[2020] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 76/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**JENNIFER MAMBY-ALEXANDER**	**1ST APPELLANT**
AND	**ALFRED THOMAS (ON BEHALF OF THEMSELVES AND 92 OTHER RESIDENTS IN THE COMMUNITY OF HOPE PASTURES IN THE PARISH OF SAINT ANDREW)**	**2ND APPELLANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**RESPONDENT**

Lord Anthony Gifford QC and Mrs Emily Shields instructed by Gifford, Thompson & Shields for the appellants

Patrick Foster QC and Mrs Symone Mayhew instructed by Symone M Mayhew for the respondent

3, 4, 18 February and 23 October 2020

PHILLIPS JA

[1] I have read in draft the judgment of my sister Straw JA and agree with her reasoning and conclusion. I have nothing further to add.

STRAW JA

[2] On 27 October 2015, the appellants, Jennifer Mamby-Alexander and Alfred Thomas, commenced a claim in the Supreme Court of Jamaica. Pursuant to leave granted by the said court on 17 November 2015, they were allowed to pursue the claim on behalf of themselves and 92 other residents in the community of Hope Pastures in the parish of Saint Andrew against the respondent, Jamaica Public Service Company Limited ('JPS'). They sought, *inter alia,* a declaration that JPS is bound to provide and maintain a supply of electricity by underground cables to their premises in Hope Pastures, as well as injunctive relief restraining JPS from taking steps to convert their electricity supply from underground to overhead cables.

[3] On 27 January 2016, before the claim was heard, the appellants successfully obtained an injunction restraining JPS from deliberately disconnecting their underground supply of electricity, without their agreement, until the trial of the claim or further order of the court.

[4] Subsequently, at the case management conference held on 8 June 2017, Sykes J (as he then was) made orders which effectively bifurcated the trial of the claim. The learned judge ordered that certain preliminary points of law were to be determined in open court and the parties were to file an agreed statement of facts as well as an agreed bundle of all applicable statutes and subsidiary legislation.

[5] The trial of the preliminary points of law took place on 28 and 29 November 2017 before Sykes J. On 10 May 2018 the learned judge made the following orders:

> "1. Preliminary points of law have been answered in the negative.
>
> 2. Cost to the Defendant [JPS] to be agreed or taxed.
>
> 3. Leave to appeal is refused.
>
> 4. Injunction granted on the 25th day of November 2015 is discharged.
>
> 5. Matter to be set down for case management to determine whether [the] rest of the claim can go forward."

[6] On 24 May 2018, the appellants filed a notice of application for leave to appeal the decision of Sykes J and requested an interim injunction, pending the appeal, which would restrain JPS from disconnecting the underground supply of electricity provided to the appellants. On 17 July 2018, this court granted leave to appeal the decision of Sykes J and ordered an interim injunction as requested. On 18 February 2020, we confirmed that the interim injunction granted on 17 July 2018 was to remain in place until the determination of the appeal.

The preliminary points of law

[7] This court has had the benefit of the learned judge's written reasons for judgment. It is useful to set out paragraph [3] of that judgment which sets out the preliminary points of law and provides the context for these points which the learned judge ultimately resolved in the negative. It appears that these points for determination were framed by the parties having regard to the issues and were set out in a document entitled "Preliminary Points of Law". The learned judge stated as follows:

> "[3] As can be seen this dispute is ultimately about who should pay for the underground cable system, if it is to be

replaced, now that it has to come to the end of its useful life. There is no dispute about the facts. This state of affairs permitted the matter to be heard without oral evidence being called. **Since there was agreed facts and agreed documents the matter proceeded by way of formulating the issues that arose for decision. The preliminary questions were framed in this way**:

> (1) Whether by reason of the approval by the House of Representatives on 27th April 1961 and the Legislative Council on 5th May 1961 of the Hope Housing Scheme ('the scheme'):
>
> > a. the defendant was obliged by law to install and maintain a supply of electricity to the residents in the scheme by means of underground wires;
> >
> > b. the actions and proposed actions of the defendant between about 2014 and the present day, in installing or seeking to install a supply of electricity by overhead wires were illegal.
>
> (2) Whether the claimants have any legal right to the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24th of April 1962 between the Director of Housing and the defendant granting the defendant certain easement liberties and rights.
>
> (3) Whether the claimants and/or residents of the scheme have a right to seek and obtain relief by way of:
>
> > a. an injunction restraining the defendant from changing the mode of supply of electricity to their residences from underground wires to overhead wires;
> >
> > b. a mandatory injunction ordering the defendant to restore a supply by underground wires to those properties which have been provided with a supply by overhead wires;

> c. a mandatory injunction ordering the defendant to dismantle all poles and wires and other equipment which have been installed within the area of the scheme;
>
> d. damages for any loss suffered by reason of the illegal installation of an overhead supply."

The orders sought and grounds of appeal

[8] The appellants filed a notice and grounds of appeal on 19 July 2018 seeking the following orders:

> "(i) That the decision of the Honourable Chief Justice Bryan Sykes be set aside;
>
> (ii) That each and every question contained in the document titled Preliminary Point[s] of Law be answered in the affirmative;
>
> (iii) That the Declarations sought in paragraphs 1 and 2 of the Amended Particulars of Claims be granted;
>
> (iv) That the injunctions sought in paragraphs 3, 4, 5 and 6 of the Particulars of Claims be ordered;
>
> (v) That the matter be remitted to the Supreme Court to assess the damages to which the Appellants or any resident represented by them are entitled [;]
>
> (vi) Costs to the Appellants to be taxed or agreed.
>
> (vii) Such further or other relief as may be just."

[9] For completeness, the declarations sought at paragraphs 1 and 2 of the amended particulars of claim (referred to in paragraph (iii) of the above orders) are as follows:

> "1. A Declaration that the Defendant, Jamaica Public Service Company Limited, is bound to provide and maintain a supply of electricity by underground cables to the premises of the Claimants in Hope Pastures in the parish of Saint Andrew;
>
> 2. A declaration that the provision of electricity by the Defendant by overhead wires to any part of the Hope Pastures scheme is a breach of the provisions of the statutory scheme and is illegal."

[10] The injunctions sought in paragraphs 3, 4, 5 and 6 (referred to in paragraph (iv) of the above orders) are as follows:

> "3. An injunction restraining [JPS] whether by itself or any person duly appointed by [JPS] and acting as its servant or agent, from disconnecting the supply of electricity provided by way of underground cables to the premises of the Claimants;
>
> 4. An injunction restraining [JPS] whether by itself or any person duly appointed by [JPS] and acting as its servant or agent, from entering upon the premises of the Claimants other than in accordance with the right of the easement grated on the 24th April, 1962 for the maintenance and repair of the installations for the supply of electricity by underground cables;
>
> 5. A mandatory injunction ordering [JPS] to reconnect the supply of electricity by underground cable to the premises of the Claimants which have been disconnected from the underground supply;
>
> 6. A mandatory injunction ordering [JPS] to restore and maintain the supply of electricity by underground wires to the whole area of the statutory scheme and to remove all poles [,] wires and other things which have been installed by [JPS] in order to provide a supply by means of overhead cables."

[11] In respect of the order sought at paragraph (v), it was indicated by counsel for the appellants that an award of damages in general terms was not being sought as that

was not appropriate. Damages were being sought in respect of specific appellants who incurred particular losses relating to electrical outages and securing alternative methods of power.

[12] It is to be noted that counsel for JPS took issue with a number of the orders sought, in particular the injunctive relief, on the basis that they were premature and could not be granted by this court having regard to the separation of the trial of the issues.

The grounds of appeal

[13] There are a total of 14 grounds of appeal, which are as follows:

> "(a) The learned judge erred in his expressed understanding of what the issues before the court were when he said 'As can be seen this dispute is ultimately about who should pay for the underground cable system if it is to be replaced, now that it has come to the end of its useful life' (paragraph 3);
>
> (b) The learned judge erred in concluding that the underground system was at the end of its useful life when there was no expert opinion before him on which such conclusion could be based and that was not an agreed fact;
>
> (c) The learned judge erred in holding that no obligation was imposed on JPS by law by reason of the approval, by the House of Representatives on 27th April 1961, and by the Legislative Council on 5th May 1961, of the Hope Housing Scheme;
>
> (d) The learned judge erred in not holding that by reason of the provisions of section 43A (1) (g) (sic) [46C(2)(g)] of the Housing Act [sic] as amended, the provision of the scheme for an underground electricity supply had effect as if enacted in law;

(e) The learned judge erred in holding that the Respondent was not obliged by law to install and maintain a supply of electricity to the residents in the Hope Housing Scheme by means of underground wires;

(f) The learned trial judge erred in holding that the actions and proposed actions of the Respondent, between about 2014 and the present day, in installing or seeking to install a supply of electricity by overhead wires, were not illegal;

(g) The learned judge erred in holding that the Appellants have no legal right to the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24th day of April, 1 962 between the Director of Housing and the defendant granting the defendant certain easements liberties and rights;

(h) The learned judge erred in not holding that since the rights granted to the Respondent by the said instrument were endorsed on the certificates of title of each and every owner of houses in the scheme, such rights could only be extended or modified by application to the Supreme Court pursuant to the Restrictive Covenants (Discharge and Modification) Act;

(i) The learned judge erred in not holding that under the terms of the Respondent's License, which were incorporated into the terms and conditions of the contracts of each owner, the Respondent was obliged to perform the duties imposed or authorized under the relevant laws, and was further obliged to observe such conditions relating to wayleaves as the relevant laws may prescribe.

(j) The learned judge erred in holding that Appellants have no right to seek and obtain relief by way of an injunction restraining the Respondent from changing the mode of supply of electricity to their residences from underground wires to overhead wires;

(k) The learned judge erred in holding that Appellants have no right to seek and obtain relief by way of a mandatory injunction ordering the Respondent to restore a supply by underground wires;

> (l) The learned judge erred in holding that Appellants have no right to seek and obtain relief by way of a mandatory injunction ordering the Respondent to dismantle all poles and wires and other equipment which have been installed within the area of the scheme;
>
> (m) The learned judge erred in holding that Appellants have no right to seek and obtain relief by way of damages for any loss suffered by reason of the illegal installation of an overhead supply.
>
> (n) The learned judge erred in awarding costs in a matter involving important issues of public law and in which the principles relevant to judicial review cases should have been applied."

