COURT OF APPEAL
TURKS AND CAICOS ISLANDS

CIVIL APPEAL
CL-AP 16/2022

BETWEEN

LEEWARD WATER SERVICES LTD.

APPELLANT

AND

PROVO WATER COMPANY LTD.

THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENTS

BEFORE	**The Hon. Mr. Justice Neville Adderley**	**President (Acting)**
	The Hon. Mr. Justice Stanley John	**Justice of Appeal**
	The Hon. Sir Ian Winder	**Justice of Appeal**

APPEARANCES:

Conrad Griffiths KC and Murray Snider for the Appellant
Jonathan Katan KC and Mark Harvey for the 1st Respondent
Khalila Astwood-Tatum for the 2nd Respondent

Heard: 1 February 2023

Delivered: 24th March 2023

JUDGMENT

SIR IAN WINDER, JA

1. This is an appeal by Leeward Water Services Ltd. (Leeward) against the decision of Justice Michael Hylton QC (the Learned Judge) who held and declared, upon the hearing of a preliminary question, that the Water and Sewerage Ordinance CAP 8.03 (the "**Ordinance**") does not prohibit the appointment of more than one water undertaker for any specific geographical area.

BACKGROUND

2. Provo Water Company Ltd. (Provo) was appointed as a water undertaker under the Ordinance for the Island of Providenciales, including the Leeward Area[1], on 6 December 1996 for a period of 65 years. The original appointment, with subsequent variations, has been maintained continuously since the original appointment. Leeward was first appointed as a water undertaker under the Ordinance on 6 February 2007 for one year, with the ability to renew its licence on an annual basis. It would appear that at some point Leeward's 2007 license was not renewed and on the 1st of April 2019 Leeward was issued with a new instrument of appointment for a period of 10 years. By that date the Provo had begun providing water services within parts of the Leeward Area.

3. Leeward says that it has been the historic supplier of water in the Leeward area of Providenciales but as a result of Provo, recently starting to install a water supply system in the Leeward Area, it commenced action in the Supreme Court against Provo and the Attorney General seeking, *inter alia*:
   (1) A declaration that, except where Section 34 of the Ordinance applies, there can be only one water undertaker with respect to a particular geographical area.
   (2) A declaration that Leeward is the sole water undertaker with respect to the Leeward Area.

[1] But excluding the area comprising the Club Med and the Provo Golf Course

(3) As necessary, rectification of the Instrument of appointment in favor of Provo as to exclude at a minimum the Leeward Area.

(4) An injunction restraining Provo from encroaching into the Leeward Area, and taking any actions to provide water and sewerage services in the Leeward Area.

4. The determination of the preliminary question called for a statutory construction of the Ordinance; Section 22 of the Ordinance. Section 22 of the Ordinance provides:

PART IV

APPOINTMENT AND REGULATION OF UNDERTAKERS

Division 1

Appointments

Appointment of undertakers

22. (1) Subject to the provisions of this Ordinance the Minister may appoint a company to be a water undertaker or sewerage undertaker or a water and sewerage undertaker for any defined geographical area of the Islands, and may on the application of a company holding an appointment under this Part, vary the appointment.

(2) Before making or varying an appointment under subsection (1), the Minister shall consult with the Board.

(3) The appointment of a company to be such an undertaker shall be by service on the company of an instrument in writing, containing the appointment, the conditions of the appointment, if any, and describing the area for which it is made.

(4) A company shall not be appointed a water undertaker or a sewerage undertaker or a water and sewerage undertaker unless it is a limited company registered under the Companies Ordinance or any re-enactment or modification thereof.

(5) It shall be the duty of the Minister to ensure—

(a) that any company appointed under this Ordinance to be a water or sewerage undertaker or a water and sewerage undertaker shall have the capability and resources necessary to carry out the functions of a relevant undertaker under the Ordinance; and

(b) that in making an appointment under this Part, he shall give preference to a company that is controlled by Belongers.

