[2012] JMSC Civ 110

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 05613

BETWEEN	**DENNIS MEADOWS**	**FIRST CLAIMANT**
AND	**BETTY ANN BLAINE**	**SECOND CLAIMANT**
AND	**CYRUS ROUSSEAU**	**THIRD CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**FIRST DEFENDANT**
AND	**THE JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**SECOND DEFENDANT**
AND	**THE OFFICE OF UTILITIES REGULATION**	**THIRD DEFENDANT**

IN OPEN COURT

Hugh Wildman instructed by Marvalyn Taylor Wright and Co for the claimants

Althea Jarrett instructed by the Director of State Proceedings for the first defendant

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton and Associates for the second defendant

David Batts QC and Daniella Gentles-Silvera instructed by Livingston Alexander and Levy for the third defendant

June 26, 27, July 11, 2012 and July 30, 2012

STATUTORY INTERPRETATION – SECTION 3 OF THE ELECTRIC LIGHTING ACT – WHETHER THE MINISTER IS PERMITTED TO GRANT LICENCE TO ONE PERSON TO SUPPLY ELECTRICITY FOR THE WHOLE ISLAND OF JAMAICA

SYKES J

[1] This case has generated wide public interest and understandably so, as there is general dissatisfaction with the cost of electricity. The dissatisfaction cuts across all classes of the society from the businessman to the householder. They have been complaining about the high monthly bills that they receive from the Jamaica Public Service Company Limited (JPS), the nation's monopoly supplier of electricity. However, this case is not about the billing practices of the JPS and neither is this case intended to be a facility of redress for those representing the dissatisfied JPS clientele.

[2] Some persons believe that the reason for these high bills is the absence of competition in the electricity transmission, distribution and supply sector. They also believe that the JPS which has a twenty-year all-island exclusive licence over the transmission, distribution and supply of electricity is a stumbling block to their vision of greater competition in the respective markets. The citizens with this view have sought to bring an end to this monopoly by organizing themselves in groups and have launched this claim.

[3] There are at least two such groups. One is known as Citizens Action for Securing Cheaper and Better Supply of Energy. Mr Meadows, the first claimant, is a member of that group. There is another group known as Citizens United To Reduce Electricity Rates. Miss Betty Ann Blaine, the second claimant, is a member of this second group. There is also Mr Cyrus Rousseau, Chairman of Heavensent Distributors, a company that bottles spring water. What unites the groups and Mr Rousseau is their desire to bring an end to the monopoly that JPS has over the transmission, distribution and supply of electricity in Jamaica.

[4] They are asking this court to say that the all-island exclusive licence granted to JPS is illegal because the Minister did not have the power to grant an all-island licence to one company to transmit, distribute and supply electricity for the whole of Jamaica. It should be mentioned that there are other companies which generate electricity which is sold to the JPS.

[5] The citizens' groups and Mr Rousseau are also saying that the Office of Utilities Regulation (OUR) breached its own statute, the Office of Utilities Regulation Act (OURA) when it recommended that the Minister grant the all-island licence to JPS.

[6] The resolution of the main issue in the case, that of the all-island licence, comes down to the interpretation of section 3 of the Electric Lighting Act (Jam), 1890 (ELA). The ultimate question is whether the Minister with responsibility for mining and energy has the power under section 3 of the ELA to grant an all-island licence to one entity to transmit electricity to the entire island of Jamaica. Reference is only made to transmission here because of how some of the declarations sought were framed. Section 3 in its current form reads:

The Minister may from time to time license any Local Authority as defined by this Act, or any company or person, to supply electricity under this Act for any public or private purposes within any area, subject to the following provisions

(a) the licence may make such regulations as to the limits within which, and the conditions under which a supply of electricity is to be provided, and for enforcing the performance by the licensees of their duties in relation to such supply, and for the revocation of the licence where the licensees fail to perform such duties, and generally may contain such regulations and conditions as the Minister may think expedient;

(b) where, in any area or part of an area in which any undertakers are authorized to supply electricity under any licence, the undertakers are not themselves the Local Authority, the licence may contain any provisions and restrictions for enabling the Local Authority, within whose jurisdiction such area or part of an area may be, to exercise any of the powers of the undertakers under this Act with respect to the breaking up of any street repairable by such Local Authority within such area or part of an area, and the alteration of the position of any pipes or wires being under such street, and not being the pipes or wires of the undertakers, on behalf and at the expense of the undertakers, and for limiting the powers and liabilities of the undertakers in relation thereto, which the Minister may think expedient.

[7] This legislation was influenced by the Electric Lighting Act, 1882, of the United Kingdom. When the Jamaican Act of 1890 was enacted, the statutory functionary who could grant licences was the Governor in Privy Council and not the Minister as is now stated in the legislation. There have been changes to section 3 since 1890 which should be noted. First, there were three provisos and now there are two. Second, Local Authority now means Parish Councils and not Parochial Boards which are the ancestors of Parish Councils.

[8] The basic contention of Mr Hugh Wildman is that the Minister does not have the authority to grant an all-island licence to one entity to generate, transmit, distribute and supply electricity to the entire island of Jamaica. Such a grant is illegal in the sense of not authorized by law. Mr Wildman was careful to make the point that this is not a challenge based on administrative law grounds such as bad faith, irrationality or irrelevant considerations. He is not saying that the Minister had the power but exercised it incorrectly; he is saying that the Minister does not have the power at all.

[9] The steps to this conclusion are these. The Minister with responsibility for mining and energy when granting a license to supply electricity is acting under a power given to him by the ELA. Section 3 of the ELA sets out the full range of the Minister's powers. There is no provision in section 3 which authorises the Minister to grant to one entity an all-island licence. Therefore, the Minister could not lawfully grant JPS alone a licence for the entire island. The effect of this illegality is that no valid licence was issued to JPS. The end result being that JPS is now operating without a valid licence.

[10] For this submission Mr Wildman relies on **National Transport Co-operative Society Limited v The Attorney General of Jamaica** [2009] UKPC 48. In that case the relevant legislation said that the Minister may grant 'to any person an **exclusive**

licence on such conditions … to provide public passenger services within and throughout the Corporate Area' (emphasis added). The problem arose because the Minister, unwittingly, ended up granting two licences to operate within the Corporate Area. The result was that there were two licences in respect of the Corporate Area in a context where the legislation said that the licence granted in the Corporate Area must be exclusive. Unsurprisingly, Brooks J, the Court of Appeal of Jamaica, and the Judicial Committee of the Privy Council held that the Minister had breached the relevant legislation. The consequence was that the terms of the licence between NTCS and the Government were unenforceable despite the fact that NTCS had acted upon the licence for many years.

[11] This decision points to one of the striking features of public law which is that where a statutory body or a person authorised by statute to do an act, does an act not authorized by the relevant statute, then the unauthorised act has no legal effect even if person or persons acted on it for years. There is no such thing, as in private law, as ratification of action not authorised by the enabling statute. Everything is a nullity. This is the conclusion Mr Wildman hopes for in the instant case.

[12] There was another point raised by Mr Wildman. Mr Wildman said that giving an all-island licence necessarily meant that the Minister prevented himself from considering other applicants for a licence to transmit electricity. The argument here was that granting the all-island licence was not permitted by section 3 of the ELA and this all-island licence, by the fact of being all-island, meant that the Minister had deprived himself of the power to consider other applicants. This amounted to a fettering of discretion flowing from an illegal act.

[13] As will be shown below, this second point raised by Mr Wildman is a seriously flawed argument. There is a difference between saying that the Minister cannot grant

an all-island licence and that he cannot grant an all-island exclusive licence. An all-island licence is not the same thing as an all-island **exclusive licence** (emphasis added).