[14] Counsel for the appellants, Lord Gifford QC, advanced his submissions in respect of the 14 grounds by reference to six pillars. These are as follows: Pillar 1: the Housing (Amendment) Law, 1958; Pillar 2: the grant of easement/wayleave; Pillar 3: the Electric Lighting Act; Pillar 4: the respondent's licence; Pillar 5: the contract with the appellants and Pillar 6: the restrictive covenant. Counsel for JPS, Mr Foster QC, made his submissions by reference to the grounds.

[15] However, for expediency, the submissions of both counsel will be grouped and considered by reference to the three preliminary questions which the learned judge resolved in the negative. The questions as distilled are set out as follows:

> Preliminary question 1: Did the learned judge err in concluding that the legislative approval of the Hope Housing Scheme did not oblige JPS to install and maintain the underground supply of electricity to the appellants; and did he also err in not finding that this rendered the installation of supply by overhead wires illegal. ***(grounds c, d, e, f)***
>
> Preliminary question 2: Did the learned judge err in concluding that the appellants did not have any legal right to

> the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24 April 1962 between the Director of Housing and JPS granting JPS certain easement liberties and rights. ***(grounds g, h and i)***
>
> Preliminary question 3: Did the learned judge err in concluding that the appellants and/or residents of the scheme did not have a right to seek and obtain injunctive relief and damages. ***(grounds j, k, l, m)***

[16] Ground e, though it relates to preliminary question 1, is wider in scope than the question the learned judge was asked to resolve and will be given special consideration. Grounds a and b will be considered separately, as they are not relevant to any of the preliminary questions to be reviewed and, in my view, are peripheral to the issues to be determined on appeal. In relation to ground n, which pertains to the award of costs, it is to be noted that no submissions were made relative thereto. It will therefore be assumed that there is no requirement to resolve that issue during the determination of this appeal.

Preliminary question 1: Did the learned judge err in concluding that the legislative approval of the Hope Housing Scheme did not oblige JPS to install and maintain the underground supply of electricity to the appellants; and did he also err in not finding that this rendered the installation of supply by overhead wires illegal *(grounds c, d, e, f)*

Submissions on behalf of the appellants

The Hope Housing Scheme

[17] By way of background, Lord Gifford referred the court to the legislative framework under which the Hope Housing Scheme ("HHS") was submitted. The Housing Law, 1955 (the "Housing Law") was amended by the Housing (Amendment) Law, 1958 (the "Housing (Amendment) Law") which inserted Part VIIA and is read as

one with the Housing Law. This Part contained the new sections 46A to 46C, entitled "Preparation, approval and completion of scheme prepared by housing associations." The HHS was submitted under the said Housing (Amendment) Law by Housing Estates Limited ("HEL") a housing association as certified by the then Minister of Housing and Social Welfare on 16 August 1960.

[18] It was acknowledged that there was no direct reference to any provision for electrical supply in the said Housing (Amendment) Law, however, the court was asked to consider the following provisions at sections 46A(1), (2)(a) and (f) which provide:

> "46A (1) A housing association may prepare and submit to the Minister a scheme for the laying out or subdivision of land and the construction of houses thereon.
>
> (2) Every scheme submitted under subsection (1) of this section shall be accompanied by a plan of the area to which such scheme relates and a statement showing –
>
> (a) the manner in which it is intended that the area to which the scheme relates shall be laid out and the land therein used and, in particular, the land intended to be used for the provision respectively of houses, roads and open spaces and for public and commercial purposes;
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) particulars relating to water supply, drainage, sewage disposal **and to such other matters of like nature as the Minister may require**;"
>
> (Emphasis supplied)

[19] The HHS having been approved by the Legislative Council and House of Representatives, Lord Gifford also invited the court's attention to section 46C(2)(g), which provides:

> "(2) Where the Legislative Council and House of Representatives approve any scheme submitted under subsection (1) of this section, the following provisions shall apply with regard to the carrying out of such scheme –
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …
>
> (g) the provisions of the scheme shall have effect as if they were enacted in this Law."

[20] Turning now to the actual instrument titled "Hope Housing Scheme Parish of St. Andrew – Jamaica" ("the Scheme document"), which was appended to a Ministry Paper dated 6 April 1961, Lord Gifford referred to paragraph 3 which recited, "[f]ollowing are the required particulars. Sec. 46A(2) Plan is enclosed showing the area to which the scheme relates". He stated that the 10 sub-paragraphs which followed, refer to matters such as the road system, developmental works, fencing, and in particular sub-paragraph 5 which provides, "[u]tilities in the form of telephone and electric services will be available. The respective Companies were asked in keeping with the request from the Ministry to make provision for the undergrounding of the wires and this has

been done". It is learned Queen's Counsel's contention that when these paragraphs are read together, the parts dealing with electrical supply are "provisions of the scheme" and thus have effect as if enacted into the Housing Law pursuant to section 46C(2)(g).

[21] Queen's Counsel contended that the *ejusdem generis* principle is to be applied to the requirement for the electrical connection, even though it was not listed under section 46A(2)(f) (set out above at paragraph [18]) which spoke to water supply, drainage and sewage disposal.

[22] Reference was also made to sub-paragraphs 6 and 7 of the Scheme document:

> "6) The Jamaica Public Service Co. Ltd. estimated that the cost of the underground system would be £67,810 and £16,800 for the present system of overhead wires, or a difference £51,010.
>
> 7) Settlement of negotiations with the two Companies provides for the following expenditure to be met by the Housing Estates Ltd.:-
>
> > a) The excess cost amounting to £51,000 for underground electric wires, which amount will be refunded on a pro rata basis on completion of the buildings from time to time.
> >
> > b) …"

[23] It was reiterated that these provisions contained in the Scheme document, took effect therefore as if enacted in law (per section 46C(2)(g) of the Housing Law) and, in particular, that this meant that (a) the supply of electricity to the Hope Pastures community was to be by underground wiring; (b) HEL would refund to JPS the extra cost of installing the underground wiring; and (c) HEL would secure such refund on

completion of the buildings from time to time, that is, the extra cost would be recovered from the individual purchasers. Lord Gifford further submitted that any alterations to these provisions could only be made by the Legislature.

Effect of the Minister's request

[24] Lord Gifford contended that the learned judge erred in his agreement (set out at paragraph [28] of his judgment) with counsel for JPS' proposition that the Minister could not insist on any provision which had not been set out in the statute; that he could make a request, but not impose an obligation to provide electricity. Queen's Counsel submitted also that the learned judge overlooked the fact that the then Minister of Housing and Social Welfare, in moving the resolution in Parliament for the approval of the scheme said "an interesting **feature** of this scheme is the fact that all the wiring for telephone and light and power will be underground" (emphasis supplied).

[25] It was further submitted that, even if it was a request and not a requirement or feature, the effect would not be any different. If a method of supply of electricity was requested and that request acceded to, it would become a provision of the scheme.

Special statute

[26] Reference was also made to section 5(1)(a) of the Electric Lighting Act which Lord Gifford contended confirmed the legal effect of the approval of the HHS. This section reads:

> "5(1) The undertakers shall be subject to such regulations and conditions as may be inserted in any licence, order or

> **special Statute**, affecting their undertaking with regard to the following matters –
>
> > (a) the limits within which, **and the conditions under which, electricity is to be supplied**;
> >
> > (Emphasis supplied)

[27] He referred the court to the definition of "special act" from Stroud's Judicial Dictionary (fourth edition); that it is an act that is "directed towards a special object, or special class of objects … its antithesis is a general or public Act of Parliament". Lord Gifford made two submissions in respect of this point. Firstly, the term "special statute" was apt to describe the legislative approval of the HHS, pursuant to the Housing Law which states that the "provisions of the scheme shall have effect as if enacted in this Law".

[28] Secondly, Queen's Counsel submitted that section 5(1) of the Electric Lighting Act is wide in its terms and its objective is clear that if any regulations or conditions are contained in any official document, especially one approved by or created under the authority of Parliament, then JPS, as the undertaker, is subject to them and must comply with them.

[29] Lord Gifford candidly acknowledged that neither section 5(1) of the said Act nor the arguments in respect of a special statute were commended to the learned trial judge. However, he submitted that these aspects of his submissions were merely confirmatory of the correctness of the appellants' case. It was further submitted that if the learned judge had considered section 5(1), he might not have come to the conclusion that he did at paragraph [19] of his judgment:

> "...the provision of electricity was settled by negotiation which can only mean that no obligation was placed on JPS by the approval of the legislature. The obligation at all material times was on HEL which in turn contracted with JPS so that it could meet its obligation under the approval. JPS was not the housing association and therefore could not be the subject of statutory obligations. Any obligation on JPS would have to be found in the law of obligations. Only private law arrangements could oblige JPS to provide electricity to the residents by underground cable..."

[30] Further, it was contended that the learned judge erred in finding as he did at paragraph [36] that HEL had the duty to ensure that the HHS included underground cables to provide electricity. Rather, he submitted, it was JPS who was tasked with the actual installation.

Amended and Restated All-Island Electric Licence 2011

[31] It was contended that once the underground system was installed, it was JPS' duty to maintain it in accordance with the Amended and Restated All-Island Electric Licence 2011 ("the 2011 licence") which was granted by the relevant Minister in the exercise of powers conferred by section 3 of the Electric Lighting Act. The 2011 licence was published in the Gazette on 19 August 2011. Lord Gifford referred the court to a number of conditions under the said 2011 licence on which he relied in support of his contention.

Condition 13: Duty to Connect at paragraph 10(i):

> "10. Notwithstanding any other provisions, the Codes shall contain the following:
>
> (i) the Licensee shall at all times during the term of this Licence or any extension thereof furnish and maintain

> a Supply of electricity for public and private use in accordance with reasonable standards of safety and dependability as understood in the electric business;"

Condition 2: general conditions at paragraph 6:

> "The Licensee shall discharge its obligations and perform the duties imposed or authorized under the relevant laws and shall enjoy the rights and exercise all powers conferred by such laws on authorized undertakers."

Condition 25: Powers to Carry Out Street Works, Way Leaves, Etc. at paragraph 6:

> "The Licensee may exercise such rights and shall observe such conditions relating to way-leaves, entry to private property and the construction of lines above or below ground, as the relevant laws may prescribe..."

[32] Lord Gifford submitted that JPS was required to maintain a system of supply mandated by law, and in the present case, the undergrounding of the wires had to be maintained. This was supported by each contract between the appellants and JPS which is expressed to be subject to JPS' licences. Queen's Counsel referred the court to the specimen contract which states, in the terms and conditions of service, that electricity will be supplied in accordance with, *inter alia*, the Standard Terms and Conditions of Electricity Service; which in turn provides that JPS "shall furnish service under its current Rates or any amendments thereto from time to time and these Terms and Conditions and subject also to the provisions of its Licences under the Electric Lighting Law and Regulations made under the said Licences or the Law".