(6) It shall be the duty of the Minister to secure that such appointments are made under this Part as will ensure that for prescribed areas of the Islands there is at all times a company holding an appointment under this Part as a water undertaker or a sewerage undertaker."

5. The matter came before the judge for case management on 8 July 2022. On his own motion the judge directed, pursuant to Order 14A of the Civil Rules 2000, that there be a hearing to determine the question of law as to whether the Ordinance prohibits the appointment of more than one water undertaker for any specific geographical area.

6. Following the hearing the judge determined that there was no prohibition on the appointment of more than one water undertaker and set out his detailed reasons in a written judgment. That decision is the subject of this appeal.

THE APPEAL

7. Leeward has appealed the judge's decision on the basis that:

    1. The Learned Judge erred in finding that the Water and Sewerage Ordinance CAP 8.03 (the "Ordinance") does not prohibit the appointment of more than one water undertaker for any specific geographical area. On its true construction the Ordinance permits of only one water undertaker for any specific geographical area.
    2. The Learned Judge erred in his approach to the question of statutory construction and the determination of the meaning of the Ordinance when he accepted that as a matter of normal language the use of the word "a" (water undertaker) carries with it "an implication of singularity", but then wrongly held that the Interpretation Ordinance CAP 1.03 effectively provides that the use of the word "a" does not necessarily suggest or imply singularity such that the natural and ordinary meaning of the word does not assist …
    3. The Learned Judge erred in finding that the Interpretation Ordinance places a burden on the Appellant/Plaintiff to persuade the court that there is something in the Ordinance which is inconsistent with the plurality that section 4 mandates. Section 4 does not mandate plurality or anything...
    4. Accordingly, the Learned Justice erred in law in finding that the use of the word "a" in section 22(1) of the Ordinance was determinative of the question of whether the Ordinance permits the appointment of more than one water undertaker for a specific geographic area. The Learned Justice thereby erred in failing to consider the object and purpose of the Ordinance and to construe the Ordinance as a whole.
    5. The Learned Judge erred in holding that he was not persuaded there was anything unworkable or bizarre about there being multiple water undertakers for the same area. The very nature of a public supplier brings with it the implication of monopoly supply…
    6. The 1st and 2nd Defendants expressly accepted that the Electricity Ordinance CAP 14.04 created a monopoly supply for "a" public supplier of electricity. The language of the Electricity Ordinance is similar to the Ordinance and the Electricity Ordinance refers to "a" public supplier (sections 10, 15 and 17 by way of example). Market conditions are obviously identical. The distinction between public suppliers and private suppliers of electricity under the Electricity Ordinance is irrelevant here as there can still only ever be one public supplier for any area under the Electricity Ordinance. It is

impossible to sensibly distinguish the regimes under these utility supply ordinances. Accordingly, the Learned Judge erred in his reasoning.

7. The Learned Judge erred in his reasoning when he held that a reading of the Ordinance as a whole did not lead to the conclusion that there can only be one licensed water undertaker for any geographic area. The Ordinance as a whole makes clear that there can be only one such water undertaker and sections 25, 34, 35 and 39 can only be read as permitting a single water undertaker.

DISCUSSION

8. This is purely a question of statutory construction.

9. Leeward contends that the Ordinance on its true construction only permits a single supplier of water and that is consistent with the language of the Ordinance and the nature of public utility supply. Provo and the Attorney General contend for the completely opposite view and assert that the Ordinance permits the appointment of more than one supplier of water in a particular geographical area.

10. The discussion in the Court below and the before this Court centered on several areas of consideration to determine the proper construction of Section 22 of the Ordinance. These were:
    (1) The decision of Neuberger J (as he then was) in the case of ***Crest Nicholson v McAllister [2003] 1 Al ER 46*** where he considered the meaning of the infinite article "a".
    (2) Section 4 of the Interpretation Ordinance.
    (3) Other provisions of the Ordinance, in particular Sections 25(7), 34, 35 and 39.
    (4) Comparisons to similar legislation such as Water Industry Act and The Electricity Ordinance.
    (5) The notion of a "Natural Monopoly".