The declarations

[14] From these arguments, Mr Wildman urged the court to grant the following declarations:

1. *A declaration that the 20-year All-Island Electricity Licence granted by the then Minister of Mining and Energy to the Jamaica Public Service Company Limited on 30th March 2001 pursuant to section 3 of the Electric Lighting Act, and extended by the Amendment Licence granted in July 2007 for a further 7 years, on the recommendation of the Office of the Utilities Regulation, is illegal, null and void and of no effect.*

2. *A declaration that as a consequence of the first declaration, the Jamaica Public Service Company Limited is currently operating without a licence as required by the law, stipulated under section 3 of the Electric Lighting Act.*

3. *Alternatively, that section 3 of the Electric Lighting Act does not empower the Minister to disenfranchise the prospective right of any person to apply for a licence to transmit electricity, whether for personal, public or commercial purposes.*

4. *A declaration that the grant of an exclusive licence to the Jamaica Public Service Company Limited, on the recommendation of the Office of Utilities Regulation, constitutes an unlawful fetter on the discretion of the Minister and subsequent Ministers in the grant of a licence to transmit electricity under section 3 of the Electric Lighting Act, and/or conduct the business of the transmission of electricity pursuant to a licence granted under section 3 of the Electric Lighting Act.*

5. *A declaration that the Office of the Utilities Regulation acted unlawfully in recommending the grant of an exclusive licence by the Minister in favour of the Jamaica Public Service Company Limited, pursuant to section 4 of the said Office of Utilities Regulation Act, as it has no such power.*

6. *A declaration that the said All-Island Licence is contrary to the provisions and spirit of the Fair Competition Act, and as such is unlawful.*

7. *Such other relief as the court sees fit*

8. *Costs*

[15] The sixth declaration was not pursued.

The relevant terms of the licence

[16] It is appropriate to state the relevant parts of the licence which have provoked the ire of the claimants. The opening words in part one of the licence read:

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

Condition 4 states:

> *The licensees shall have the exclusive right to provide service within the framework of an All-Island Electric Licence and the All-Island Electrical System. The exclusive right specified herein shall be as follows:*
>
> *(a) In the first three years from the effective date of this Licence, the Licensee shall have the exclusive right to develop new generation capacity. Upon the expiry of this*

period the Licensee shall have the right together with other outside person(s) to compete for the right to develop new generation capacity.

(b) The licensee shall have the exclusive right to transmit, distribute and supply electricity throughout Jamaica for a period of 20 years.

Provided that no firm or corporation or the Government of Jamaica or other entity or person shall be prevented from providing a service for its or his own exclusive use.

What are the exclusive rights of JPS?

[17] It is important to identify what exclusive rights the JPS has. The first exclusive right that the JPS has the exclusive right to develop new generating capacity within the first three years of the licence granted in 2001. By the time the licence was amended in 2007, this exclusive right expired. The second exclusive right is the right to transmit, distribute and supply electricity. The third exclusive right is that the exclusivity is limited to twenty years which has now been extended for a further seven years.

[18] It is equally important to identify what the licence does not do. It does not prevent any other person from providing electricity for himself. It seems then that a private householder or company is free to develop its own electricity supply.

Principles of statutory interpretation

[19] The principles of statutory interpretation that are relevant will now be stated. In times past, judges spoke of the various 'rules or cannons of statutory construction.' In plain English this simply means the principles of statutory interpretation. Until recently, every generation of law students would learn of the golden rule, the literal rule and the mischief rule. These rules would be accompanied by their Latin-speaking cousins with names such as *ejusdem generis*, *expressio unius est exclusio alterius* and *generalia specialibus non derogant*. All these rules and sub-rules were designed, it was said, to arrive at the clear and unambiguous meaning of the words of the statute.

[20] The clear and unambiguous meaning of these words was said to express the intention of Parliament. However, as time has gone on it has come to be recognised that the process of interpretation of statutes is more nuanced than previously acknowledged. Language we now know only becomes better understood if the context if known.

[21] The expression 'clear and unambiguous meaning' assumed that the words could have only one meaning. It is now better appreciated that the meaning of a statute is not necessarily the meaning of the words used in the statute. The meaning of words, borrowing Lord Hoffman's phraseology, is the business of dictionaries but the meaning of a provision is determined by examining the words themselves in the immediate context; then in the context of the whole statute; then the statute in the particular social and economic circumstance in which it was passed, and perhaps more important, the context in which it is now to be applied (**Investor Compensation Scheme v West Bromwich Building Society** [1998] 1 All ER 98, 115). As Lord Nicholls humourously noted, the meaning of the expression 'eats shoots and leaves' depends on whether one is speaking about a panda or a Wild West outlaw (Donald Nicholls, *My Kingdom For A Horse: The Meaning of Words*, LQR, (2005), 121 (Oct), 577 – 591, 579).

[22] It used to be the case that before the court could look at the context to interpret a statute, there had to be some ambiguity. This has now gone by the way. In **R (on the application of West Minster City Council) v National Asylum Support Service** [2002] 1 WLR 2956, Lord Steyn said at page 2958:

> *The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it.* ***It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen.*** *… in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 , 912-913* ***Lord Hoffmann made it crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction.*** (emphasis added)

[23] Implicit in this passage is the idea that an interpretation need not result in a manifest absurdity before it is rejected. Indeed, in this court's experience, there are not many interpretations of statutes advanced by counsel that have been absurd to say nothing of manifestly absurd. The current case is an example of that. Many times the different interpretations are prima facie reasonable and the court has to look carefully at what has been advanced and using the various principles developed over time settle on the most reasonable interpretation.

[24] This position is not new as Lord Blackburn made the same point over one hundred years ago. What is new is that it is now fully embraced (**River Wear Commissioners v Adamson** (1877) 2 App Cas 743). The 'rediscovery' of Lord Blackburn's thinking sparked a renaissance in the interpretation of documents including statutes. Lord Blackburn explained the position as follows at page 763:

> *I shall … state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.*

[25] In between those two cases was Lord Reid's advice in ***Black-Clawson International Ltd v Papierwerk Waldhorf*** [1975] AC 591, 613 – 615. His Lordship indicated that it is not accurate to say that we are seeking the intention of Parliament. What is being sought is the meaning of the words Parliament used. His Lordship advocated that one begins with the words of the statute read as a whole. That is, putting the section in question in the context of the whole statute. For Lord Reid, context was not restricted to the four corners of the statute (the four-corners doctrine). Context went beyond the words of the text and included matters that would be known to the legislators.

[26] These three cases capture the basic position of modern statutory interpretation.

[27] There is also another principle which has been raised in this case and that is the always-speaking principle. The principle in mind is that unless indicated otherwise a statute speaks not just from the time it is passed but is always speaking. Some statutes by their very nature do not always speak since it might have been a statute,

for example, to raise money for a specific project which is now completed. A modern example of legislation that would not be speaking beyond a specific time would be legislation drafted in Jamaica to deal specifically with the Cricket World Cup held in the Commonwealth Caribbean Region in 2007. This was a special type of statute called sunset legislation that existed for a specific time to govern a specific circumstance.

[28] Admittedly, the always-speaking principle is open to the accusation that it is a surreptitious method of judicial updating of legislation which has not been amended by the legislature. This court will acknowledge that there is always that danger but that should not deter the courts from applying old statutes to new circumstances that were not in the minds of the legislators provided that words can reasonably accommodate the new circumstance. Where this can be done without altering the substance of the legislation then the courts should do this even at the risk of being accused of 'amending' the statute. This is exactly what the House of Lords did in **R v Ireland** [1998] AC 147. Among the questions their Lordships had to answer was whether a recognisable psychiatric illness fell within the expression 'bodily harm' used in an 1861 statute. The House concluded that it did despite the fact that it was accepted by the Law Lords that in 1861 the legislators did not have in mind psychiatric illnesses when they used the words 'bodily harm.' Lord Steyn classified the 1861 statute as always speaking and therefore must be interpreted 'in light of the best current scientific appreciation of the link between the body and psychiatric injury' (page159). His Lordship was able to do this because that extension could be accommodated within the meaning of the words without distorting the meaning of the provision and the statute.