[33] Queen's Counsel submitted also that there is no dispute that the underground system, if properly maintained, is safe and dependable. He referred the court to

paragraph 25(e) of JPS' amended defence, wherein it was pleaded that "whenever a customer requests an underground supply this is facilitated at the cost of the customer" as well as the letter from JPS dated 23 February 1970 which shows that JPS was fully aware of its responsibility to do the necessary maintenance work.

Submissions on behalf of the respondent

[34] Learned counsel for JPS, Mr Foster QC, began his submissions by reference to the legal framework in which JPS operated. He referred the court to sections 3 and 5 of the Electric Lighting Act. By way of background, it was acknowledged that JPS has several licences to supply electricity. JPS charges its customers for a supply of electricity according to published tariffs which are updated periodically as approved by the regulator, Office of the Utilities Regulation ("OUR"). Tariffs are predicated on the cost of installation and maintenance of an overhead system, not an underground one. Additionally, under its licence, JPS is obliged to connect customers up to 100 metres from an electricity distribution line. Connections beyond that distance require the customers to pay. Equally, where underground connections are requested, JPS facilitates this at the customer's cost. Things such as internal wiring, potheads, and metre points are the responsibility of the customer and these must be approved by the Government Electrical Inspectorate prior to JPS supplying electricity.

The Hope Housing Scheme

[35] It was submitted that the learned judge was correct, having considered sections 46A, 46B and 46C(2)(e) of the Housing Law, to conclude that there was no obligation imposed on JPS under the HHS. It was clear on a proper construction of the legislation

that the statutory obligations were imposed on the housing association (HEL) and not JPS, who was a mere contractor/provider of services. Reference was made to the learned judge's summary of what he considered to be the responsibilities of the parties at paragraphs [32] and [33] of his judgment.

Effect of the Minister's request

[36] It was submitted that, on a proper review of the documents before the court and proper construction of the legislation, it was clear that the provision of electricity by underground wires was as a result of a request of the Minister of Trade and contractual arrangements between HEL and JPS. The learned judge was correct in his conclusion to this effect, which was set out at paragraphs [27] and [28] of his judgment.

[37] Further, it was contended that nowhere in section 46A, where the details to be included in the statement to be provided to the Minister were set out, is there any requirement for details in relation to the provision of electricity services. The House of Representatives did not require this information as necessary for the approval of the HHS, as such there was no statutory obligation to provide electricity via underground wires. The Housing Law contemplated that a scheme could have been approved without provisions for electricity being expressly set out before the House of Representatives. Against this background, it was submitted that the provision of electricity by underground wires was an added feature of the HHS and not a statutory requirement.

JPS' Licences - Amended and Restated All-Island Electric Licence 2011

[38] Queen's Counsel stated that an All-Island Licence was issued to JPS in 1966. Pursuant to clause 4, JPS has the right and privilege to sell and supply electricity for public and private purposes in all of the island of Jamaica, subject to the provisions of the licence and the regulations provided therein. Mr Foster referred the court to clauses 5, 17 and 18 which are essentially mirrored in the conditions in the 2011 licence, namely condition 2 (paragraphs 2 and 3) and condition 13 (paragraph 10(i)):

> "Condition 2: General Conditions
>
> 1. …
>
> 2. The Licensee is hereby granted the Licence, right and privilege (hereinafter called "this Licence") to generate, transmit, distribute and supply electricity for public private purposes in all 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 the 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."

> "Condition 13: Duty to Connect
>
> 10. Notwithstanding any other provisions, the Codes shall contain the following:
>
> (i) the Licensee shall at all times during the term of this Licence or any extension thereof furnish and maintain a Supply of electricity for public and private use in accordance with reasonable standards of safety and dependability as understood in the electric business

> (ii) the rights of any Person desiring to obtain electric service will be subject to his entering into an agreement with the Licensee in such form as may be established by the Licencee from time to time with the approval of the [OUR];"

[39] Mr Foster reiterated JPS' position as pleaded in its amended defence, that: (i) the underground system was installed over 50 years ago and is antiquated, consequently, JPS has faced difficulties in sourcing replacement parts to maintain and repair the system which affects its reliability; (ii) it is an implied term of the agreement with the appellants that in the event that JPS is unable to maintain a safe and reliable supply of electricity via the underground cables, then it is at liberty to provide a supply by other means, such as an overhead supply; (iii) JPS has no legal obligation to supply the appellants via underground cables only, its obligation is to provide an adequate, safe and efficient supply of electricity based on modern standards.

Special statute

[40] Mr Foster took the point that the appellants have for the first time in their written submissions raised the point that the Housing Law is a special statute. This was neither raised in the pleadings in the court below nor in the grounds of appeal before this court.

[41] In any event, it was contended that the appellants have misinterpreted section 5 of the Electric Lighting Act. The reference to a special statute must be read together with the following words, that is, "special Statute affecting their undertaking with regard to the following matters" (emphasis supplied).

[42] The Housing Law is not a special statute, but a general statute relating to matters concerning housing and the responsibilities of developers establishing housing schemes and the requirements and procedures for the approval of schemes under the Act. It does not affect JPS' undertaking as contemplated by section 5 of the Electric Lighting Act.

[43] By contrast, an example of a special statute which affects JPS' undertaking is the Office of the Utilities Regulation Act ("OUR Act"). This Act gives the OUR powers in relation to JPS' provision of electrical services, including powers to determine rates which would affect the conditions under which electricity is to be supplied as contemplated by section 5 of the Electric Lighting Act. There is nothing in the Housing Law which affects the terms or conditions under which JPS supplies electricity.

[44] Even if the Housing Law were a special statute, it was submitted that there is nothing in the said Act which refers to JPS or any conditions or obligations under which it is to supply electricity. The appellants' arguments relate to schemes approved under the Housing Law and not the Act itself.

Illegality of the installation of overhead wires

[45] With respect to the finding of the learned trial judge at paragraph [36] of his judgment, that the contract between the residents and JPS was not illegal on the basis of JPS breaching a statutory duty as it was not mandated by the Act to provide electricity by underground means, rather it was the duty of HEL, it was submitted that this was an inescapable finding.

[46] Mr Foster pointed out that if there was a statutory requirement then the logical conclusion would be that any changes would have to be approved by Parliament.

Analysis and determination

[47] At paragraphs 4 to 17 of his written judgment, Sykes J set out expansively the history of the Housing Laws and specifically, the establishment of the HHS. This formed part of the record of the court and will not be repeated in any great detail, save for what is required for a proper determination of the appeal. I must also express my gratitude to both counsel for their submissions and industry in this regard. Learned counsel for the appellants helpfully provided a chronology relating to the HHS", which is reproduced below:

22 September 1960	The HHS was submitted for approval by the Minister
4 April 1961	Ministry Paper No 14/1961 was submitted for the approval of the House of Representatives
27 April 1961	The House of Representatives approved the HHS
5 May 1961	The Legislative Council approved the HHS
14 April 1962	The grant of easement given to JPS by the Director of Housing

23 February 1970	JPS issued a letter to its customers informing of works being carried out on the underground system
In or about 2014	JPS launched a pilot project for the supply by an overhead cable network, including the erection of concrete and wooden poles throughout the area.

The legislative framework of the scheme

[48] The essential issue for determination is whether the approval by Parliament – the House of Representatives on 27 April 1961 and by the Legislative Council on 5 May 1961 of the HHS within the framework of the Housing Law, created a statutory obligation on JPS to provide electricity to the said HHS by means of an underground system.

The Housing (Amendment) Law

[49] For context, it bears repeating that the HHS was submitted under the Housing (Amendment) Law, which was an amendment to the Housing Law. The amendment resulted in Part VIIA being inserted into the principal law. This part which is titled "[p]reparation, approval and completion of scheme prepared by housing associations" contained new sections, 46A to 46C. Section 46A(1) states that a housing association may prepare and submit to the Minister a scheme for the laying out or subdivision of land and the construction of houses.

[50] It was by virtue of this provision that HEL submitted the HHS to the relevant Minister. Section 46A(2) sets out the details of the scheme that must be included in the statement that is submitted along with the plan. What is of particular importance are the details set out at section 46A(2)(f), which provides that the accompanying statement should include:

> "particulars relating to water supply, drainage, sewage disposal and to such matters of like nature as the Minister may require."

[51] This subsection has to be read in conjunction with sections 46C(1) and (2) and in particular, subsections (e) and (g) of subsection (2), which provide:

> "46C (1) Where the Minister considers that any scheme submitted under section 46A of this Law should be approved, he shall submit the scheme to the Legislative Council and House of Representatives with a statement that the layout plan and the statement furnished under paragraph (b) of subsection (1) of section 46B of this Law have been approved by the Local Authorities concerned or by the Minister, as the case may be.
>
> (2) Where the Legislative Council and the House of Representatives approve any scheme submitted under subsection (1) of this section, the following provisions shall apply with regard to the carrying out of such scheme –
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) the Director shall have power from time to time to
>
> carry out or cause to be carried out such inspections as he may think fit to ascertain whether the scheme

> as approved under this section is being carried out, and the Director may require the housing association to remedy any failure to conform with the scheme and the housing association shall comply with such requirement;
>
> (f) …
>
> (g) **the provisions of the scheme shall have effect as if they were enacted in this Law**."
>
> (Emphasis supplied)

[52] When the Ministry Paper relevant to the HHS was placed before the House of Representatives for approval, the provisions of the scheme included a requirement for electricity to be provided by an underground connection. In fact, the Minister had requested that HEL provide for the same. HEL did so by direct negotiation with JPS. In the notes of the proceedings before the House of Representatives, the Minister is recorded as saying that a very interesting feature of the scheme is the fact that all the wiring for telephone and light and power would be underground. The HHS was subsequently approved by the Legislative Council.

The Electric Lighting Act

[53] Section 3 of the Electric Lighting Act empowers the relevant minister to licence any local authority, or any company or person to supply electricity under the Act for any public or private purposes within any area subject to certain provisions essentially contained in a licence (see section 3(a)). Such a person, company or local authority is termed an undertaker. HEL was not licensed to provide electricity. There is no dispute that JPS was such an undertaker under the Electric Lighting Act at the time of approval of the HHS by Parliament and this is part of the agreed statement of facts. The learned

judge found that, at the request of the Minister, HEL negotiated with JPS to install the underground system for the HHS. There can be no challenge to this finding.

