



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 306 OF 2012

BETWEEN CAYMAN WATER COMPANY LIMITED

APPLICANT

AND 1. GOVERNMENT OF THE CAYMAN ISLANDS
AND 2. WATER AUTHORITY OF THE CAYMAN ISLANDS

RESPONDENTS

IN OPEN COURT
BEFORE THE HON. CHIEF JUSTICE
THE 1ST AND 2ND APRIL AND 19TH JUNE, 2014

APPEARANCES: Mr. Paul Smith and Mr. Ben Hobden of Conyers Dill & Pearman for
the Applicant

Mrs. Suzanne Bothwell, Senior Crown Counsel of the Attorney
General's Chambers for the First Respondent

Mr. Richard Gordon QC, instructed by Mr. Simon Dickson of Mourant
Ozannes, for the Second Respondent

RULING

1. The Applicant, Cayman Water Company Limited, is the concessionaire under a 20-year licence that allows it exclusively to produce and supply potable water to the public in the Seven Mile Beach and West Bay areas of Grand Cayman. Having been the beneficiary of a similar earlier licence, the Applicant has been supplying water in those areas now for some forty (40) years.

2. This application arises out of the renewal of the Licence. In its now modified form the Applicant's Notice of Motion seeks the Court's determination, and if appropriate and necessary, declarations, as to the meaning of certain provisions of the Licence and of the relevant statutory provisions.

The Applicant's Notice of Motion

3. The relief originally sought in the Notice of Motion was more elaborate than now sought and can be summarized as follows:

- (i) An order for certiorari, quashing the decision of the Second Respondent, the Water Authority of the Cayman Islands ("the Authority") to impose a Rate Cap Adjustment Mechanism ("RCAM") model of pricing upon the Licence as a condition of its renewal;
- (ii) An order of mandamus directing the Water Authority not to use powers granted to it under the Water Authority Law (2011 Revision) to prefer itself in any way;
- (iii) An order of mandamus directing the Water Authority not to use its powers granted under the Water (Production and Supply) Law 2011 to prefer itself in any way;
- (iv) A declaration that the Applicant's rights afforded to it by its Licence Agreement dated 11 July 1990 (the Licence) are preserved by the provisions of section 16 of the Water (Production and Supply) Law 2011;
- (v) A declaration that the Applicant should negotiate terms to extend the Licence with the First Respondent, the Government of the Cayman Islands (the "Government") [rather than with the Water Authority]; and



- (vi) A declaration as to how the contradictory provisions of section 4(3) of the Water (Production and Supply) Law 2011 and Section 6(a)(vi) of the Water Authority Law (2011 Revision) shall be reconciled.
4. Those particular heads of relief sought against the Authority arose out of extensive negotiations and exchanges between the Applicant and the Authority during which the Authority was perceived by the Applicant to have decided to advise the Government to impose the RCAM model of pricing.
5. The Authority having explained that no such decision has been taken and that the Applicant shall be heard before any such decision is taken and a time-table set for the further discussions, the Applicant no longer seeks the first three heads of relief by way of Judicial Review.
6. Instead, the Applicant seeks determination by the Court of the matters of construction relating to the Licence and arising from the applicable Laws, by way of answers to three questions which are now framed as follows:
- (i) Is a tender process required for the renewal of the Licence?
 - (ii) What is the identity of the entity with whom the Applicant shall negotiate – is it the Water Authority or the Governor-in-Cabinet?
 - (iii) Is a licence from the Water Authority required or only a concession from the Governor-in-Cabinet?

The statutory scheme

7. The questions pivot around changes in the legislation. Importantly for present purposes; whereas under section 3 of the Water (Production and Supply) Law 1979 (“the repealed Law”) a concession granted by the Governor enabled a concessionaire



(here the Applicant) to produce and supply water to the public; by section 4(3) of the Water (Production and Supply) Law 2011 (the “new Law”); all concessions granted by the Governor “*shall be exercised in accordance with the terms and conditions contained in a licence issued by the Authority*” which may include all such matters (including as to charges and fees) as were formerly to be included in a concession granted under the repealed Law and “*such other matters as the Authority may determine*”.

8. Further, while the requirement of a separate licence from the Authority became an advent of the new Law, common to both the repealed Law and the new Law, is the requirement (now carried over as expressed in Section 4(2) of the new Law) that:

“Before the Governor in Cabinet grants a concession ...he shall seek the advice of the Water Authority which shall advise him pursuant to such advisory powers as may be conferred on the Authority by any Law.”

Thus, an advisory role for the Authority has been and remains a feature both of the repealed Law and the new Law.