[29] Even before the **Ireland** case, the House of Lords in **Royal College of Nursing of the United Kingdom v Department of Health and Social Security** [1981] AC 800, had to determine whether the words 'medical practitioner' in the

expression ‘pregnancy is terminated by a registered medical practitioner’ found in section 1 (1) of the Abortion Act, 1967, included a nurse acting under the doctor’s instruction. By a majority (3:2), it was held that nurses were within the expression once they acted under the doctor’s instruction because the purpose of the legislation was to have medically supervised abortion. The majority judgments make it clear that advances in modern methods of abortion which did not exist in 1967 when the statute was passed made a wider interpretation necessary to give effect to the statute.

[30] The problem of always-speaking statutes was again addressed by the House of Lords in the case of **Regina v Secretary of State for Health** [2003] 2 AC 687. The issue in that case was whether a 1990 Act passed to govern embryos created in the only two ways known to science at the time the statute was passed could be extended to cover a third method which did not exist in 1990. The House held that it could be extended since it was the clear intention of the legislature that created embryos should be regulated by statute. Lord Millett said at [39]:

> *In the present case the question is not whether Parliament positively intended to cover embryos produced by a process such as CNR which does not involve the use of a fertilised egg; it plainly did not, for it did not foresee the possibility. The question is whether Parliament intended to legislate only for embryos created by a process which does involve the use of a fertilised egg or whether it intended to legislate for embryos by whatever process they are created.*

[31] Lord Bingham said at [7] – [9]:

> *Such is the skill of parliamentary draftsmen that most statutory*

enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.

The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of "cruel and unusual punishments" has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so. The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language:

[32] The principle of interpreting statutes as always speaking is firmly established. This court agrees with Lord Steyn, writing extra-judicially, when his Lordship said the legislature 'must be deemed to contemplate that generally its statutes will endure for a considerable time, and that unless statutes evince a contrary intention, they will be judged to be constantly speaking' (Lord Steyn, ***Dynamic Interpretation Amidst An Orgy of Statutes***, EHRLR 2004, 3, 245 – 257).

[33] The process of interpretation of statutes has evolved. It is now appreciated that, on the face of it, there is usually a range of meanings that may be applied to the words used. The key is to identify the most suitable interpretation from those available. This does not mean that a judge is free to give any meaning he wishes to the statute. Words do not exist in a vacuum. They have, for the most part, an initial prima facie meaning. If that were not so, communication would be impossible. The meaning eventually given to the words ought to be one that the words can reasonably carry unless of course the context compels some very unusual meaning. What used to be called rules of interpretation are nothing more than guides to direct

the thought process when interpreting a statute. The Latin maxims operate more as refined tools designed to see if the court's interpretation is reasonable.

The London Electricity Supply case

[34] After the hearing in this matter was completed, counsel for the claimants brought to the attention of the court and counsel for the defendants the case of **London Electricity Supply Corporation Ltd v Westminster Electric Supply Corporation Ltd** [1913] LGR 1046. The court invited counsel to make further submissions on this case if they wished to do so. The invitation was accepted. Further submissions were heard on July 11, 2012. It is perhaps convenient to indicate that on Friday, July 27, 2012, the claimants' attorney brought to the attention of the court, yet another case. This was **The Case of Monopolies** 77 ER 1260. The court did not advance the matter very much and so the defendants were not invited to respond to it. The case before the court is one of statutory interpretation. The **Monopolies** case was not dealing with the circumstances before the court.

[35] Mr Wildman contended that this case established that the Jamaican ELA was designed to suppress monopolies and promote competition and this led to the inevitable conclusion that the Minister could not grant a licence to one company to supply electricity to the entire island. He relied on a number of passages from the judgments of the Law Lords which he says support his conclusion. It is important to appreciate the facts and context of that case.

[36] The London Electric Supply Corporation (London Electric) and Westminster Electric Supply Corporation Ltd (Westminster Electric) were permitted to supply electricity in the City of Westminster which was a part of the County of London. London Electric also supplied electricity to other parts of London. Westminster

Electric operated only in Westminster. Both companies were authorised to supply electricity by provisional orders granted in 1889.

[37] London Electric contracted with Westminster Electric to provide London Electric's customers in the City of Westminster with electricity. This agreement was entered into in May 1910 and approved by the Board of Trade in June 1910.

[38] Under the agreement, Westminster Electric was to manage London Electric's operations in Westminster and supply London Electric's customers with electricity. Unfortunately, Westminster Electric interpreted the agreement to mean that it was a complete transfer of assets; the customers of London Electric were now Westminster's and also that it could force London Electric's customers to take continuous current even if they wanted alternate current.

[39] London Electric found this to be unacceptable and took the matter to court. London Electric contended that the terms of the agreement between itself and Westminster Electric did not permit that type of conduct. London Electric lost in the trial court and in the Court of Appeal but prevailed in the House of Lords.

[40] The legal regulatory framework in which the contract was made is vital to a proper understanding of the case.

[41] The first legislation governing the supply of electricity in England was passed in 1882. The 1882 English Act had section 11 which reads as follows:

> *Any local authority who have obtained a license, order or special Act for the supply of electricity, may contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply, or for the supply of electricity within any area mentioned in such license, order or special Act, or in any part of such area; but* ***no local authority, company, or person shall by any contract or assignment transfer to any other company or person or divest themselves of any legal powers given to them, or any legal liabilities imposed on them by this Act, or by any license, order, or special Act, without the consent of the Board of Trade****.* (emphasis added)

[42] This provision was understood to prevent one company from acquiring the business of another unless the Board of Trade consented. The Act did more than that. It prevented companies from entering into what today would be called management contracts, that is to say, company A could not contract with company B for company B to run company A's electrical business. This restriction undoubtedly hampered the electricity supply companies.

[43] There was also another problem. The law as it was understood at the time indicated that each company had to run its own mains and pipes to provide electricity to its customers. How did this affect London Electric and Westminster Electric? In 1889, both companies received their provisional orders to supply electricity in Westminster. London Electric was permitted to supply electricity to other parts of London as well. However, in order to supply its customers in Westminster, it needed to put in place its own machinery and do all the investment necessary to meet its obligations under the provisional order. As it turned out London Electric either could not or would not make the necessary investment to supply its customers in Westminster. In the absence of investment it either had (a) to transfer its business or (b) enter into a management contract with another company or (c) give up the right to supply electricity. The first option was not permitted unless the Board of Trade

consented and the second option was not allowed under the statute. Obviously, it did not wish to adopt the third option.

[44] It was in this context that the London Electricity Supply Act was passed in 1908. What this 1908 Act did was to allow electricity supply companies, in the County of London, with the approval of the Board of Trade, to enter into management contracts.

[45] The 1908 Act went on to make it plain that despite the power to enter into management contracts the electricity companies could not use these contracts to get out of their statutory responsibilities to provide electricity to their customers in accordance with their licence or provisional order.

[46] When the case came before the House of Lords the legal position in terms of statute law was this:

(a) companies were prohibited from assigning, transferring or divesting themselves of their legal power and legal liabilities imposed on them by their provisional order or the general law or special statute made applicable to them unless they had the permission of the Board of Trade (section 11 of the 1882 Act and the terms of the provisional orders of both companies);

(b) the London Electric Supply Act, 1908, permitted companies, in the County of London, to enter into management contracts.

[47] What is clear from this rather detailed examination of the full circumstances of the **London Electric** case is that there was no licencing dispute before the court. None of the litigants was taking issue with the Board of Trade over its decision to grant or not to grant a licence or provisional order. It was simply a matter of interpreting the agreement having regard to the power given to the contracting parties by Acts of Parliament. The English equivalent of section 3 of the Jamaican Act was not before the court.

[48] The court will now refer to some of the passages relied on by Mr Wildman in support of his submission that the Jamaican ELA, like its English counterpart, suppressed monopoly and advanced competition.