Statutory construction

[54] Before embarking on an analysis of the issues in this appeal, it is useful to have regard to the main principles of statutory interpretation which "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". In particular, I bear in mind that judges must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of statutes as well as determine the extent of general words with reference to that context (see paragraphs [53] and [54] of the dictum of Brooks JA in **Jamaica Public Service Company Limited v Dennis Meadows and others** [2015] JMCA Civ 1).

[55] Mr Foster has submitted that since the word "electricity" was not set out as a detail pursuant to section 46A(2)(f), it is not caught by section 46C(2)(g) which states that the provisions of the scheme shall have effect as if enacted into "this Law". On any reading of the statute however, applying the rules of statutory interpretation, it is difficult to accede to this view.

[56] In Francis Bennion's leading text Statutory Interpretation, the *ejusdem generis* principle and its relevance to statutory interpretation is described at page 828 as "a principle of construction whereby wide words associated in the text with more limited

words are taken to be restricted by implication to matters of the same limited character…the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping up words".

[57] Further, it is stated that the most common case for the application of the *ejusdem generis* principle is where a phrase beginning with genus-describing terms is concluded by wider residuary words. The effect of the principle is then to curtail the literal meaning of the residuary words so as to confine it to the genus described. This form of the principle was stated by Cockburn CJ in these words "[a]ccording to well-established rules in construction of statutes, general terms followed by particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislature" (see Bennion's Statutory Interpretation page 835, paragraph 381 and **R v Cleworth** (1864) 4 B&S 927, 932).

[58] Therefore, the words "to such other like matters as the Minister may require", attached to the list of words contained at section 46A(2)(f) (set out above). can be considered to be the wider residuary words attached to a string of genus-describing words – "water supply, drainage, sewage disposal". The principle then would be that services of like nature, such as electrical wiring and telephone wiring (often described collectively as utilities) are not specifically excluded without more as being part and parcel of services that could be included in the scheme.

[59] Bennion, in the commentary of paragraph 378, page 828, refers to Rupert Cross, Statutory Interpretation and his explanation of the principle: "the draftsman must be

taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted…". The learned author also referred to Odgers, Construction of Deeds and Statutes (5th edition, page 184) where it is stated that "it is assumed that the general words were only intended to guard against some accidental omission in the objects of the kind mentioned and were not intended to extend its objects of a wholly different kind". While I do agree with Mr Foster that the scheme could have been approved without provision for electricity, it was not. The fact that it could have been approved without any such reference cannot therefore provide a sufficient basis to conclude that the electrical supply did not become a provision of the scheme. Therefore, although there is no mention of the word 'electricity' as a utility in the Housing (Amendment) Law, it would be included based on the *ejusdem generis* principle which was relied on by Lord Gifford.

[60] Further, the fact that the provision of electricity was settled by negotiation between HEL and JPS, does not negate the creation of a statutory obligation for which JPS assumed responsibility to comply. I have adopted the use of those words as underlined from **Poole Borough Council v GN (through his litigation friend "The Official Solicitor") and another** [2019] UKSC 25, a recent decision of the UK Supreme Court. This authority was not referred to or relied on by the parties, but I have used it for very limited purposes. Lord Reed, who delivered the judgment of the court, expressed at paragraph [73] that there were several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation or the operation of a statutory scheme.

[61] Further confirmation of my opinion is found in the words of Lord Herschell, LC who stated, "[t]he effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions…" (see **Institute of Patent Agents v Lockwood** [1894] AC 347, 359 and 360).

[62] It is not only HEL which had to conform to the provisions of the HHS. JPS, as the undertaker which had been granted various licences to supply electricity in the island of Jamaica, having negotiated to provide the underground connection (for the purposes of supplying electricity to the HHS), must certainly conform to those provisions. In fact, a definition of a "statutory undertaker" included in section 2 of the Housing Law is given in the following terms, "any authority, company or person empowered by a Law to execute or construct authorised works or to carry into effect the purposes of that Law". Prima facie, JPS could be said to be included in such a definition of a statutory undertaker under the Housing Law. As noted previously, JPS is also referred to as an "undertaker" in the Electric Lighting Act.

[63] The fact that the provision of the underground electrical connection had become part of the law is again reinforced, in my opinion, by reference to paragraph 9 of the Ministry Paper (Number 14/1961) of the HHS, dated 6 April 1961:

> "Provision has been made in the scheme for the undergrounding of wires for telephone, light and power in keeping with the requirements of the Ministry of Trade and

> Industry. The consequent additional cost involved in connection with the light and power wires is £51,010."

Also, in the proceedings of the House of Representatives dated 27 April 1961, the Minister, in presenting the scheme for the legislature's approval, expressed thus:

> "Now Sir, a very interesting feature of the scheme is the fact that all the wiring for telephone and light will be underground. It is something that the Ministry of Trade and Industry will be speaking on later on [sic] and I think it is a good thing and will probably lend power to the area."

When the matter was placed before the Legislative Council on 5 May 1961 where it was considered, the Minister, in answering the Speaker of the House, expressed:

> "... they will see in this particular Scheme, the terrific cost of taking water into the area and of laying down the wires underground. It is an expensive scheme. They have been required to bring the area to the last word."

[64] This issue of the electrical supply (by means of the underground connection) was specifically referred to and emphasised before the scheme was approved. It is difficult to conclude that once the arrangements were completed, JPS having entered into negotiations with HEL, did not assume the responsibility to continue the facilitation of such a service in compliance with the statutory provision. In fact, as pointed out by Lord Gifford, a perusal of the documentation relevant to the scheme revealed that the outlay for the underground electrical wiring resulted in an increased cost/tariff which was to be shared between HEL and the individual purchasers.

[65] Further, a perusal of a sample of the individual contracts that would have been eventually entered between JPS and each resident of the scheme including the

appellants, does not negate or conflict with this statutory obligation. In fact, under the document (the contract) described as 'JPS Standard Terms and Conditions of Service' at page 17 under the heading 'Service Connections', reference is made to both overhead and underground connections and in particular, the following is set out regarding an underground connection:

> "Consumers **desiring an underground service from the Company's overhead system are required to notify the Company accordingly, after which they may arrange for the work to be carried out at the Consumer's expense.** In every case of underground service (including the length on the pole) installed by a Consumer, the Company will make the connection to its secondary wires on the pole from which the underground service is being taken. In the case of such supplies the Company may require the Consumer to erect a pole at the incoming end of the underground service on his property on which the Company's metering equipment may be installed. The Company reserves the right to refuse connection to its system of any underground service, which does not meet the necessary requirements.
>
> The cost of extending Service wires over -100 feet is chargeable to the Consumer."
>
> (Emphasis supplied)

Also, both parties are agreed that the underground connection is one of the means JPS has utilised to supply electricity to its customers. The obligation assumed therefore by JPS relevant to the HHS is certainly not in conflict with its mandate under the Electric Lighting Act or the licences granted, in particular the 2011 licence.

[66] It is clear also that JPS demonstrated by subsequent activity that it accepted and has acted in line with the obligation it assumed. This is evidenced by the letter dated 23

February 1970 from JPS to its customers in Hope Pastures, where reference is made to the fact that Hope Pastures is supplied electricity by means of an underground system. The letter is signed by one TS Oliver, Vice President - Operations. That letter spoke also to the extensive repair work that would be carried out in the community in order to ensure the maximum reliability of service from the underground system. JPS' conduct in complying with the statutory obligation has continued steadfastly for over 40 years until about 2013. Based on the agreed statement of facts, it is only since 2013 that JPS commenced discussions with the residents and made arrangements to install and commenced installation of a new overhead network in the Hope Pastures community.

[67] In conclusion, therefore, when one considers all of the above circumstances, it is difficult to understand why this specific requirement (for electricity by underground connection) would not have been included in section 46A(2)(f) and, therefore, having the effect of law pursuant to section 46C(2)(g) of the Housing (Amendment) Law. Lord Herschell, LC in **Institute of Patent Agents**, at page 360, in examining a provision which read "shall be of the same effect as if they were contained in this Act" stated that he had great difficulty in construing those words in any other manner except to treat them exactly as if they were in the Act. I would adopt those sentiments in relation to this matter. The provision of underground electricity for the Hope Pastures community is, therefore, a provision of the scheme enacted into the Housing Law and cannot be construed in any other manner.

[68] This conclusion would consequently affect JPS' ability to unilaterally effect changes to the method of supply in the Hope Pastures community. Based on the agreed statement of facts, sometime in 2014, JPS launched a pilot project at certain locations in the community relating to the conversion from an underground to an overhead electrical system. Some of the customers agreed to that conversion. The appellants refused to convert their supply. Based on the agreed statement of facts also, it is noted in passing that JPS has been directed by the Government Electrical Inspectorate that it cannot maintain both an underground and an overhead electrical system, as this would be unsafe. Since JPS would have been under a statutory obligation to install an underground system to the Hope Pastures community for the supply of electricity, it would be unable to legally establish overhead connections in the manner they have attempted to do.

Can the provisions of the HHS be regarded as a special statute?

[69] In regard to the above, Lord Gifford submitted that the provisions of the HHS should be regarded as a special statute which is confirmatory of the legal effect of the HHS; that JPS would be statutorily bound by virtue of section 5(1)(a) of the Electric Lighting Act to ensure that the underground connection is provided. Mr Foster has disputed this and contended that the Housing Law does not fall within the description of a special statute and is therefore not relevant to section 5(1)(a) of that Act. Section 5(1) provides:

> "5(1) The undertakers shall be subject to such regulations and conditions as may be inserted in any licence, order or

special Statute, affecting their undertaking with regard to the following matters –

(a) the limits within which, and the conditions under which, electricity is to be supplied;

(b) the securing of a regular and efficient supply of electricity;

(c) the securing of the safety of the public from injury, or from fire or otherwise;

(d) the limitation of the prices to be charged in respect of the supply of electricity;

(e) the authorizing inspection and inquiry from time to time by the Minister and the Local Authority;

(f) the enforcement of the due performance of the duties of the undertakers in relation to the supply of electricity, by the imposition of penalties or otherwise, and the revocation of the licence, order or special Statute, where the undertakers have, in the opinion of the Minister, practically failed to carry the powers granted to them into effect within a reasonable time, or discontinued the exercise of such powers; and

(g) generally with regard to any other matters in connection with the undertakings."