11. Leeward's principal argument is that the use of the word "a", as a matter of normal language and of use in a statute, carries with it an implication of singularity. Much reliance was placed on the English High Court decision of Neuberger J (as then was) in ***Crest Nicholson v McAllister*** **[2003] 1 All ER 46 at 51** where the judge was called upon to construe the meaning *"a private dwelling house"* in the context of a restrictive covenant. At paragraph [14] and [15] of the decision Neuberger J stated:

"THE FIRST ISSUE: ONLY ONE DWELLING HOUSE?
[14] The claimant's construction of the first sentence of para (2) (the first covenant) essentially involves reading the words 'other than those of or in connection with a private dwelling house' as

meaning 'other than for residential purposes'. The defendant's reading of the first covenant means that the plot as a whole cannot be used other than for or in connection with a single private dwelling house. As with any issue of construction, other than where the answer seems plain, the fact that one can reformulate a particular interpretation so as to make it clear can always enable the opponent of that interpretation to contend that, if that was the meaning intended, it would have been only too easy to express it in that way. As both Mr. Vivian Chapman, who appears for the claimant, and Mr. Kim Lewison QC, who appears for the defendant, sensibly accept, such an argument rarely takes a dispute as to construction further. The very reason that the question of interpretation is before the court is normally because the provision has not been as clearly drafted as it might have been.

[15] I have reached the conclusion that the defendant's interpretation of the first covenant is to be preferred. First, as a matter of ordinary language, the indefinite article 'a' tends to carry with it the concept of singularity as opposed to plurality. Restriction to use as 'a private dwelling house' appears to me, at least in the absence of contextual or factual contra-indications, to mean restriction to a single dwelling house. The fact that the first covenant is not a restriction to 'a private dwelling house' but to '[purposes] of or in connection with a private dwelling house' does not appear to me to call that conclusion into question in the present case. What the draftsman had in mind is the various uses to which one might put the land and buildings, and provided that the various purposes could fairly be said to be 'those of or in connection with' a private dwelling house, they would be within the covenant. However, the use of those anterior words does not, to my mind, cast doubt on the simple fact that 'a private dwelling house' tends to denote singularity. Given that it is 'the premises', i.e. the plot as a unit, which is not to be used other than for purposes 'of or in connection with a dwelling house', it seems to me that the natural meaning of the words is that there can be only 'a' dwelling house, i.e. one dwelling house, on the premises, i.e. the plot.'

12. Leeward, in reliance on ***Crest Nelson***, says that the starting point is one of singularity, i.e., the reference to "a water undertaker" is in the singular and synonymous with "the water undertaker". They say that it plainly and obviously carries the concept of singularity (and see its similar use in the Electricity Ordinance).

13. The learned judge considered the submission at paragraph 24-27 of his judgment. He stated:

> [**24**] Counsel [Leeward] submitted that as a matter of normal language and when used in a statute, the use of the word "a" carries with it "an implication of singularity". That is no doubt correct as a matter of normal language and in ordinary conversation. But it cannot be the case when one is construing a statute, because the Interpretation Ordinance effectively provides that the use of the word "a" does not necessarily suggest or imply singularity. This is therefore one case in which the natural and ordinary meaning of the word does not assist.

[**25**] This also disposes of counsel's reliance on Crest Nicholson. In some respects, the same considerations may apply when a court is construing a commercial contract or similar instruments and when it is construing a statute, but there are fundamental differences. One difference is that the Interpretation Ordinance applies to the latter but not the former.

[**26**] Neuberger J was no doubt right when he said that "as a matter of ordinary language the indefinite article "a" tends to carry with it the concept of singularity as opposed to plurality". But that was in the context of a restrictive covenant, a context in which it would be appropriate to consider the ordinary meaning and usage of a word.

[**27**] I therefore did not find this argument or the decision in Crest Nicholson persuasive.

14. Leeward says that the Learned Judge fell into error to have suggested that there was a burden on it to persuade the court that plurality is not mandated by the Interpretation Ordinance. The starting point, they say, is and was the ordinary meaning of the language in the Ordinance.