[49] In respect of the general statute of 1882, Lord Moulton observed at page 1059:

> *In the year 1882 the first Electric Lighting Act was passed, and that Act still forms the basis of our legislation on the subject. But no practical action took place under it by reason of the shortness of the term which at that time Parliament was willing to give to undertakers of electric enterprises. In this respect, however, the conditions under which powers of electric supply were granted were made more favourable by the Act of 1888, and consequently many applications for provisional orders, covering various areas of London were made in 1889, and among them were [London Electric] and [Westminster Electric].*

[50] This passage indicates that the 1882 Act was deficient in a very significant respect. Lord Moulton does not specify the time period but it was the case that in

instances where a licence was granted instead of a provisional order, the time period was seven years. This period was too short to make it economically viable for persons to invest in the supply of electricity. This is one of the reasons explaining why granting permission by licence as distinct from provisional orders fell into disuse. Provisional orders became the preferred method of granting permission because the statute did not place a time limit on them and in practice none was placed in them. The price for failing to live up to the terms of the provisional order was revocation. Little wonder that few investors came forth when licences and not provisional orders were the main means of granting permission in the early years after 1882.

[51] Lord Moulton stated at page 1059:

> ***During the early years of the public electric lighting the Legislature was very jealous of any association or union between electric lighting enterprises lest a monopoly should grow up to the detriment of the public.*** *But in 1908 it was felt that the difficulties of establishing generating stations in populous neighbourhoods and the advantages of production on a large scale and with large units of machinery rendered it advisable to make some concessions in this respect to the industry in London, and accordingly, the London Electric Supply Act, 1908, was passed to allow authorised undertakers of electric lighting to enter into agreements as to certain matters with other electric supply companies. It was under the powers of this Act that on May 4th 1910, the parties to this suit entered into the agreement out of which this action arises.*

[52] The need for Lord Moulton to trace the history of the matter in this way was to show that the contract entered into was in fact permitted by statute. Once this was decided, the next issue was whether the terms of the contract permitted Westminster Electric to do what it was doing. This meant that the contract had to be examined against the 1908 statute to see if its terms were within the statute. His Lordship held that the agreement did not authorise a wholesale transfer of London Electric's statutory responsibilities and business to Westminster Electric as Westminster Electric contended. What the agreement did was to provide for Westminster Electric to manage London Electric's operations in Westminster. In effect, it was a management contract and not a transfer of the business.

[53] The Lord Chancellor, Lord Haldane said at page 1052:

> *My lord, in order to understand the meaning of the agreement it is necessary to remember the state of the legislation affecting these companies when the agreement was made.* ***Section 11 of the Electric Lighting Act, 1882, had prohibited such companies from divesting themselves of their legal powers and liabilities, as imposed by that Act or by any licence, order or special Act, without the consent of the Board of Trade. The object was to maintain competition and avoid monopoly.*** *The Provisional Orders of [LESC] and [WESC], which were made in 1889 and were confirmed by Parliament, accordingly prohibited them from purchasing or acquiring the undertakings of, or from associating themselves with any other company or person supplying electricity under any licence, provisional order or special Act within London, unless authorised by Parliament* (emphasis added).

[54] What the Lord Chancellor was saying here is that the agreement between the parties was once prohibited by law (section 11 of the 1882 Act) but the 1908 Act made the contract possible. He was also saying that the provisional orders under which both companies operated were also prohibitive and prevented the type of agreement into which they entered. In other words, he agreed with Lord Moulton's view of the history of the legislation. This explains the Lord Chancellor's observation at pages 1052 – 1053 where his Lordship said:

> *In 1908, by the London Electric Supply Act of that year, they were authorised to enter into and carry into effect, with the approval of the Board of Trade, any agreement for mutual assistance or for association with each other in regard to, among other things, the giving and taking of a supply of electricity and the distribution and supply of electricity so taken, and for the management and working of any part of their undertaking. It will be observed that this permission did not in terms authorise purchase or transfer. Section 11 of the Act of 1882 and the Orders of 1889 remained in standing except so far as the words of the Act of 1908 relaxed their stringency. Section 11 was, indeed, afterwards repealed by section 14 of the Electric Lighting Act of 1909 but its substance was re-enacted by the same section in rather more stringent terms.*

[55] Lord Shaw stated at page 1055:

> *The respondents [Westminster], supply within the district of their operations on the system of continuous current; the appellants [London Electric], supply within the same district electricity on the principle of alternating current. Both of the companies conduct their*

business under the sanction of statute and there can be no doubt that the grant of this franchise by Parliament was at least intended to be sufficiently guarded to protect the rights of consumers and the public.

And at pages 1056 – 1057:

My lords, this is entirely in accord with the powers conferred by Parliament at the legislative stage then reached. For it must be bourne in mind that that which Parliament had denied from the year 1882 onwards was that the powers and undertaking sanctioned by Parliament for one company should be parted with and transferred to another. There is no reason to doubt that the policy of section 11 of the Act of 1882 has never been departed from. Upon the contrary, it has been re-affirmed by section 14 (1) of the Electric Lighting Act of 1909. A company cannot, by transfer or otherwise divest itself of any of its powers, rights, or obligations except under and in accordance with a provision contained in a licence, order or special Act authorising such divestiture.

It is not contended that such a licence, order or Act ever came into force authorising the divestiture or transfer which it is now argued is the legitimate consequence of the agreement of May 1910 except by way of the following inference. It is said that section 3 of the Electric Lighting Act of 1908 does in real substance and effect sanction such a transfer. ***My lords, I am of the opinion that this argument is unsound, and I feel morally certain that it is entirely out of accord with the intentions of Parliament, which throughout***

> ***appear to have been undeviating in protecting the rights of consumers and the public against the amassing of a monopoly and the extinction of those options of supply which might without it cease*** (emphasis added).

[56] All these passage cited by Mr Wildman contained general statements but none of them addressed the question of whether the Board of Trade could grant one entity a licence or provisional order over the entire Count of London. Also, the actual text of the 1882 Act did not prohibit absolutely the transfer of legal powers and obligations from one company to the other. The transfer could be done but it had to be done with the permission of the Board of Trade. There was no evidence that the Board of Trade permitted any transfer of legal powers and legal obligations. Also the parties were contracting under the 1908 Act. That Act, as noted above, permitted companies to contract for one company to manage the works of another with the permission of the Board of Trade.

[57] From the passages quoted from the Law Lords and others, Mr Wildman's submissions ran like this. Their Lordships, in interpreting the agreement before the court, had to look at it against the statutes under which they were permitted to supply electricity to Westminster. Those statutes had as their object the protection of the public against monopoly. This object governed the interpretation of the agreement. The object of the suppression of monopoly was evident in the 1882 English Act. Despite the fact that the 1882 Act was amended from time to time between 1882 and 1909, that object of suppressing monopolies did not change. The London Supply of Electricity Act, 1908, did not alter that object in respect of the County of London.

[58] Mr Wildman continued by submitting that that policy of monopoly suppression was adopted by the Jamaican legislature when it enacted the Jamaican ELA. This

policy of suppressing monopolies is evidenced in various provisions in the Jamaican ELA. The Act established a particular scheme that cannot be properly understood unless one appreciates that the unifying idea of the provisions is one of anti-monopoly. The only way to be anti-monopoly and thus given effect to the policy of the statute is by granting more than one licence. Granting a licence to one person for the entire island is inherently wrong and contrary to section 3 of the Jamaican statute.

[59] The power that Mr Wildman is attributing to the general statements of their Lordships goes beyond what the actual state of the law was at the time of the case their Lordships were deciding. The Law Lords were not considering the power of the Board of Trade to grant a licence to an electricity provider. Their Lordships were not deciding whether the whole of London could be regarded as one area and therefore one licence could be granted. Indeed by 1913, the year their Lordships decided the **London Electric** case, any such possibility had become academic since section 1 of the Electric Lighting Act, 1888, made it clear that the Board of Trade had the power to grant several licences or provisional orders for the same geographical area. Inferentially, it seems to this court, if it had the power to grant several, then it necessarily had the power to grant only one, or not grant any.