[70] Both counsel are agreed that this contention in relation to a special statute was never argued before the learned judge. I have, however, considered the submissions of both counsel on this interesting point. I do note that there are other definitions apart from the one referred to by Lord Gifford (in Stroud's), which may appear to support his contention. I will refer two of these in passing. Black's Law Dictionary (9th edition) provides:

> "**special statute.** A law that applies only to specific individuals, as opposed to everyone. – Also termed private statute."

Jowitt's Dictionary of English Law defines "Special Acts of Parliament" as follows:

> "local, personal, or private Acts; Acts which apply only to a particular kind of persons or things, as a particular undertaking to be constructed, or otherwise dealing with a particular area or person only, and therefore not overruled by the general terms of a general Act (Taylor v. Oldham Corporation (1876) 4 Ch.D. 410). But the term has received various statutory definitions …"

[71] On the other hand, it could be argued that the Housing Law (which has incorporated the HHS) cannot readily be described as a private or special statute. It could be advanced, as Mr Foster has done, that it is general in its application (save for the provisions of the HHS which is relevant to a limited class of the public). The issue would therefore require more in-depth analysis which I do not consider to be necessary, as I have already concluded that JPS has assumed a statutory responsibility under the Housing Law. Also, in fairness to the learned judge, it was not an issue raised before him.

Was there a statutory obligation for the maintenance of the underground system?

[72] Having determined that JPS was statutorily obliged to install the underground system by virtue of the HHS, the issue of its maintenance is somewhat more complicated. It is clear that the learned judge dealt with the obligation to maintain the underground connection within the context of the HHS as the preliminary question relating to the issue of maintenance was set out within that context (see paragraphs [3]

and [40] of Sykes J's judgment). It is expedient to restate how this issue was framed for the learned judge's consideration:

> "(1) Whether by reason of the approval by the House of Representatives on 27th April 1961 and the Legislative Council on 5th May 1961 of the Hope Housing Scheme ('the scheme'):
>
> > a. the defendant was obliged by law to install and maintain a supply of electricity to the residents in the scheme by means of underground wires;
> >
> > b. the actions and proposed actions of the defendant between about 2014 and the present day, in installing or seeking to install a supply of electricity by overhead wires were illegal."

[73] He made the finding that there was no obligation imposed on JPS by the HHS to install or to maintain such a supply of electricity.

[74] While I have determined that JPS was statutorily obliged to install the underground system (under the HHS), I would agree with Sykes J, that there is no provision for the maintenance of that system enacted in the Housing Law and no such statutory responsibility under that Law can be implied.

[75] However, ground e was argued before this court within the wider context of JPS' obligation under law, as distinct from its obligation merely by virtue of HHS. I determined therefore that it should be considered within this context, as Mr Foster made no objections, either to the ground as worded or to Lord Gifford's submissions in that regard.

[76] In the submissions before this court, the appellant's position was that, once the underground system was installed, JPS had a duty to maintain it in accordance with the 2011 licence which was granted by the relevant Minister pursuant to section 3 of the Electric Lighting Act.

[77] Lord Gifford stated also that this duty to maintain the underground connection was supported by each contract between the appellants and JPS which is expressed to be subject to JPS' licences. In particular, Lord Gifford referred this court to a specimen contract which would have been entered into by each of the appellants with JPS and requires JPS to furnish service subject to the provisions of its licences under the Electric Lightning Act and Regulations made under the Licences or the law.

[78] Conversely, while no issue was taken with its obligation under the law to furnish and maintain electrical supply in general, the respondent's position was that it has no legal obligation (whether by statute or contract) to supply the appellants via underground cables only, but its obligation was pursuant to the Electric Lighting Act and the licences granted thereunder which is to provide an adequate, safe and efficient supply of electricity based on modern standards. It was posited also that JPS would be at liberty to provide a supply by means other than an underground connection if it is unable to maintain a system that is safe and efficient.

[79] It is impatient of debate, therefore, that JPS has a duty by law to maintain electricity supply furnished to its customers and it is to this general obligation, as shown

in the relevant legislation, licences and contracts to which I have had regard in treating fully with ground e.

[80] Pursuant to section 3 of the Electric Lighting Act, the Minister licensed JPS to supply electricity for public or private purposes and this licence is subject to the regulations and conditions as contained in the said licence. It is part of the agreed statement of facts that JPS had been granted an All-Island licence to supply electricity in all parts of Jamaica since 1966. The agreed statement refers to the year as being 1996 instead of 1966, but this would appear to be an error. Mr Foster submitted that the 2011 licence mirrored certain relevant clauses of the 1966 licence; in particular, conditions 2 and 13 of the 2011 licence (referred to at paragraph [38] of this judgment).

[81] Condition 2.3 of that licence states that JPS is to provide an adequate, safe and efficient service based on modern standards. Condition 13.10(i) states that the licensee is at all times to furnish and maintain a supply of electricity for public or private use in accordance with reasonable standards of safety and dependability as understood in the electric business. Condition 13.10(ii) provides that the rights of any person desiring to obtain electric service will be subject to his entering into an agreement with the licensee. Having considered all of the above, I concluded that JPS does have a statutory responsibility to maintain the underground system, for which it assumed a statutory responsibility to install under the HHS, in the Hope Pastures community. The appellants and the other residents, who have entered into contractual arrangements with JPS,

have a legal right for their electricity supply to be maintained, as JPS is statutorily bound to do, albeit not by virtue of the HHS, but by virtue of the Electric Lighting Act and the relevant licences granted under that Act. Lord Gifford's submissions in this regard and to that extent therefore have merit.

[82] This determination of JPS' statutory obligation, however, is not the end of the matter. It is to be noted that in the amended defence filed by JPS, there are several averments concerning this issue of the maintenance of the underground system as set out below:

> "23 v. …it was an implied term of the agreement with the Claimant's [sic] that in the event the Defendant is unable to furnish and maintain a safe and reliable supply of electricity in accordance with reasonable standards of safety via underground cables the Defendant was at liberty to provide and maintain such a supply by other means as for example and overhead supply."
>
> "24 … and in relation to the outages which have increased over time, the Defendant states that the underground electrical system in Hope Pastures, is aged and antiquated. Notwithstanding maintenance to date the underground system has been and continues to be prone to constant and chronic failure thereby resulting in frequent and extended outage for residents supplied by the system. Due to the age of the system the Defendant has significant difficulties sourcing replacement parts to maintain and repair the system which affects its reliability."

[83] The issue of the safety and reliability of the underground system as it now exists and JPS' ability in that regard to properly maintain it, has arisen on the pleadings. This issue has been part of Mr Foster's complaint. A question that would arise relevant to this issue is, therefore, whether JPS' assertion that the underground system is unsafe

and unreliable is true and would therefore prevent it from supplying an adequate and efficient supply to the Hope Pastures community. This could only be determined after a trial as it was not a preliminary issue resolved by Sykes J and, in fact, could only be resolved with the evidence of expert witnesses.

[84] In relation to preliminary question 1 (grounds c, d and f), therefore, Sykes J would have erred in concluding that JPS had no statutory obligation under the HHS to install a supply of electricity to the residents in the scheme by means of the underground connection. Subject to any future amendment to the HHS, JPS has assumed a statutory obligation to do so. Further, the learned judge would have also erred in concluding that the installation of supply by overhead wires was not illegal in the circumstances that existed, as it would have been a breach of JPS' statutory obligation under the HHS and could not be done in the manner in which it purported to do so.

[85] However, in relation to the issue of the maintenance of such a system, the learned judge cannot be faulted in concluding that there was no statutory obligation under the provisions of the HHS to do so, as his consideration was confined within that context. Therefore, the respondent's submissions in relation to that issue has merit. In a consideration of ground e though, I have found that there is an obligation on JPS, other than by virtue of the HHS, to maintain the underground connection. The continuation of this obligation, however, is contingent on the determination of the issues remaining on the pleadings that would have to be determined at a subsequent

trial, as discussed at paragraph [83] of this judgement. Grounds c, d, and f therefore succeed and ground e succeeds in part, as it relates to JPS' wider obligation to maintain the electrical supply outside of the HHS.

Preliminary question 2: Did the learned judge err in concluding that the appellants did not have any legal right to the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24 April 1962 between the Director of Housing and JPS granting JPS certain easement liberties and rights (grounds g, h and i)

Submissions on behalf of the appellants

Easement/wayleave agreement

[86] By way of background, Lord Gifford referred to paragraph 17 of the Scheme document which stated "[c]opy of the proposed Restrictive Covenants is attached for approval" and then a note at the very end of the document attached which read:

> "Note: Provision to be made to include Easements for the Water Commission, Jamaica Public Service Co. Ltd., and Jamaica Telephone Co. Ltd., the draft Easements to be approved by the Crown Solicitor or other officer on behalf of Government."

[87] Lord Gifford contended that the easement is relevant insofar that it confirms that the intention of the Minister in submitting the HHS, and the intention of the Legislature in approving it, was that the supply of electricity to the residents was to be by underground wiring and not otherwise. The easement was prepared by the Government's legal officer to implement a scheme which the Minister had proposed and Parliament had accepted, and was intended to continue in perpetuity.

[88] The said easement, which is referred to as a wayleave agreement, pursuant to section 41 of the Electric Lighting Act, was also expressly imposed as incumbrances upon the titles of each of the appellants pursuant to section 63 and 93 of the Registration of Titles Act. The effect of these incumbrances is that JPS was given full and free right to carry out the works referred to in the grant of easement. Further, the imposition of the easement upon the face of the title of each house owner meant that all subsequent owners of interests in those titles were bound to be supplied by electricity by way of underground means; they were bound to give access to workers of JPS to the premises to carry out such works as are necessary for the maintenance and whatsoever else was necessary to be done to the underground supply.