15. Provo and the Attorney General argue that the learned judge was correct to draw a distinction between the construction of legislation and a private law document. They assert that drafters draft in the singular and, in the TCI, rely on the provisions of section 4 of the Interpretation Ordinance with respect to the plural. They say that to suggest that the absence of an 's' after the word undertaker in Section 22(1) of the Ordinance is material, is misconceived. They argue that if Leeward was correct a legislative drafter would need, on every occasion where the plural may apply, to include the plural in the sentence. This, they say, would obviate the need for section 4 of the Interpretation Ordinance.

16. I prefer the submissions of Provo and the Attorney-General and concur with the learned judge that ***Crest Nelson*** was not persuasive on the issue. Were Neuberger J considering the interpretation of a private law document, rather than a statute, he would not have had in mind or considered the provisions of the English Interpretation Act and its equivalent to Section 4 of the Interpretation Ordinance.

17. Section 4 of the Interpretation Ordinance provides:

> "4. In this Ordinance and in all Ordinances and other instruments of a public character relating to the Islands now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided—
>
> (b) words in the singular include the plural, and words in the plural include the singular."

18. In ***Crest Nelson,*** Neuberger J was called upon to determine whether a restrictive covenant, which provides that a plot "*shall not be used for any purpose other than those of or in connection with a private dwelling house or for professional purpose"*, prevented the erection of more than one dwelling house on that plot. In deciding the issue, Neuberger J recognized that the interpretation of the covenant had to be arrived at contextually and taking into account all attendant circumstances. In fact, he also accepted that a provision such as section 61 of the 1925 Law of Property Act (similar to Section 4 of the Interpretation Ordinance) could have yielded a different interpretation but for his view that the natural reading of *a private dwelling* and the contrast with *"for professional purpose [purposes]"* prevented the erection of more than one dwelling house on the plot. At paragraph [31] of the judgment He stated:

> [31] Mr. Lewison very properly drew attention to section 61 of the Law of Property Act 1925, which provides that, in all deeds, unless the context otherwise requires, the singular includes the plural (and vice versa). As explained by Russell J in *Re Solicitors' Arbitration* [1962] 1 WLR 353 at p356, that statutory provision, "is designed to shorten the drafting of deeds and nothing more". However, that obviously does not mean that the provision can effectively be ignored. None the less, as exemplified by that very case, such a statutory provision, "which is designed to save verbosity, cannot properly be relied on" to alter the meaning of a provision if the court is satisfied that the provision was not intended to have the extended meaning that would result from applying section 61. It is fair to say that it is not as obvious to me that section 61 should not be applied in the present case as it appears to have been to Russell J in relation to the provision before him. However, it seems to me that the factors that have persuaded me that "a private dwelling-house" is to be given its natural meaning, ie to be limited to singular, should lead to the conclusion that "the context otherwise requires". Apart from the natural reading of "a private dwelling-house", and the contrast with "for professional purpose [or purposes]", it is to be noted that the application of section 61 in *Dobbs* would have produced a different result from that obtained.

19. It seems clear that *unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided'* words in the singular include the plural. In this case therefore drafters would be expected to draft in the singular and rely on the principle, set out in Section 4 of the Interpretation Ordinance, to include the plural. If it in intended otherwise, as contended by Leeward, one would expect the legislation to expressly reflect that the plural is not to be incorporated into the singular. The use of the indefinite articles "a" and "an" used in Section 22 of the Water and Sewerage Ordinance would not, without more, connote singularity but that the undertaker being appointed is one of a group or class and as such more than one undertaker can be appointed for any specific geographical area. I do not

find that there is anything in Section 22 which suggests any contrary intention which would displace the general application of Section 4 of the Interpretation Ordinance. I therefore endorse the holding of the Learned Judge at paragraph 30 where he stated:

> Unless [Leeward] can show that there is something in the Ordinance that requires singularity, the Defendants must succeed because of the plurality required by the Interpretation Ordinance.