[60] The court has dealt with this case at some length in order to show that at the end of the day, it does not answer the question of whether the Minister could grant one licence to a one entity or person to supply electricity for the whole of Jamaica. Merely to say that the statute promoted competition and suppressed monopolies does not take account of the fact that under the Jamaican statute there is nothing, other than possibly administrative law principles, that prevent the Minister, where there are multiple licensees from permitting one to acquire the legal powers and obligations of another licensee. The statements in the **London Electric** case have been pressed far beyond their legitimate boundaries.

Can the Minister grant an all-island licence to one person to generate, transmit, distribute and supply electricity in Jamaica?

[61] The ELA was passed to provide a licensing regime for providers of electricity. The Act envisaged that there may well be many providers and made provision for that eventuality. But there was always the possibility that there might be just a single applicant for a licence for any geographical location.

[62] Section 3 of the ELA uses ordinary everyday language. There is no specialised vocabulary present. As outlined in the section dealing with statutory interpretation, the court's starting point is the actual text of section three. It says that the Minister may grant a licence to any person (companies as well as natural persons) or Local Authorities (Parish Councils) to supply electricity within any area. Sections 3 (a) and (b) permit the Minister to impose conditions and regulations on the licence. He may impose any conditions and regulations he 'may think expedient.'

[63] It is important to note what the section does not say in explicit terms. It does not say that one person cannot be granted an all-island licence. Neither does the Act say that the Minister must grant multiple licences to a multiplicity of persons. Also, the Minister is not prevented from granting more than one all-island licence. Indeed the Act could hardly have said any of these things because the Minister cannot know how many applicants there will be.

[64] The section permits the Minister to grant licences to a person to supply electricity within any area. On the face of it, persons and companies can receive licences for any area. There is nothing to say that one licensee cannot receive licences for several areas. There is nothing to say that the areas cannot be contiguous to each other. This is the point being made by Miss Althea Jarrett, counsel for the Attorney General. If a licensee can be granted a licence over any

area of the island, why can't the 'any area' be added up to make a whole? What is there to prevent one licensee being granted licences for different parts of the island if it turns out that that is the only licensee who can provide the electricity?

[65] It is at this point that Mr Hylton QC's submissions on always-speaking statutes become important. His point was that there is a presumption that the legislature passes statutes that always speak unless there is a contrary intention. He submitted that even if 'area' in 1890 in Jamaica meant a geographical area less than the whole of Jamaica, there is no reason why in the twenty first century area cannot mean the entire Jamaica.

[66] This court expressly adopts the always-speaking principle. This court sees no reason why in the twenty first century we should be shackled by what the legislators in 1890 thought. Social and economic circumstances have changed considerably. Jamaica was a colony at that time but is now an independent country with a growing population which means an increasing demand for the supply of electricity. The priority of a colonial government in the nineteenth century which was controlled by a Governor appointed by the colonial power may not be the priority of a democratically elected government under universal adult suffrage in the twenty first century. In 1890 the Governor was obliged to govern in the interest of the United Kingdom. In 2012, the Government is elected by Jamaicans to govern in the interest of Jamaicans.

[67] The court readily agrees that in 1890 when electricity generation and distribution were in their infancy, the legislators may have had a different view of the world. However, the statute has to be applied in the twenty first century.

[68] Section 5 gives the Minister power to insert conditions which would govern a wide variety of matters.

[69] Mr Wildman contends that when one reads other provisions such as sections 21, 25, 43, 46 and 47, it is clear that the Minister cannot grant an all-island licence to a one person. There must be at least two licensees. If this is not the case, the submission went, then the statute is rendered useless since many provisions would be rendered useless.

[70] The court will summarise the sections identified by counsel. Section 21 states that any Local Authority, company or person who has erected, maintained, have electric lines in, over, along, across or under any street or public road without a licence or does these things beyond the area defined by the licence is guilty of an offence.

[71] Section 25 makes provision for the Minister to take possession of the works of undertakers who are unable, by reason of bankruptcy or other cause, to continue to supply electricity for the area for which they were licensed. The Minister is authorised to maintain the plant in working order for twelve months or such time as is necessary for the sale or disposal of the plant.

[72] Section 43 (1) permits undertakers to agree to supply each other with bulk supplies of electricity. Bulk supply of electricity means a supply of electricity to be used for the purpose of distribution (section 47).

[73] Section 46 (c) states that the Minister may make regulations requiring undertakers to give information required by Electrical Inspectors.

[74] Section 47 is the definition section of the ELA. Mr Wildman attaches great significance to the definition of 'undertakers' (plural). Learned counsel also contends that the use of the plural 'undertakers' (referring to the providers of electricity) means that there could not be just a sole supplier of electricity for the entire island.

[75] Mention was made of the **National Transport** case earlier. In that case, the statute actually used the words 'exclusive licence.' This clearly meant that only one licence could be granted by the Minister since exclusive in that context could only mean one licence. The ELA does not have similar language.

[76] Counsel further submitted that in 1890 the legislators contemplated that electricity would be supplied by many producers of electricity and that is why the legislation was drafted to take account of multiple producers of electricity. What was not clear from Mr Wildman's submission was whether he was saying that the Minister had the power to grant multiple licences for one geographical area or that he had only power to grant licences in respect of different areas.

[77] The court does not agree that the provisions referred to taken either individually or collectively have the effect contended for by Mr Wildman. The Act facilitates management of electricity generation, transmission, distribution and supply in the event that there are multiple licensees but the Act does not mean that electricity generation and supply could not take place under licence unless there are two or more licensees.

[78] Mr Wildman submitted that inherent in the word *area* is the notion that any licence granted cannot be over the whole since *area* means something less than the whole. Therefore, since the Minister is authorised to grant licences in respect of areas then that must necessarily mean he cannot grant one licence in respect of the whole.

[79] In his written and oral submissions Mr Wildman rested his arguments on the proposition that 'the island is divided into areas so as to enable different undertakers to operate in the respective areas' (para. 20 of written submissions). He continued, 'in this context the notion of exclusivity of monopoly is alien to the legislation' (para. 20 of written submissions). Again, was counsel referring to exclusivity within a specific geographical area?

[80] Section 7 is one of those sections said to support the idea that there must be at least two licensees. Section 7 permits the licensee to transfer their licence with the consent of the Minister. If there were fourteen licensees, one for each parish, there is nothing in the ELA which prevents each licensee transferring its licence to one person which would make that person the holder of all the licences once the Minister consents to the transfer. What is prohibited is the transfer of the licence without the Minister's consent. This means that the Minister may permit the transfer of all the licences to one person. There is no provision in the statute that says that the Minister cannot permit one entity to have transferred to it all fourteen licenses.

[81] It is important to note that area is not defined in the Act. Neither is it accurate to say that the statute divides the island into areas. Mr Hylton QC pointed out that under the scheme developed by the rules governing applications for licences, it is the applicant who indicates which area he is interested in and then the application is

examined by the Minister. Conceivably then, an applicant could apply for 99% of the island. This possibility would meet Mr Wildman's less-than-the-whole criterion.

[82] Mr Wildman's argument is examined further. Jamaica is 10, 991 sq km. On Mr Wildman's logic, an applicant could regard 10,900 sq km as an area and assuming he is otherwise able to meet the requirements, barring some mishap, he may receive a licence. However if the applicant regarded the entire island as an entire area the Minister could never grant him a licence because the ELA mandates that one licence for the entire island could never be granted to one person. Thus in order to secure his licence the applicant could apply for an area comprising 10, 900 sq km. It would certainly be less than the whole and since this is Mr Wildman's main criterion, the Minister would now have lawful authority to grant the licence.

[83] Since it is the applicant who indicates where he wants to supply it is entirely possible that two persons, unknown to each other, may apply to supply the same 10, 900 sq km. What then?

[84] The practical result from this example is that there would be just one supplier for more than 99% of the island. Mr Wildman submitted that there must be multiple suppliers because provisions such as section 43 could not be used because there would be no other person for one supplier to purchase from. If there is one all-island licence this section is infringed because the sole supplier could not contract with himself. However in the possibility contemplated by the court, there would be one supplier if the second applicant who lost out decided not to apply for the remaining square kilometres. In this scenario, the sole supplier would not have anybody to contract with because the Minister granted him a licence over the area he wanted and the other applicant decided to back out of the electricity business. On this

analysis section 43 does not arise because there would be no person to buy electricity from.