9. The Law that confers the required “advisory” and other powers and duties (among other things to advise upon the grant of concession) upon the Authority, is the Water Authority Law (2011 Revision). By section 3, when it was originally enacted in 1982 (as Law 18 of 1982), the Authority was established as a statutory body corporate to carry out the prescribed functions. These have included from inception in 1982, “*development augmentation, conservation and best use of the water resources in the Islands*” (Section 5(2)); and, without prejudice to the generality of the foregoing; by section 5(3)(b) it shall be the duty of the Authority “*to issue, record and administer licences and permits and fees in respect thereof*”.



10. But while those provisions in sections 5(2) and 5(3)(b) imposed duties upon the Authority; the power to grant, modify or renew a licence issued under the Water (Production and Supply) Law was not vested in the Authority until it was introduced by amendment of the Water Authority Law, by Law 4 of 2011. The power came to be expressed in Sections 6(d)(v) and 7(1)(i) of the Water Authority Law (2011 Revision), in the terms set out below with other important and relevant provisions:

“6. In addition to the duties listed in Section 5, the Authority shall

....

- (c) advise the Governor on the issuance of concessions for franchised operations under the Water (Production and Supply) Law (1996 Revision) and in accordance with any law for the time being in force relating to wastewater;*
- (d) have power to do all things necessary or convenient to be done for or in connection with regulating of concessionaires, which shall include*
 - (i) monitoring and regulating the tariffs, rate structures, and terms and conditions for water supply and wastewater services charged with the respective rate cap and adjustment mechanism;*
 - (ii) reviewing and approving other rates offered by concessionaires outside of the respective rate cap and adjustment mechanism and available at the option of the consumer;*
 - (iii) recommending to the Governor the making of regulations under this Law and any law for the time being in force relating to water and wastewater;*
 - (iv) establishing and enforcing regulations, as well as processes and licence standards regarding the granting of licences under the Water (Production and Supply) Law (1996 Revision)*



and any law for the time being in force relating to wastewater;

- (v) *granting, modifying and renewing a licence issued under the Water (Production and Supply) Law (1996 Revision) and any law for the time being in force relating to wastewater:*
- (vi) *conducting the tender process for applicants for any new concession to be issued under the Water (Production and Supply) Law (1996 Revision) and any law for the time being in force relating to wastewater, and to select the successful tender; (emphasis supplied:)*
- (vii) *monitoring and regulating all concessionaires in a manner that provides an opportunity for a fair and reasonable return to concessionaires, and protect the economic interests and well-being of consumers by keeping tariffs and rate structures as low as can reasonably be achieved; and*
- (viii) *reviewing and approving annually the capital investment plans for all concessionaires.*

7. (1) *The Authority shall have all the powers necessary for the carrying out of its duties under sections 5 and 6, including the sole right to provide a public water supply and public sewage system in any part of the Islands and in particular, may –*

....

....

- (i) *grant a licence, upon such terms and conditions as it thinks appropriate, to any person to whom the Governor has issued a concession for franchised operations under the Water (Production and Supply) Law (1996 Revision) or any law for the time being in force relating to wastewater.”(Emphases added).*

11. Further provisions appear in sub-section 5 of section 7 of Law 4 of 2011 which were not present before. These require among other things, that the Authority is



reasonable, fair and protective of the interests of consumers and the public interests in carrying out its functions; including where it might determine or diminish an existing licence.

12. Subsections 7(7) – (10) go on to expand upon the powers and duties of the Authority for the purposes of ensuring matters such as the financial capacity of applicants for licences and otherwise the suitability of applicants, including as to honesty, reputation and experience.
13. And so, although not at the time when the Licence was originally issued nearly 40 years ago, but certainly when the Licence was renewed in 1990 and indeed ever since its establishment in 1982, the Authority has been responsible for advising the Governor-in-Cabinet on the issuance of concessions under the Water (Production and Supply) Law.
14. And the Legislature being satisfied, in the words of the Long Title to the new Law that in order *"to improve the concession-granting process; and for incidental and connected purposes"* there shall be the requirement of a licence to be issued by the Authority following the grant of a concession by Governor in Cabinet; the Water Authority Law (2011 Revision) and the new Law so provide (the latter in Section 4(3) and (4)). Indeed, that latter provision specifically mandates that *"a concession granted under this Law shall not be exercised until a licence has been issued."*
15. It is central to the Applicant's argument that as the Licence was granted (as was the original licence) under section 3 of the repealed Law; those provisions of the Water Authority Law (2011 Revision) and the new Law which would require a licence to be obtained from the Authority, do not apply to it.