[89] Lord Gifford referred the court to the document titled "Jamaica Public Service Company Limited Grant of Easement for Transmission and/or Distribution Lines dated 24 April 1962 (the "JPS Grant"). He submitted that the terms of the easement, as set out in the second schedule, as well as paragraphs 2(a) and 3(c) of the JPS Grant make it clear that the rights given to JPS are for one purpose only, the transmission of electricity by an underground system. It was contended that this is the only proper interpretation. He referred the court to the second schedule while emphasising the words in bold:

> "Full and free right and liberty to the Company now and at all times hereafter of installing [,] establishing [,] erecting [,] constructing [,] maintaining and operating its systems and undertakings including underground electrical transmission and/or distribution lines together with all necessary wires [,] cables [,] insulators [,] devices and other appurtenances and

> apparatus necessary for the purpose of the transmission and/or distribution of electric energy and current from any of the electricity stations belonging to or used by the Company **by means of an underground system** in through upon over and under the grantors lands or any lot or lots into which the same may now or hereafter be sub-divided and of inspecting [,] repairing [,] renewing [,] cleaning [,] removing [,] and/or **replacing** the said systems and undertakings AND ALSO the liberty and right at all times hereafter of making all necessary excavations for the purposes aforesaid and of cutting down[,] trimming and removing any trees [,] growth [,] bush [,] crops [,] and vegetation which may at any time be growing on or extending over the said lands or any part thereof and which may in the judgment of the Company interfere with or impede or be likely to interfere with or impede any of the matters or things herein referred to TOGETHER WITH the free and uninterrupted rights of entry way and passage for the Company its agents [,] workmen [,] servants [,] licencees and independent contractors at all times to upon and over the grantors lands either with or without apparatus [,] appliances [,] vehicles or animals for the purpose aforesaid or for procuring the efficient [sic] operation of the said system or for any purpose relating to any portion of any of the Company's electrical undertakings." (Emphasis supplied)

[90] Counsel submitted that the learned judge did not place emphasis on the words "by means of an underground system" in interpreting the effect of this document, but emphasised, "in through upon over and under the grantors lands". It was submitted that these words did not negative the key purpose which was expressed to be the provision of electricity by means of an underground system. It simply meant that works, equipment and "other appurtenances and apparatus necessary" for that purpose could be installed in any part of the land.

[91] Further, the learned judge erred in finding that the easement was simply to prevent JPS from being a trespasser. While its wording would indeed make JPS a

trespasser if it entered any of the lots without consent for the purpose of installing an overhead system, the easement (which was noted in the list of restrictive covenants) which formed part of the scheme approved by the legislature created an effectual contract of easement.

[92] Lord Gifford referred to paragraph [41] of the dictum of Mangatal J in **Jamaica Public Service Company Limited v Enid Campbell and Marcia Clare** [2013] JMSC Civ 22 wherein it was acknowledged that there was a contract of easement granted to JPS, by the owners of property, for the installation and maintenance of electrical transmission towers.

Submissions on behalf of the respondent

[93] It was contended by Mr Foster that a review of the JPS Grant makes it patently clear that no legal right is conferred to the appellants. Counsel, in oral submissions, acknowledged that the proper classification of what was endorsed on the appellants' titles was not a restrictive covenant but a wayleave agreement. He stated that the wording of "restrictive covenant" was misleading and he agreed with Lord Gifford's concession that it was a wayleave agreement which gave a right to JPS (as grantee) to enter upon the appellants' land to conduct specified activities. By contrast, a restrictive covenant is not a reciprocal agreement between the owner of land and another party, it is a covenant which restricts the owner.

[94] He submitted that the said instrument grants to JPS the right to enter onto to grantors' land to install, establish, erect, construct, maintain and operate its systems

and undertakings including underground electrical transmission and/or distribution lines. The easement was specifically to facilitate the underground supply. Queen's Counsel emphasised the use of the word "including" in support of his submission that there is nothing in the instrument which created an obligation on JPS to supply the appellants with electricity only by underground wires. JPS had the right to enter the property for the purpose of the underground supply, if it chose to do so. The easement would have been necessary to facilitate this supply, but it in no way translated to a contractual obligation to only supply electricity by underground means in perpetuity.

[95] The learned judge, he said, was correct to conclude that the easement was created to prevent JPS from being a trespasser. It was also submitted that the appellants were not parties to the said grant of easement, as such this instrument could not be relied upon as creating legal obligations and rights relating to the supply of electricity.

[96] With regard to the case of **Jamaica Public Service Company Limited v Enid Campbell and Marcia Clare** relied on by counsel for the appellants, Mr Foster submitted that it was unhelpful, as JPS, in that case, in the course of evidence, accepted that it committed a trespass. Also, in that case, there was no issue as to the modification of a covenant.

Analysis and determination

[97] Section 41 of the Electric Lighting Act provides:

> "41(1) Nothing in section 36, 37, 38, 39 or 40 shall –

(a) preclude the undertakers and the owner or occupier of any land from entering into an agreement for laying, placing or carrying on, under or over such land, any supply line, posts or apparatus (hereafter in this section referred to as a "wayleave agreement"); or

(b) affect any wayleave agreement subsisting on the 1st day of October, 1958.

(2) Where a wayleave agreement is made in respect of land the title of which is registered under the Registration of Titles Act, the wayleave agreement may be registered in accordance with the provisions of that Act as an encumbrance affecting the registered title of the land, and the provisions of the said Act shall have effect accordingly."

[98] A covenant is an agreement creating an obligation contained in a deed. It may be positive, stipulating the performance of some act or the payment of money, or negative or restrictive, forbidding the commission of some act (see Osborn's Concise Law Dictionary, ninth edition). A restrictive covenant is, in essence, an obligation (arising out of a deed) to refrain from doing some act on land belonging to the covenantor. It has been likened to a "negative easement" (see **Pell Frischmann Engineering Limited v Bow Valley Iran Limited and others** [2009] UKPC 45, paragraph [48] (3)).

[99] The JPS Grant describes an agreement between the Director of Housing under the Housing Law, 1955 and JPS. It speaks to the grant and transfer of the easements liberties and rights set out in the second schedule of the said document which has been set out at paragraph [89] above. It is a wayleave agreement as described by section 41 of the Electric Lighting Act. Although it is listed on the appellants' titles as well as all the

other residents of the Hope Pastures community as a restrictive covenant, it is clearly not of that genre.

[100] A perusal of the other restrictive covenants listed on the individual titles, demonstrate those characteristics described above as a restrictive covenant, except for numbers 11 and 13. Number 11 is not relevant to these proceedings. Number 13 reads as follows:

> "Full and free right and liberty to the Jamaica Public Service Company Limited and to the Jamaica Telephone Company Limited to carry out such works and inspect, repair and maintain such installations and to do such other acts and things as are mentioned and referred to in Grants of Easement dated the 24th day of April, 1962 lodged in the Office of Titles. (Miscellaneous Nos. 23891 and 23892 respectively)."

[101] Since it (number 13) does not qualify as a restrictive covenant, the provisions of the Restrictive Covenants (Discharge and Modification) Act would appear not to apply.

[102] Lord Gifford had initially contended that, since the rights granted to JPS by the JPS Grant were endorsed on the certificates of titles of the appellants, those rights could only be modified under the Restrictive Covenants (Discharge and Modification) Act. However, he subsequently conceded that the endorsements were properly described by Mr Foster as a wayleave agreement.

[103] In any event, I would agree with Queen's Counsel, Mr Foster, that the easements described on the titles of the appellants under the term "restrictive covenants" do not, by themselves, create a contractual agreement between the parties

for JPS to supply electricity exclusively by an underground connection. I would also agree with the submissions of Mr Foster that the JPS Grant does not create a legal right to that effect.

[104] A perusal of the said JPS Grant, demonstrates the intention of the Director of Housing (as the grantor) to grant access to JPS and its successors, certain rights and liberties as set out in the second schedule, "in through or over the grantors lands". The grant is to run with the grantor's land and is binding on the registered proprietor or proprietors for the time being of the said lands or any part thereof. All the successors in title, therefore, including the appellants, are subject to the terms of this grant which is endorsed on all the individual titles.

[105] I therefore agree with the submissions of Mr Foster that this wayleave agreement (the JPS Grant), as well as the easements noted on these titles are merely to facilitate the provision made in the HHS for the underground connection. They are a further indication of the intention of Parliament to ensure that the statutory obligation placed on JPS could be effected without the tort of trespass being committed by the employees of JPS. These employees would be entering on the various lands to carry out required works relating to the underground system (see **Jamaica Public Service Company Limited v Enid Campbell and Marcia Clare**). As long as the easements remain on the titles, all subsequently registered proprietors would be bound to grant access to JPS to carry out the activities listed in the wayleave agreement.

[106] The full text of the JPS Grant in conjunction with the easement endorsed on the titles establish JPS' right to enter unto the premises to install, inspect and, amongst other activities, maintain, repair and replace the underground connection. The requirement in the HHS for the underground connection was therefore given the required legal status necessary by means of the said JPS Grant and the easement endorsed on the titles.

[107] While the easement subsists, it is permanent in the rights it grants to JPS. However, an easement, whether acquired by grant or prescription, may be extinguished in several ways: namely by (i) statute – an example can be found at section 33 of the Housing Law; (ii) release – this may be done expressly by deed or impliedly by abandonment; (iii) frustration; and (iv) unity of seisin (see Cheshire and Burn's Modern Law of Real Property, 17th edition at pages 636 to 640).

[108] The learned judge would therefore have been ultimately correct in his assessment that the JPS Grant and the easement as endorsed on the titles do not create a contractual or legal obligation on the part of JPS to provide electricity solely by an underground connection. They do no more than facilitate the performance of the statutory obligation within the context of the HHS. The determination of this issue disposes of grounds g and h.

[109] Ground i, as worded, takes the matter no further. There is no dispute that JPS would have to abide by the terms of its licences incorporated into the terms and conditions of each contract holder; to perform its duties under the relevant laws

including observing the conditions relevant to the wayleave agreement. However, these obligations outside of the HHS, do not by themselves, mandate a supply of electricity exclusively by the underground connection. Further, the contractual agreement entered into by JPS and the residents of the Hope Pastures community does not disclose a contract specific to an underground supply.

[110] In the circumstances, the learned judge was correct in his determination relevant to preliminary question 2 and grounds g, h and i would therefore fail.

Preliminary question 3: Did the learned judge err in concluding that the appellants and/or residents of the scheme did not have a right to seek and obtain injunctive relief and damages *(grounds j, k, l, m)*

Submissions on behalf of the appellants

[111] Lord Gifford took issue with the learned judge's findings that there was no contract between JPS and the appellants to lay the underground cables and as such no private law obligation could arise (paragraph [19]) and that there was no privity of contract (paragraph [33]). It was submitted that there are both private and public law principles which support the appellants' position. Reliance was placed on the (i) contract of easement (JPS Grant) which was registered as an encumbrance on the owners' title which gave rise to duties on the part of JPS; and (ii) statutory duty pursuant to section 46C(2)(g) of the Housing Law, and section 5(1) of the Electric Lighting Act. Alternatively, it was submitted that the contracts of each resident were subject to the 2011 licence which required JPS to maintain the supply, which could only be varied by the Legislature.