[85] One possible way out of this conundrum would be not to grant any licence unless else someone turned up and applied and would be prepared to accept the less than 1% or any other percentage the Minister would be prepared to contemplate.

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

[87] This statute is always speaking. It was designed to facilitate electricity generation and supply all over the island. It refrained from being too prescriptive because it had to speak to the future even though the 1890 legislators may have had no view of the reality of the twenty first century.

[88] Since the statute was designed to bring electricity generation under some governmental control. Interpreting the statute in the way proposed does not run counter to the goal of the statute. The ELA was structured to permit the Minister to make decisions in light of factors that may change from time to time. For example, the Minister will have to take account of changing methods of generating, distribution

and supply of electricity. He will have to take into account the cost of each component of electricity supply. He will have to take into consideration the level of investment needed to maintain and expand electricity generating, transmission and distribution capacity. He will have to take into account the investors, their financial capability, and time to recover their investment. Needless to say, the Minister will have to consider the impact of his decisions on the consuming public. Thus, it may well be that at one stage of our development one licensee in some areas may be more appropriate than several licensees to operate in a particular segment of the market. Accepting that one person could be granted a licence to supply electricity for the whole island does not destroy the operation of the statute. There is nothing in the statute that prevents the Minister from granting licences to more than one person for the whole or part of the island. Even taking into account the **London Electric** case, it is the case that the statute gives the Minister great flexibility in determining how many licences to grant in respect of either the whole or part of the island.

[89] This court concludes that as a matter of law section 3 gives the Minister a discretion to grant to one person an all-island licence for generating, distributing and supply electricity. The section also permits the Minister to grant more than one all-island licence to generate, transmit and supply electricity. The Minister may also grant more than one licence for a part of the island. In the twenty first century there is no compelling reason to interpret *area* to mean only something less than the whole. The court has, at this point, deliberately not used the adjective 'exclusive.' Whether there is power to grant the license on terms which precludes another licensee from transmitting electricity is a matter which will be explored later.

[90] Since the court has concluded that section 3 permits the Minister to grant one all-island licence for generating and/or distributing electricity it follows that granting a twenty-year licence is not necessarily outside of the power of the Minister. The duration of the licence is a matter governed by administrative law principles. Thus the

only way to say that the period of twenty-years is unlawful is by showing that the Minister exercised his power improperly in the administrative law sense, that is to say, it would have to be shown that the discretion of granting a twenty-year license was exercised without taking into account all relevant matters or excluding material considerations or he was motivated by bad faith. None of these things is being alleged and need not be considered.

[91] In light of what has been said already, the first two declarations are not granted.

Does the Minister have the power to grant a licence on terms that prevent him from considering other applications?

[92] Section 3 authorises the Minister to grant licences on conditions. JPS is authorised to generate, transmit, distribute and supply electricity for public and private purposes in Jamaica. One condition is that JPS has the exclusive right to transmit, distribute and supply electricity in Jamaica for twenty years.

[93] The claimants seek a declaration that section 3 does not authorise the Minister to disenfranchise any person from seeking to transmit electricity for personal, public or commercial purposes. This was said to be an alternative to the first and/or second declaration sought. Respectfully, this does not seem to be the case. The first two declarations are premised on the proposition that the Minister did not have the power to grant one entity an all-island licence. On this premise, declaration three cannot be an alternative to the first two because granting an all-island licence does not in and of itself preclude another person from applying for a licence to transmit electricity. The word *exclusive* does not appear in the first two declarations. Declaration three can only be an alternative to the first two or the second if the adjective *exclusive* is implied before the noun licence. It seems that declarations three and four should be read together and they will be so treated.

[94] As stated earlier, there is power in the Minister to grant a licence. There is also power in the Minister to impose conditions on the licence. It is also true that the statute does not compel the Minister to grant anyone a licence and neither does the statute compel him to deny an applicant a licence. It is his free choice subject to principles of reasonableness, irrationality, and illegality in administrative law.

[95] The statute contemplates that there may be multiple suppliers of electricity. From this standpoint, unless precluded by statute, any person who believes that he can generate, transmit, or distribute electricity can apply for a licence. If this is so, then it means that the Minister needs to hear and consider that application even if he has a stated policy on the matter. He is free to decide the application in accordance with the policy but that policy should not be so inflexible that it prevents applicants from having their applications genuinely considered.

[96] In **British Oxygen Co Ltd v Minister of Technology** [1970] 3 All ER 165, the relevant statute conferred a discretion on the Board of Trade to make grants of money to qualified persons. The relevant Minister had made a rule that no grant would be paid in respect of items costing less than £25.00. The appellant applied for grants in respect of items costing £20.00. It was said that the Minister fettered his discretion by adopting the policy that he did. Lord Reid stated at page 170 - 171:

> *The general rule is that anyone who has to exercise statutory discretion must not 'shut [his] ears to the application'…' I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change in policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a*

> *multitude of similar applications and there will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that provided the authority is always willing to listen to anyone with something new to say …*

[97] Mr Wildman said that this case was not relevant because he is not raising administrative law issues. This court respectfully disagrees. Lord Reid is here saying that if a statute confers a discretionary power, that power can be exercised in a manner which takes into account a general policy which may involve not exercising the power in a particular manner. That is entirely permissible once it is the case that the Minister gives a genuine listening ear to any new applicant. The Minister is not precluded from exercising his power in accordance with a general policy provided he is prepared to listen to a new applicant and properly consider his application. In light of what has just been said, the real issue is whether, in this case, the terms of the licence are such that they preclude the Minister from listening to another applicant for a licence to transmit electricity, and if yes, whether this is permitted by section 3.

[98] Mr Hylton submitted that the terms of the all-island licence to JPS is a reflection of Government policy. Nothing is wrong with having a policy. Indeed it is desirable to have one and use it to make decisions or to guide the decisions. If it were otherwise, as Sedley LJ observed, '*Indeed, without policies to guide the exercise of particular powers and discretions, modern departments of state would be repeatedly challenged at law for inconsistency or arbitrariness*' (**Secretary of State for the Home Department v Pankina and other actions** [2010] EWCA Civ 719 [15]).

[99] It is one thing to say a decision will be made in accordance with a policy but it is quite another to grant a licence to a previous applicant in terms which effectively guarantee that no other application will be considered regardless of its merits.

[100] The statute does not give the power to the Minister to grant a licence on terms which effectively bar any other applicant from being considered. This, in the opinion of this court, is the problem with the current licence to JPS. The Minister has committed himself and his successors to a situation in which there is no possibility of change for the required twenty years (which has been extended) even if new technology or a new company has a better and cheaper way of doing some of what JPS is now doing.

[101] Mr Hylton relied on a number of cases to deflect this conclusion including **The Association of General Practitioners Limited and others v The Minister of Health** [1995] 1 IR 382. It appeared that doctors in the health service in Ireland were represented by two organizations which later merged. During the time negotiations were taking place between the Minister of Health and the doctors, no other organization emerged as representing any of the doctors. In June 1988, when the negotiations were coming to an end, the first claimant was formed and presented itself as representing doctors in the health service. The Minister concluded the agreement with other body. The first claimant challenged the Minister on a number of grounds. The relevant one here is whether what he did was *ultra vires* the statute. The Minister eventually contracted with the merged group of doctors on the basis that he would not conclude any agreement on different terms with any other group.