16. The transitional and savings provisions of the new Law are also relevant and appear in section 16 as follows:

“The Water (Production and Supply) Law (1996 Revision) is hereby repealed but, unless the contrary intention appears, the repeal does not –

- (a) ...
- (b) *affect the previous operation of the repealed Law or anything duly done or suffered under that repealed Law;*
- (c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Law; ...”*

17. Provisions in the repealed Law that enabled the Governor in Cabinet to make regulations were carried over into the new Law. They include, as now set out in section 14(e) of the new Law power, to make regulations to prescribe the terms and conditions upon and subject to which a concession shall, or may, be granted. That is the statutory context set both by the new Law and the Water Authority Law (2011 Revision) for the grant of concessions and licences.

The relevant provisions of the Licence

18. The relevant terms of the Licence (contained in a tripartite agreement between the Applicant, The Governor-in-Cabinet and the Authority) are as follows:

First in the recitals:

“THIS LICENCE is granted this eleventh day July 1990 by the Governor under the powers conferred by section 3 of the Water (Production and Supply) Law 1979...and all other powers thereunder enabling

WHEREAS:

- (1) *(The Applicant) ... has applied for a concession under section 3 of the Law authorising it exclusively within the area hereinafter more particularly described to process Seawater to*



Water for sale and to distribute Water to properties by means of pipes;

- (2) *the Governor has agreed to grant to the Company the concession contained in this licence upon and subject to the terms and conditions hereafter set forth;*
- (3) *Section 7(1) of the Water Authority Law, 1982 --- provides that the Authority has the sole right to provide a public water supply system in any part of the Islands;*

19. Then in the body of the Licence:

“NOW THEREFORE it is agreed and declared by and between the parties hereto in consideration of the mutual agreement between the Governor, the Company and the Authority hereinafter set forth as follows:

Right to Process, Distribute and Sell Water

Subject to the terms and conditions of this licence, the Company is hereby granted the exclusive right within the Licence Area to:

- (a) *process Water for sale from Seawater; and*
- (b) *distribute and sell Water by means of pipes.*

The Authority agrees that so long as this licence remains in force and the Governor is satisfied that the Company is meeting its obligations to provide Water to the Licence Area to meet the demands of that area in accordance with sub-clause 5.3 of this licence, the needs of that area as regards the supply of Water shall be deemed to have been met and; accordingly the Authority will not exercise its right to provide a public water supply within the Licence Area in competition with the Company.”

20. By the interpretation clause, Clause 2 of the Licence, “Law” means “*the Water (Production and Supply) Law 1979 and all amendments thereof for the time being in force*”.



21. Notably, a Law that repeals and replaces the Water (Production and Supply) Law 1979, is not included in that definition; a point conceded by Mrs. Bothwell during the arguments.

22. However, by Clause 3 of the Licence under the heading “construction of Licence” the following is provided:

“This Licence shall be governed by the laws of the Cayman Islands and shall be read and construed in all respects subject to the provisions of the Law and any regulations made thereunder.”

23. It is in the light of this provision in particular, when taken with the transitional provisions of the new Law that the Applicant’s contention – that the new Law does not govern its Licence nor the process of its renewal – must be considered.

24. To return to the relevant provisions of the Licence, Clause 4 “Term of Licence” provides in sub-clause 4.1(a) as to “Duration” as follows:

“The Duration of this licence shall, subject to the provisions for determination or extension contained therein, be for twenty (20) years from the date hereof.”

25. And Clause 4.2 “Extension” – that aspect of the Licence most in point here:

“The Company shall have the right after the end of the eighteenth (18th) year of this licence to enter into negotiations with the Governor for the extension of this licence for any further period upon the expiry of the terms of this licence. Unless the licence is terminated in accordance with sub-clause 9.4 hereof, the Governor hereby agrees that upon the expiry of the term of this licence or any extension thereof, he will not grant a licence or franchise to any other person or company for the processing; distribution, sale and supply of water within the Licence Area without having first offered such a license or franchise to the Company on terms no less favourable than the terms offered to such other person or company. The provisions of the second sentence of this sub-clause shall survive the expiry of this licence.”



Points for construction

1. Is a tender process required for the renewal of the licence?

26. All sides agree that the answer to this question is “No”. Mrs. Bothwell accepts that while the Governor-in-Cabinet (“the Governor”) is required by section 4(2) of the new Law to seek the advice of the Authority before granting a concession, the requirement of a tendering process that the Authority might insist upon pursuant to section 6(d)(vi) to the Water Authority Law (2011 Revision) would apply only for any new concession. As the Applicant’s would not be a new concession but a renewal, the requirement of a tendering process is not mandatory.