Statutory remedy

[112] The court was invited to take a robust view as to when a statutory provision gives rise to a right of action to a person affected by its breach. To this end, Lord Gifford commended the dictum of Sinclair-Haynes J (as she then was) at paragraph [40] of the judgment in **Lascelles, de Mercado & Company Limited v Financial Services Commission and Black Sand Acquisition Inc** [2012] JMSC Civ 47.

[113] It was submitted that the Housing Law imposed a duty on HEL to complete works under the HHS if JPS (and any other) did not complete such work. JPS, having performed according to the original mandate to lay the underground cables, now continues to have duties flowing from that. The statute being passed for the protection of the limited class of people who own interests in houses in the Hope Pastures community, who are now injured by JPS' failure to perform its statutory duty to maintain the underground supply, are entitled to bring an action against JPS.

[114] Reference was made to section 46C(2)(e) of the Housing (Amendment) Law which provides that the Director of Housing (now Minister) has the power of requiring that the housing association remedy any failure to conform with the scheme. This provision was described as sensible, since Crown lands were being used for a housing scheme approved by the legislature, and it was necessary to ensure the scheme was built according to plan. There were no residents until the construction was completed and the lots sold and transferred. It was submitted that the position as it exists today has changed, as HEL has fulfilled its role.

[115] Further, it was submitted that the authorities show that there is no hard and fast rule about alternative remedies, contrary to what the learned judge suggested at paragraph [31] of his judgment. Reliance was placed on the principle expressed in **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633 at page 731.

[116] It was submitted that the principle expressed in that case was apt to describe the present case. The provision of an underground supply of electricity was aimed at benefitting the persons who would buy the lots in the Hope Pastures community and live in them. A limited class of the public was intended to be protected from the hazards of hurricanes which would blow down lamp posts and wires above ground.

Submissions on behalf of the respondents

[117] Mr Foster in dealing with grounds (j) to (m), submitted that the learned judge, having found that there was no statutory obligation on JPS, did not need to consider whether Parliament intended a private law remedy.

[118] He contended that even if JPS had a statutory duty to provide the appellants with electricity only by underground supply, pursuant to the approval of the HHS under the Housing Law, the appellants have no right to enforce any breach of that duty by a private law claim. Reference was also made to **X (Minors) v Bedfordshire County Council** and the dictum of Lord Browne-Wilkinson at page 731.

[119] Queen's Counsel also referred the case of **Morrison Sports Ltd and others v Scottish Power UK plc** [2010] UKSC 37 in which **X (Minors)** was considered and where was it held that contraventions of the Electricity Supply Regulations did not give

rise to a private right of action. Queen's Counsel commended to the court paragraph [37] of the dictum of Lord Rodger of Earlsferry JSC.

[120] It was submitted that, on a proper interpretation of the Housing Law, it is clear that the provisions therein did not intend to confer any private rights to a limited class of citizens. The purpose of the legislation was to set out the requirements and the procedures for the approval of schemes of development. It cannot be said that Parliament intended to protect a limited class of persons as the scheme of the Act was regulatory in nature.

[121] Further, there is no express private law remedy set out in the Act for any breaches thereby providing for any private right of action. On the contrary, the only remedy set out is contained in section 46C(2) and is limited to a power given to the Director (now Minister) of Housing to carry out inspections to ascertain whether the scheme is being carried out as approved and to require the housing association to remedy any failure to conform with the scheme. The enforcement procedures in the Act are between the Director and the housing association, that is to ensure the scheme is built as approved. The procedures do not relate to JPS being a supplier of electricity or the appellants as residents who bought into the scheme. The remedies in the legislation are limited to enforcement by the Director and are indicative that Parliament did not intend any private law claims to private citizens. Accordingly, the appellants would not be entitled to the relief claimed against JPS.

Analysis and determination

[122] I have determined that the provisions of the HHS as incorporated into the Housing Law by virtue of section 46C(2)(g) have created a statutory obligation on JPS, to provide the underground connection to the residents of Hope Pastures. The JPS Grant as well as the easements endorsed on the individual titles, facilitated JPS (and its successors) entering into the relevant lands in order to *inter alia*, install, erect, inspect, repair or replace this underground system. The issue is whether the statutory obligation, as it exists, gives rise to a private law remedy by the appellants in case JPS fails in its statutory obligation. The learned judge, at paragraph [33] of his judgment, expressed that there was no privity or cause of action on the contract between JPS and the residents regarding the underground cable.

[123] Also, at paragraph [39] of his judgment, the learned judge referred to the test as set out in **X (Minors)** by Lord Browne-Wilkinson which was relied on by both parties. Lord Browne-Wilkinson at page 731 of that judgment summarised the principles applicable in determining when a private law cause of action would arise:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.

> "There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: ***Cutler v. Wandsworth Stadium Ltd.*** [1949] A.C. 398; ***Lonrho Ltd. v. Shell Petroleum Co. Ltd.*** (No. 2) [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see ***Groves v. Wimborne (Lord)*** [1898] 2 Q.B. 402."

[124] Sinclair-Haynes J in **Lascelles, de Mercado & Company** referred to the approach in **Groves v Wimborne** and opined as follows:

> "[40] The approach taken by Vaughn Williams LJ in Groves v Wimborne [1895 - 99] ALL ER Rep 147 in determining whether a statutory remedy was intended by the legislator to be the only remedy available in cases of breach of the statutory duty is in my opinion more robust than that taken by Lord Browne-Wilkinson LJ [sic]. Lord Browne-Wilkinson opined that an ordinary case of statutory breach does not per se give rise to civil action. Vaughn Williams LJ however declares that unless something to the contrary exists, an action lies. Further, in his judgment, the fact that the statute provides a remedy is not conclusive that it was intended to be the only remedy. In fact, he opined, that it was not the only matter to be considered…"

[125] In his judgment, Sykes J concluded that there was nothing in the circumstances of the present case that suggested that the legislation was crafted to give a private law cause of action. He stated that any defect in the scheme was to be remedied by the Director of Housing taking action under section 46C(2) of the statute.

[126] I do agree with Sykes J that the only remedy provided by statute was the power given to the Director of Housing to remedy the failure of HEL in relation to any breach of the provisions of the scheme. Once HEL completed what it was obliged to do, there were no other enforcement provisions that would have effect subsequent to the completion of the scheme. Once the provisions of the HHS were completed and once the houses were sold, it would appear that neither the Director of Housing nor HEL would have any further role to play relevant to the scheme. However, the absence or even presence of a statutory remedy is not conclusive that Parliament did not intend a private law remedy.

[127] In **Groves v Lord Wimborne**, a workman employed in a factory was injured through a breach of a duty imposed on the occupier of a factory by statute. It was held that he could recover from the occupier for breach of statutory duty although the only remedy imposed by the statute for the breach was a penalty. It was determined that some of the factors that should be considered included the nature of the duty imposed by the Act, the nature of the injuries likely to be caused by a breach of the duty, the amount of the penalty to be imposed and the person on whom it was imposed.

[128] In **X (Minors)**, the court considered the general question to be answered as composed by Lord Browne–Wilkinson in the following terms:

> "The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority."

[129] Lord Browne-Wilkinson went on to say that a claim for damages must be based on a private law cause of action; then at page 731 of the judgment (as set out at paragraph [123]), he stated that the principles applicable in determining whether such a statutory cause of action exists are well established, although the application in a particular case may be difficult.

[130] In the case under consideration, it must always be remembered that the provisions of this scheme (as it relates to electricity) are unique. Mr Foster's submission that the Housing Law is regulatory in nature and not intended to benefit a limited class of persons is not sustainable, since the provisions of the HHS became part and parcel of the said Law. Those provisions were specific to and intended to benefit a limited class of persons - the residents of the Hope Pastures community. The nature of the duty imposed would have an impact on each resident of the Hope Pastures community. The impact was limited and specific to those residents.

[131] The conduct of the parties subsequent to the establishment of the HHS is also relevant. The Director of Housing would have entered into an agreement with JPS by the creation of the JPS Grant and subsequently caused the endorsement of the

easement on the titles. Once the underground system had been established in accordance with the provisions of the scheme, each resident would have been obligated to enter into individual contracts with JPS to be legally connected to that system. One can clearly discern a series of events resulting from the provision of the scheme being approved relevant to the electrical supply, affecting JPS and the residents who entered into contractual arrangements with JPS.

[132] Under those circumstances, one approach to the issue is to consider whether it could be said that Parliament would have intended that JPS could unilaterally change the method of connection the day after the scheme was established. If that could not be said, and it is highly unlikely that such a conclusion could be drawn, then what would be the route to ensure that the specific feature of the scheme could continue as clearly intended by Parliament? Continuity within the reasonable bounds of the relevant laws and licences granted can be taken to have been intended.

[133] Mr Foster's reliance on **Morrison Sports Ltd** does not assist his submissions in this matter, as the circumstances are starkly different. At paragraph 37 Lord Rodger of Earlsferry JSC said:

> "Looked at as a whole, therefore, the scheme of the legislation, with its carefully worked-out provisions for various forms of enforcement on behalf of the public, points against individuals having a private right of action for contraventions of regulations made under it."

The legislative scheme in that case had "carefully worked-out provisions" for various forms of enforcement on behalf of the public; it was also held to be difficult to identify

any limited class of the public for whose protection the relevant Regulations were enacted and on whom Parliament intended to confer a private right of action for breach of the provisions of the Regulations. Lord Rodger of Earlsferry JSC, having reviewed the principles set out in **X (Minors)** (at paragraphs 28 and 29) and other authorities, concluded that the contravention of the subject regulations did not give rise to a private right of action.

[134] In applying the principles as expressed in **X (Minors)** and as extracted from **Groves v Wimborne**, the only reasonable inference that can be drawn would be that private law remedies could be pursued for the following reasons:

1. The HHS provided no other enforcement provisions save for what has been described above that was given to the Director of Housing. The scheme having been completed, that enforcement provision had no further practical viability. The Housing Law which incorporates the provisions of the HHS is not a statute with "carefully worked-out provisions for various forms of enforcement on behalf of the public" (see paragraph 37 of **Morrison Sports Ltd**); and

2. It is clear that Parliament intended the scheme, including the specific electrical connection to benefit a limited class of the public – the residents of the Hope Pastures community. As expressed in **X (Minors)** at page 731 "…if the statute provides no other remedy for its breach and Parliamentary intention to protect a limited class is shown, that indicates

that there may be a private right of action since otherwise there is no other method of securing the protection the statute was intended to confer".