[102] The difficulty this court has with using the case in the manner suggested by Mr Hylton is that it was more about whether the Minister exercised his power reasonably than it was about whether he had the power to do what he did. The court will cite two passages from his Lordship's judgment which make the point. His Lordship said at page 392:

> *A more difficult question is posed by the contention that the Minister, having been given specific statutory functions to perform by the provisions of s 26 of the Health Act, 1970, was not entitled to give over control, or a measure of control, to any other person or body in relation to the manner in which he was to exercise the said functions.*
>
> *This proposition is correct in principle, but in each case it remains to be determined whether what was done by the decision-making body was a reasonable means of carrying the statutory functions into effect or was something in the nature of an abdication of responsibility by the person or body entrusted with these functions.*

[103] The second paragraph shows how O'Hanlon J framed the issue. When framed in that way, it is clear that his Lordship was not using the expression 'ultra vires' to mean an absence of statutory authority but rather that the Minister was either acting unreasonably or had abdicated his responsibility.

[104] When one reads the rest of his Lordship's reasoning on this issue at pages 392 – 393, it seems that his Lordship was indeed approaching the matter as one of a reasonable exercise of the Minister's power as distinct from whether he had the power to do what he did. This is further supported by the fact that nowhere in his Lordship's judgment was there any analysis of the text of the statute in order to determine the scope of the Minister's powers.

[105] Mr Hylton also cited **R v Hammersmith and Fulham London Borough Council, ex parte Beddowes** [1987] 1 ALL ER 369. This case is not relevant here because nowhere in that case was the issue of statutory construction raised in order to determine the extent of the Minister's powers. Indeed, it was Fox LJ who stated that in the case before him that, '*In general, I do not understand it to be disputed that there was power in the council (as the judge held) to create restrictive covenants*

under the Housing Acts, or otherwise' (page 379). The applicant for judicial review in that case clearly accepted that the Minister had the power to do what he did but sought to challenge him on administrative law grounds. The usual three horsemen of (a) irrationality; (b) bad faith; (c) failure to have regard to proper considerations, were joined by a fourth, lack of consultation. All four grounds failed. In addition, the Court of Appeal did not consider the House of Lords' decision in **British Oxygen** which dealt with the important question of whether a statutory functionary can adopt a closed-ear-closed-mind policy.

[106] Mr Hylton cited **Carrigaline Community TV v Minister For Transport, Energy And Communications And Others** (unreported) (delivered November 10, 1995) by Keane J. This, too, was a case in which there was no issue concerning whether the Minister had the power to make the decision. It was a pure administrative law challenge. However, in that case Keane J considered whether the grant of a licence on terms which excluded others was authorised by the relevant statute. His Lordship examined the statute and found that it did not authorise the Minister to grant a licence to one person on terms that precluded him from granting a licence to another. This court concludes that none of three cases advances the case of JPS. Interestingly there is this passage from Keane J in **Carrigaline**:

> *In the present case, the Minister, while under a duty to consider all applications for licences made to him in a fair and impartial manner, was also entitled, and indeed obliged to have regard to what might be described as certain policy consideration.*

[107] If anything, this points away from the Minister adopting a position that locks him into refusing any application for a licence regardless of how meritorious it may be.

[108] If one looks at the **British Oxygen** case carefully, it will be seen that that was case which has a close affinity to licensing cases where the Minister has a 'licensing power embodying a discretion as to the decision to license' (Azeem Suterwalla, 'Discretion and Duty: the Limits of Legality' in Helen Fenwick (ed), *Judicial Review*, (4th edn, Butterworths, London, 2010) ch 7, 7.22.1). In **British Oxygen**, the Minister had the power to allocate money but it was a discretionary power. He was obliged to, or stated more firmly, under a duty to consider applications made to him in order to decide whether the applicant would receive the money but he had a discretion to grant or refuse the application. By contrast, cases such **The Association of General Practitioners** and **Hammersmith** were ones in which the Minister had the power to achieve a particular result but a discretion 'as to the way in which the result is achieved' (Sutwerwalla, para. 7.7.1). From this standpoint, it is perhaps not surprising that the passages cited by Mr Hylton were phrased in the way that they were. This explains why **British Oxygen** was not considered by the courts in these two cases.

[109] Carrigaline was a case in which the Minister had the power to grant licences but a discretion as to whether he would in fact grant any. It was in this context that Keane J made reference to **British Oxygen** and made the observation already cited that the Minister must consider fairly all applications made to him. Keane J ultimately invalidated the Minister's decision to grant a licence to one person on terms that precluded him considering any other applicant. What is important for present purposes is that his Lordship did not find any power, express or implied, in the statute that would have authorised the grant of an (exclusive) licence to the exclusion of others. This, his Lordship did after referring to and adopting Lord Reid's approach in **British Oxygen**, to the matter, that is to say, the decision maker cannot adopt a closed-ear-closed-mind approach in these types of cases. If the decision maker is under a duty to consider all applications fairly, then it must necessarily mean that granting a licence to one person on terms that another application will not be considered must be outside of the power given to the Minister unless the statute gives him such a power.

[110] Keane J went as far as saying that the failure by the Minister to consider the claimant's application amounted to a failure to act impartially and fairly. By parity of reasoning, it appears that a good argument could be made here that the Minister, in granting a licence to JPS on terms that preclude him considering any other application, amounts to a commitment to act unfairly and in a partial manner.

[111] Tipping J of the New Zealand Supreme Court in **Practical Shooting Institute (NZ) Inc v Commissioner of Police** [1992] 1 NZLR 709 reasoned in a very similar manner. In that case, the legislature gave the Commissioner of Police a discretionary power to decide which type of firearms would be imported into New Zealand. The Commissioner decided that an absolute ban on certain types of firearms was the best way to go. This was challenged. It was accepted that the Commissioner was motivated by the purest of intentions.

[112] Although the challenge came by way of judicial review and not by an application to interpret the statute, Tipping J held that the question was whether the statue gave the Commissioner the power to do what he did. In other words, the starting point was the interpretation of the statute. In the ELA, it may be said that (to paraphrase and transpose Tipping J's analysis and reasoning) whereas the ELA contemplated that more than one person may apply to the Minister for a licence to transmit electricity, the Minister in this case has granted a licence upon terms that effectively make the statutory right to apply for a licence a dead letter. To grant a license upon terms of exclusivity is equivalent to the Commissioner of Police exercising his discretion to create an absolute ban. The Commissioner had decided that he would close his ears to any submissions that may be made to him. The Minister here has adopted a closed-ear-closed-mind stance by formulating terms of exclusivity. The exclusive term means that even if technology has changed which permits, for example, transmission at cheaper rates to the consumer, the Minister

could not entertain any applicant who might wish to make these advances available to the consumers.

[113] The facts as known demonstrate the dangers of the Minister's approach. JPS already has a twenty-year exclusive all-island licence. During the currency of that licence, the Minister granted an extension for a further seven years. If, Mr Hylton is correct, what is there to prevent the Minister from granting a one-hundred-year licence? If a one-hundred year licence were granted, what is there to prevent the Minister to add another two hundred years during the one hundred year licence? These numbers are extreme but they serve to make the point that section 3 was not designed to permit the Minister to shut out persons from the electricity supply market by continuous extension of an exclusive licence.

[114] The ELA contemplated that one or many persons may apply for a licence and the applicants have the legitimate expectation that their applications would be genuinely considered and then a decision made. The legitimate expectation arises from the words of the statute. They have the right to apply. To have the right to apply without a further right to have it genuinely considered would be meaningless. If it were otherwise the right to apply would be deprived of any value.

[115] The Minister can undoubtedly adopt a policy regarding the granting of licences for participating in the electricity sector and after hearing an applicant decline to grant a licence in light of the policy. Nothing is wrong with this provided that it is an honest and bona fide exercise of discretion. What is not permitted is the adoption of a position which amounts to a decision without considering the application on its merits because of a policy, or in this case, a commitment to an existing licensee not to consider another applicant. It may be said that in this case what has occurred is a commitment not to grant another licence rather than not to consider another

application. This may be true as a matter of language but in the context of this case the distinction is meaningless because a prior commitment not to grant another licence to a new applicant, regardless of its merits, means that the new applicant even before he applies is doomed to fail because the Minister has committed himself to the position of not granting any other licence. In practical terms such a position means that the new application will never be considered either at all or on its merits.