27. Mr. Gordon QC, for his part, sees the answer to this question as being self-evidently “No”. As he puts it, section 6(d) of the Water Authority Law (2011 Revision) provides facilitative powers to the Authority, not duties. That being so, the Authority is not obliged to carry out a tendering process and can concede as it is prepared to do, that one will not be required. I agree with these views expressed by Counsel on this point.

2. What is the identity of the entity with whom the Applicant shall negotiate – is it the Water Authority or the Governor?

28. Here, too, I agree both with Mrs. Bothwell and Mr. Gordon QC that no difficulty of the sort apprehended by the Applicant arises.

29. The Applicant would insist on negotiating only with the Governor because it apprehends that the Authority would impose its requirements (including such as might favour itself as competitor) as conditions of a concession were it at liberty to do so. But this is a misapprehension. The Governor has always been the public law



body responsible for the grant of a concession, whether under the repealed Law or the new Law: see section 3 of the Water (Production and Supply) Law 1979, section 3(1) of the Water (Production and Supply) Law 1996 and section 4(1) of the new Law.

30. This responsibility reposed in the Governor does not, however, mandate that the Governor may not delegate the negotiation process to the Authority. Indeed, delegation may be the only practicable way of ensuring that the mandate of section 4(2) of the new Law is fulfilled where it requires that the Governor shall seek the advice of the Authority before granting a concession.
31. Quite apart from whatever negotiations the Authority might itself become engaged in for the purpose of fulfilling its own mandate for the grant of a licence, there can be no objection to it being called upon by the Governor to act as agent for the purposes of negotiations for the grant of a concession.
32. As Mr. Gordon QC observed, there is no power in the Authority to grant a licence unless a concession has been granted.
33. It follows that it should be in the interests of all parties to the tripartite arrangement that the negotiations for the concession which would lead to the grant of a licence, should take place between the Applicant and the Authority on behalf of the Governor.

3. *Is a licence from the Authority required or only a concession from the Governor?*

34. This, of course, is the point of real significance to the Applicant. The Applicant cites the fact that the Authority is not only a regulator but a competitor which currently supplies water to those areas of Grand Cayman not covered by the Licence and so may have designs on the areas covered by the Licence.



35. For that reason, Mr. Smith submits that a construction of the statutes in favour of the issuing of a concession without the need for a separate licence from the Authority would avoid conflict of interests being potentially brought to bear upon the terms under which the Applicant is allowed to operate its licence.
36. To support this argument, he points to the practice since May 2011 when the new Law came into force and since when the Governor has been granting extensions of the concession (pending the outcome of the renewal process) without the apparent or suggested need for a separate licence from the Authority.
37. But these concerns about a conflict of interests are, in my view, misplaced in the context of a statutory scheme that imposes duties and vests powers in a regulatory body for the fulfilment of those duties. Such a body may not act arbitrarily or capriciously. It is amenable to having its decisions and actions reviewed in keeping with the requirements of the statutes from which it derives its powers.
38. And so it is to the statutes that one must turn for the answer to this question whether the Applicant is required to obtain a licence from the Authority.
39. Indeed, it is as a matter of construction of the statutes that Mr. Smith argues:
- (i) That the requirement of section 4(3) of the new Law does not affect the Applicant, although it provides that all concessions granted by the Governor shall be exercised in accordance with the terms and conditions contained in a licence issued by the Authority; and
 - (ii) That the power vested in the Authority by section 6(d)(v) and 7(1)(i) of the Water Authority Law (2011 Revision) to grant, modify or renew a licence issued under the new Law or to grant a licence to any person to whom the



Governor has issued a concession, does not apply to the Licence nor to the Applicant.

40. Mr. Smith relies on two provisions in particular for this construction. First, the transitional provision, what he describes as the “grand-fathering” provision of section 16(c) of the new Law – where it provides that the repeal of the repealed Law does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Law.
41. Second, the Licence itself, where in the interpretation clause, it states that “Law” means “the Water (Production and Supply) Law 1979 and all amendments thereof for the time being in force”. (Emphasis added.)
42. These provisions, he says, must be taken as applying the repealed Law for all purposes of the construction of the Licence, having regard also to Clause 3 of the Licence (as set out above at paragraph 22 of this ruling).
43. And so it is in this context that Mr. Smith emphasizes that in referring only to subsequent “amendments” of the repealed Law, Clause 3 of the Licence does not admit of it being governed by subsequent Laws which repeal or replace the repealed Law; viz: the new Law.
44. In effect therefore, that the Applicant shall have the right in keeping, says Mr. Smith, with Clause 4.2 of the Licence, to enter into negotiations with the Governor for the extension of the Licence, without the intervention of the Authority and without the need for a licence from the Authority as mandated by section 4(3) of the new Law.
45. This, for the reasons propounded again by Mrs. Bothwell and Mr. Gordon QC, I regard as an untenable argument.



