submissions were, of course, predicated on the outcome of this appeal being in favour of the respondents.

[108] As, on this judgment, the respondents have not been successful, the issues raised by counsel do not fall for assessment. The general principle that the unsuccessful party should pay the costs of the successful party should apply in respect of the appeal and in the court below. There is no reason to depart from that principle. Its application would result in the respondents being ordered to pay the costs of the appeal as well as the costs in the court below.

Conclusion

[109] Based on the reasoning set out above, it is concluded that the appeals by JPS and the Attorney-General (except for the latter's appeal against the order for costs), should be allowed while the respondents' appeal should be dismissed. On the issues raised by the respondents, JPS and the Attorney General, it is concluded that on a fair

interpretation of the ELA in its context, it does not prevent the Minister granting an exclusive all-island licence. It is also concluded that the grant of an exclusive licence does not prevent the Minister from considering other applications for licences. The respondents, in this regard, did not provide any evidence that the Minister had adopted an approach that no other applications for licences would be considered on merit.

[110] Based on the above findings costs should follow the event and should be awarded to the JPS, the Attorney-General and OUR both in this court and in the court below. Such costs are to be taxed, if not agreed.

PANTON P

ORDER

(a) The appeals by the Jamaica Public Service Company Limited and the Attorney General, respectively, are allowed.

(b) The counter appeal by the respondents is dismissed.

(c) Costs of the appeals and counter appeals, as well as costs in the court below, to the Jamaica Public Service Company Limited, the Attorney General and the Office of Utilities Regulation, to be paid by the respondents, such costs to be taxed if not agreed.