[116] The affidavits filed on behalf of the JPS spoke to significant investment made in the provision of electricity and they seem to suggest that any decision which does not uphold the monopoly would have dire consequences. However, the Minister cannot exercise a power that in law he does not have. The way out of this problem (if it is seen as a problem) is to amend the law to give the Minister the powers he needs to implement the policy of the Government. The **National Transport** case was one which gave the Minister the power to grant an exclusive licence. The current case is not that type of case.

[117] The court is minded to grant the declarations sought in paragraphs three and four but they need to be modified to accord with the reasons given by the court.

Did the OUR recommend that the Minister grant an exclusive all-island licence to JPS to generate, transmit, distribute and supply electricity?

[118] The legal foundation of this alleged breach is said to be section 4 (3) (a) of OURA which states that the OUR 'shall undertake such measures as it considers necessary or desirable to (a) encourage competition in the provision of prescribed utility services.' Electricity supply is a prescribed utility.

[119] It is being said that the OUR recommended an exclusive licence. This recommendation was said to be in breach of OURA because it was not a recommendation that encouraged competition in the public utility services. The factual foundation of this submission is alleged to be found reference in the opening words of the 2001 licence to the recommendations of the OUR. However, the opening words do not say what the recommendations were. This reference in the recital is not sufficient to enable anyone to conclude that the OUR recommended the granting of an all-island exclusive licence to JPS to distribute electricity. This evidential base is too slender to support the conclusion particularly when the direct evidence on the point goes in the other direction.

[120] The direct evidence on the point, which has not been discredited or even challenged, is that the OUR 'did not advise on the granting of an exclusive licence to JPS' (paragraph 5 affidavit of J Paul Morgan dated February 15, 2012). Additionally, as Mr Batts QC pointed out, the terms of section 4 do not compel the OUR to make any recommendations. Section 4 (1) (b) states that the functions of the OUR, among other things, shall be to 'receive and process applications for a licence to provide a prescribed utility service and make such recommendations to the Minister in relation to the application as the Office considers necessary or desirable.' Section 4 (1) (d) says that the OUR shall 'advise the responsible Minister on such matters relating to the prescribed utility service as it thinks fit or as may be requested by that Minister.' These provisions emphasise that the OUR recommends and the Minister decides. There is no evidence indicating the advice the OUR gave to the Minister regarding the grant of an exclusive licence.

[121] In looking at the conduct of the OUR, the evidence revealed that there is a letter dated March 15, 2001, in which the OUR wrote to the responsible Minister indicating its opposition to the decision to exempt the JPS from the Fair Competition Act. It must be noted that the Fair Competition Act is the primary statute dealing with

competition issues within a given market. The letter actually addresses the issue of whether the agreement between the Government and the JPS would have the effect of substantially lessening competition. The OUR went as far as saying that there was no need to exempt the JPS from the Fair Competition Act. Notwithstanding this advice, the Minister exempted JPS from the Fair Competition Act. In 2010 the exemption was revoked. This supports the point made by Mr Morgan, in his affidavit, that the OUR advises and the Minister decides whether to accept the advice.

[122] There is therefore no factual foundation for saying that the OUR acted contrary to its powers under the OURA.

[123] For these reasons the fifth declaration sought is denied.

Parliamentary debates

[124] The claimants sought to place before this court, what purported to be Parliamentary records of the United Kingdom Parliament in order to show that the purposes of the English ELA, 1892, were to promote competition and suppress monopolies. The defendants objected on a number of grounds.

[125] This court agrees with the objections taken. Miss Jarrett objected on the grounds that there was no proof of authenticity of the records. It appeared to be a download from the internet. The affidavit to which the documents were attached stated that the documents were given to the deponent by Mr Wildman who sought the assistance from Mr Peter Knox QC of the English Bar. None of this proves the authenticity of the documents.

[126] Mr Batts objected on the basis that the Hansard purported to be a record of the debate from another jurisdiction and not the Jamaican legislature.

[127] Mr Hylton took the point that none of the bases for referring to Parliamentary debates had been established. It had not been shown that the English Act was ambiguous and neither was it shown that the extract was from the promoter of the Bill. Mr Hylton here was referring to the Pepper v Hart test established by **Pepper v Hart** [1993] 1 All ER 32.

[128] This court had indicated, during submissions on this aspect of the case, that it had serious reservations about the correctness of the decision and its implications. Not all of them need be dealt with here but enough will be said to suggest that **Pepper v Hart** is not a case which should be followed without extreme care and caution. Without getting into the facts, the House of Lords used the debates in Parliament to interpret a statute in a manner more favourable to the taxpayer than what the Inland Revenue had contended for before their Lordships. In particular, the Law Lords relied on assurances given to the House by the Finance Minister concerning the way in which the words in the particular statute were to be interpreted.

[129] Dr Aileen Kavanagh has summarised the case against **Pepper v Hart** in her illuminating article *Pepper v Hart and Matters of Constitutional Principle*, LQR (2005) 121, 98 – 121. She indicated that the case represents a case of ministerial statements being promoted as the intention of Parliament – a truly remarkable position given the constitutional prohibition on the executive's ability to enact statutes. The decision, she pointed out, permits the executive branch of government to take on judicial functions. With carefully crafted statements, the executive may seek to influence judicial interpretation of the statute by extra-curial methods whereas the time-honoured method of influencing the court is through argument before the

court in a pending cause. She went on to say that **Pepper v Hart** undermines the principle that the enacted words are what represent the actual law of the land. It is one thing for a particular Minister to have a view of the legislation but quite another for the court to say that the Minister's views are to be taken as the final word thereby ignoring the contribution of other law makers.

[130] It is well known that ministerial assignments are often the product of political considerations rather than the person's actual expertise in a particular area. The Minister may not know much about his portfolio prior to his assignment. His statements to Parliament are often prepared by advisers and senior civil servants. Sometimes the legislation comes after extensive public discussion. All this shows that **Pepper v Hart** is not without difficulties and should be avoided.

[131] It is well known that revenue law is complex. When the Minister in **Pepper v Hart** gave his assurances to Parliament, was he speaking from the standpoint of sure knowledge that the revenue authorities supported his interpretation of the law? Was he simply giving 'political assurances' to ensure passage of the Bill without thinking through the implications of what he was saying? It seems to this court that the House of Lords did not analyse the arguments advanced by the Inland Revenue and showed the flaw in the arguments but rather adopted the Minister's views expressed in Parliament.

[132] The implication of what happened in **Pepper v Hart** led Mr Francis Bennion, that erudite authority on statutory interpretation, to coin the phrase executive estoppel. By this he meant that it may now be possible to argue that the executive branch of government, in the event of litigation or some dispute after the passage of legislation, should not be allowed to take a position contrary to what it advanced in the legislature. If Mr Bennion is correct there is a further problem: what if the words of the statute do not permit the authorities to act in the way promised or indicated by the

Minister? What if after the Minister's presentation there are strong objections and the statute is amended in a way contrary to the Minister's wishes?

[133] Of course there are counter arguments to the points raised but the difficulties raised are sufficiently grave for this court to say that resort to Parliamentary debates should be avoided (Stefan Vogenauer, *A Retreat From Pepper v Hart? A Reply to Lord Steyn*, OJLS, (2005), 25 (4), 629 – 674; Philip Sales, *Pepper v Hart: A Footnote to Professor Vogenauer's Reply to Lord Steyn,* OJLS, 2006. 26 (3), 585 – 592).

Conclusion

[134] This court concludes that the Minister has the lawful authority to grant a licence to a one operator to provide electricity, whether generation, distribution and retailing, for the whole island. The licence granted to JPS is therefore valid.

[135] Section 3 of the ELA permits the Minister to impose conditions. However, the Minister does not have the power to grant a licence on terms which prevent other applicants from having their applications being considered genuinely. The Minister does not have the power to grant a licence upon terms that bar the possibility of any other person entering the market for transmission of electricity. The term of JPS's licence granting it exclusive right to transmit electricity is not valid.

[136] The OUR acted within its statutory remit. Counsel are to prepare an order that reflects the reasons of this court.