46. First, the Licence itself states in Clause 3 that it shall be governed by the Laws of the Cayman Islands (see above at paragraph 2). This can only mean, as the Laws of the Cayman Islands are in effect from time to time. Otherwise, the Licence would purport to operate as a fetter upon the authority of the Legislature. It is trite that such a construction is not permissible. As Maugham LJ famously declared in *Ellen Street Estates Ltd. v Minister of Health*¹ “the legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation...” The position is only more obvious where what is proposed is that the Legislature is precluded from affecting, by subsequent legislation, the terms on which a licence – earlier granted by an executive undertaking – may be renewed, extended or determined.
47. The purported “right” of the Applicant said to be preserved by Clause 3 of the Licence, cannot be allowed to override the clear legislative mandate and intent of the new Law, which is to improve, in the public interest, the process by which concessions and licences are granted (see the Long Title to the new Law).
48. There is, moreover, to be no interference by the new Law with any right of the Applicant as vested by the Licence. As set out in Clause 4.2 of the Licence, that right is one simply to enter into negotiations with the Governor for an extension of the concession and Licence. It is not a right that has been breached or is being breached in any manner of which the Applicant might at present complain; the negotiations are taking place with the Authority as the Governor’s adviser and agent. And Mr. Gordon QC has made it clear that within the context of those negotiations, the Applicant is at liberty to raise its concerns about the merits of a RCAM for the



¹ [1934] 1 KB 590

consideration of the Authority – perhaps the single most important regulatory issue of concern to the Applicant for the renewal of the Licence.

49. The fact that extensions pro tem of the Licence, during the course of the negotiations, have been granted – not by the Authority but by the Governor – is nothing to the point of the proper construction of the Licence or the statutes. As Mr. Gordon QC observed, the extensions pro tem give the Applicant nothing more than the preservation of the right to negotiate – which is the right recognized by Clause 4.2 of the Licence.

50. Nor does Mr. Smith’s reliance on section 25(2) (c) of the Interpretation Law advance the Applicant’s position any further. That subsection provides that where any Law repeals any other enactment, unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or suffered under any enactment so repealed.

51. Here, the only accrued “right, privilege or obligation” is that which affords the Applicant the opportunity to negotiate for a renewal of its licence – the very opportunity it is now being afforded². A “right” in the sense contemplated by the subsection does not include a mere right to take advantage of the repealed enactment by the acquisition of a benefit which had not yet vested: *Abbott v Minister of Lands*³.

Here the Applicant has no accrued right to the renewal of its concession or licence.

There is no more than a hope that the Governor in Council, in the proper exercise of discretion, will give a favourable decision and that the Authority will follow suit in



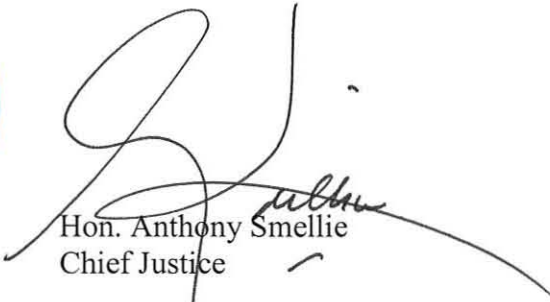
² The applicant also has a right, under the Licence, of first refusal should the Governor decide to grant a concession on different terms to interested parties but that right obviously does not arise for consideration now.

³ [1985] AC 425.

the issuance of a licence. See *Director of Public Works and Another (No. 3) v Ho Po Sang and others*⁴, later adopted and applied by Privy Council in *Free Lanka Ins. Co. Ltd. v A.E. Ranasinghe*⁵, per Lord Evershed: “...there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given.”

52. It is plain that here the parties, in the process of the negotiations, are engaged upon an “investigation” of the latter kind.
53. My conclusion on this third and final point is that a licence from the Authority is required. Section 4(3) of the new Law plainly confers a power and duty upon the Authority to settle the terms and to issue a licence. This follows only upon the completion of the advisory function of the Authority to the Governor by which the Governor may grant an extension to the concession.
54. The foregoing conclusions on the three points raised by the Applicant are matters of statutory construction upon which I have expressed the views of the court for the clarification of the process of negotiations engaged between the parties. There is no need for declaratory relief and so it would be inappropriate for the court to purport to grant declaratory relief in these circumstances.




Hon. Anthony Smellie
Chief Justice

June 19 2014

⁴ [1961] AC 901.

⁵ [1964] AC 541