3. JPS assumed the responsibility, through the negotiations with HEL, to supply underground wiring for electricity and thus the inference is to be drawn that they would provide electricity by that means to contractual customers. The Minister ensured that JPS would have the liberty to enter the property of each resident to fulfil its statutory obligation in establishing the underground system and further to, *inter alia*, inspect, maintain and replace as per JPS Grant and the easement endorsed on the titles.

[135] Having considered and weighed all the above factors, it is difficult to come to any other conclusion but that the appellants do have a private law remedy against JPS. Otherwise, how would this limited class of the public, having expended monies and received their titles to residential homes in this scheme approved by Parliament, seek to be protected from a statutory breach without a private law cause of action?

[136] It is my opinion, therefore, that Sykes J erred in concluding that the appellants would have no right to seek and obtain injunctive relief and damages on the basis that there was no private law remedy available to them. In regard to preliminary question 3, therefore, grounds j, k, l and m succeed to the extent that the appellants do have a right to seek injunctive relief and damages against JPS.

[137] Mr Foster has submitted, however, that even if this court found that the learned judge erred, the injunctive relief sought could not be granted at this stage. Counsel contended that the remedies sought by the appellants were premature as injunctive relief would have to be dealt within the context of other evidence, which would require expert evidence.

[138] He has referred the court to the defence which includes averments relating to the viability of the underground system (see paragraph [82] of this judgment). He reiterated that it is for these reasons that certain injunctive relief requested from the court by Lord Gifford cannot be granted, as to do so would be inappropriate at this stage of the proceedings.

[139] Mr Foster's submission on this issue has merit. At this stage of the proceedings, it would not be appropriate to accede to the appellants' request in the forms of orders for permanent injunctive relief. This would include any orders that would require JPS to remove all poles installed to provide electricity by means of overhead cables. While I am cognisant that there are some residents in the Hope Pastures community who are presently supplied by overhead connection, and that some are still supplied by way of the underground connection, there are issues that should be determined between the parties before these orders are made. Any injunctive relief granted at this juncture, would be limited to a preservation of the status quo until these other relevant issues are determined at the trial Similarly, any issues relating to damages as a result of

electrical outages or for payment demanded of the appellants by JPS in order to establish overhead connections would best await a full determination of all such issues.

The trial judge's reliance on facts which were not agreed (grounds a and b)

Submissions on behalf of the appellants

[140] There is a further complaint made by Lord Gifford in relation to comments by the learned judge that at paragraphs [1] and [3]) of his judgment. Queen's Counsel submitted that he erred insofar that he stated that certain facts were undisputed, when this was not so. The following facts which were treated as undisputed did not form part of the statement of agreed facts:

> "[1] …They want JPS to replace the underground cable system at JPS' cost…"
>
> "[3] As can be seen this dispute is ultimately about who should pay for the underground cable system, if it is to be replaced, now that it has come to the end of its useful life. There is no dispute about the facts."

[141] Lord Gifford contended that contrary to the learned judge's statement, there was a dispute about the facts relating to the underground system and the responsibility for any failures. Lord Gifford sought to demonstrate this dispute by reference to the pleadings:

> Amended Particulars of Claim
>
> "26. Since about 2003 the underground system began to malfunction more frequently due to [JPS'] failure to maintain it and [JPS] was asked to service and maintain the system more effectively."

Defence

> "24. …the underground electrical system in Hope Pastures, is aged and antiquated. Notwithstanding maintenance to date the underground system has been and continues to be prone to constant and chronic failure thereby resulting in frequent and extended outages for residents supplied by the system. Due to the age of the system [JPS] has significant difficulties sourcing replacement parts to maintain and repair the system which affects its reliability."
>
> "25 (g) That due to inter alia the age and antiquity of the underground system in Hope Pastures, its continued uses to reliably supply customers with electricity has been rendered practicably impossible"

[142] Queen's Counsel contended that the agreed statement of facts contained no reference to the state of the underground system or the reasons for any failure. The extent of the parties' agreement on this issue is set out at paragraphs 22 and 23 of the agreed statement of facts, where it was agreed that JPS had been directed by the Government Electrical Inspectorate that it cannot maintain both an underground and overhead electrical system as it is generally unsafe; that many of the residents of Hope Pastures continue to be supplied with electricity by JPS by underground cables. The first-named appellant gave affidavit evidence that this is true of around 70% of the residents.

[143] He submitted that if there is a trial of the facts, the appellants' position that would be advanced is that the underground system, if properly maintained, would be safer and more economical as it is less susceptible to damage from hurricanes and storms. He stated, therefore, that it is not agreed that the entire system had to be replaced. It was contended also, that if the appellants are found to be entitled by law to

the continuance of the underground supply, then the resolution of these issues, which would require extensive expert evidence, would not be necessary. It was on this basis that the appellants agreed to the determination of the points of law on the agreed statement of facts.

Submissions on behalf of the respondent

[144] It was submitted by Mr Foster that whether or not the facts were agreed did not matter as the statements ultimately did not affect the learned judge's determination of the preliminary points of law. This is so because the issues determined were points of law which were unaffected by whether the statements were true or agreed. There is no reference in the disposition (at paragraphs [40] to [44]) where the learned judge arrived at any decision or made any findings whether directly or indirectly on the matters which the appellants contend are not agreed.

[145] The learned judge demonstrated an understanding of the issues that were before him and the analysis showed that he had a full grasp of the matters to be adjudicated upon. The reference to who should pay for the replacement of the underground cable system was not a finding but merely a passing reference to the full gamut of issues in dispute, some of which would have to be resolved if the claim proceeded to an assessment of damages, had the points of law been resolved in the appellants' favour.

[146] Mr Foster reiterated that the underground system was not provided by JPS at its own expense, and as such who should bear the cost of replacement could not be

determined by this court. The very agreed statement of facts showed that there was a contemplation of further evidence in the event that the appellants succeeded on the legal points.

Analysis and determination

[147] The learned judge would have been incorrect in asserting that the facts relevant to the state of the underground system were undisputed. This was not a part of the agreed statement of facts. However, this complaint is not tied to any of the preliminary questions that were to be resolved. The comments, although germane to the conflict between the parties (which was astutely recognised by Sykes J), are indeed peripheral to the issues the learned judge had to determine. His statements on the issue should not be treated as determinative of the facts as set out. But these facts should await determination at a trial, which I have determined would be necessary, in order for the court to treat with all the relevant issues that could not be determined by the preliminary points of law.

Conclusion

[148] It has been determined that Sykes J erred in his application of the law in relation to his determination of preliminary question 1 (in part) and question 3. However, there are outstanding issues that remain to be determined between the parties at a trial. Since there is also the issue of the safety of co-existing overhead and underground connections existing at this time, I am recommending that the trial of the claim proceed as expeditiously as possible. As a final observation, serious thought should be given to the appropriateness of bifurcating claims having regard to the overriding objective of

the Civil Procedure Rules (rule 1.1.) which includes considerations of saving expense and a proper use of the court's resources.

[149] Accordingly, I would propose that the court make the following orders:

1. The appeal is allowed in part.

2. The declarations are granted in the following terms:

    a. The respondent is under a statutory obligation to provide a supply of electricity by underground cables to the premises of the appellants in Hope Pastures, pursuant to the provisions of the HHS incorporated into the Housing Law.

    b. The respondent is under a statutory obligation by virtue of the Electric Lighting Act, the 2011 Licence and in conjunction with the contracts entered into with the appellants to maintain such an underground connection, pending the determination at trial as to whether such a supply is adequate safe and efficient based on modern standards as required under the relevant legislation.

    c. The provision of electricity by the respondent by overhead wires to any part of the Hope Housing

Scheme is a breach of the provisions of the statutory scheme of the HHS as it exists at this time.

3. The injunctive relief is granted in the following terms:

    a. Pending the trial in the Supreme Court and the determination of the issues relevant to the adequacy, safety and efficiency of the underground connection, an injunction is granted restraining JPS whether by itself or any person duly appointed by JPS and acting as its servant or agent, from disconnecting the supply of electricity provided by way of underground cables to the premises of the appellants.

    b. Pending the trial in the Supreme Court, an injunction is granted restraining JPS whether by itself or any person duly appointed by JPS and acting as its servant or agent, from entering upon the premises of the appellants other than in accordance with the right of the easement granted on 24 April 1962 for the maintenance and repair of the installations for the supply of electricity by underground cables.

4. The matter is to be set by the Registrar of the Supreme Court for a case management hearing and for a subsequent trial date to be set before a different judge as expeditiously as possible; and

5. Two-third costs of the appeal and two-third costs in the court below to the appellants to be agreed or taxed.

EDWARDS JA

[150] I too have read the judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. The appeal is allowed in part.

2. The declarations are granted in the following terms:

    a. The respondent is under a statutory obligation to provide a supply of electricity by underground cables to the premises of the appellants in Hope Pastures, pursuant to the provisions of the HHS incorporated into the Housing Law.

    b. The respondent is under a statutory obligation by virtue of the Electric Lighting Act, the 2011 Licence

and in conjunction with the contracts entered into with the appellants to maintain such an underground connection, pending the determination at trial as to whether such a supply is adequate safe and efficient based on modern standards as required under the relevant legislation.

c. The provision of electricity by the respondent by overhead wires to any part of the Hope Housing Scheme is a breach of the provisions of the statutory scheme of the HHS as it exists at this time.

3. The injunctive relief is granted in the following terms:

a. Pending the trial in the Supreme Court and the determination of the issues relevant to the adequacy, safety and efficiency of the underground connection, an injunction is granted restraining JPS whether by itself or any person duly appointed by JPS and acting as its servant or agent, from disconnecting the supply of electricity provided by way of underground cables to the premises of the appellants.

b. Pending the trial in the Supreme Court, an injunction is granted restraining JPS whether by itself or any person duly appointed by JPS and acting as its servant or agent, from entering upon the premises of the appellants other than in accordance with the right of the easement granted on 24 April 1962 for the maintenance and repair of the installations for the supply of electricity by underground cables.

4. The matter is to be set by the Registrar of the Supreme Court for a case management hearing and for a subsequent trial date to be set before a different judge as expeditiously as possible; and

5. Two-third costs of the appeal and two-third costs in the court below to the appellants to be agreed or taxed.