20. Leeward argues at paragraph 18 of its skeleton argument that:

> Section 4 of the Interpretation Ordinance does not mandate plurality. That is not what the section says. The section simply says that words in the singular include the plural, and words in the plural include the singular. It is a form of permission and no more. If the Learned Judge's contention was correct, then each of the propositions within section 4(b) would revolve in ever decreasing circles. The singular shall mean the plural, the plural shall then mean the singular, and so on, *ad infinitum*.

Respectfully, Leeward may have set the bar exceptionally low to suggest that the statutory guidelines in the Interpretation Ordinance was simply a form of permission. I accept the statements of the learned authors of ***Bennion, Bailey and Norbury on Statutory Interpretation*** *8th Edn paragraph 19.1 and 19.12* where they stated as follows:

> Introduction
> [19.1] The Interpretation Acts contain a number of definitions and other provisions of an interpretive character that apply to legislation in general.
> Comment
> The Interpretation Acts collect together a number of definitions and other provisions of an interpretive character that are of general application. <u>They make a modest contribution to simplifying Acts and making them shorter by eliminating the need for repetition.</u>
> <u>Legislation is drafted with the Interpretation Acts in mind so it is important for anyone who wants to understand legislation to be familiar with them.</u>
> Many of the rules do little more than give statutory expression to common sense or serve the limited purpose of putting something beyond doubt, but others are far from intuitive and deserve careful consideration.
>
> [19.12] Singular and plural at section 19.12
> The Interpretations Acts all provide that, unless the contrary intention appears, words in the singular include the plural and vice versa. ….
> Comment
> <u>Most legislation is drafted in the singular and reliance is placed on the provision of the Interpretation Acts to deal with plurals</u>. …
>
> [Emphasis added]

21. In looking to construe Section 22 and determine whether the Ordinance permitted multiple water undertakers, other provisions of the Ordinance were examined in order to aid in the interpretation. In particular sections 25(7), 34, 35 and 39 of the Ordinance were examined. These provisions provide:

Termination and variation of appointments by Minister
25(1)…

(7) The appointment of a company to be a water or sewerage undertaker shall not be terminated or otherwise cease to relate to any area or to any part of any area except with effect from the coming into force of such appointments and variations replacing that company as an undertaker as to secure either—

(a) that another company becomes the undertaker for that area or part of an area that includes that area or part; or

(b) that two or more companies each become the undertakers for one of a number of different areas that together constitute or include that area or part." *[emphasis added]*

"Duty to maintain water supply system, etc.
34. (1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—

(a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

(b) for maintaining, improving and extending the water undertaker's water mains and other pipes, as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part.

(2) The duty of a water undertaker under this section shall be enforceable under section 29 by the Minister.

(3) The obligations imposed on a water undertaker by the following sections of this Part, and the remedies available in respect of contraventions of those obligations, shall be in addition to any duty imposed or remedy available by virtue of any provision of this section and shall not be in any way qualified by any such provision."

Division 3
Supply Duties

Duty to comply with water main requisition
35. (1) It shall be the duty of a water undertaker (in accordance with section 38) to provide a water main to be used for providing such supplies of water premises in a particular locality in its area as (so far as those premises are concerned) are sufficient for domestic purposes, if—

(a) the undertaker is required to provide the main by a notice served on the undertaker by one or more of the persons who under subsection (2) are entitled to require the provision of the main for that locality;

(b) the premises in that locality to which those supplies would be provided by means of that main are—

(i) premises consisting in buildings or parts of buildings; or

(ii) premises which will so consist when proposals made by any person for the erection of buildings or parts of buildings are carried out; and

(c) the conditions specified in section 36 are satisfied in relation to that requirement.

(2) Each of the following persons shall be entitled to require the provision of a water main for any locality, that is to say—

(a) the owner of any premises in that locality; and

(b) the occupier of any premises in that locality.

(3) The duty of a water undertaker under this section to provide a water main shall be owed to the person who requires the provision of the main or, as the case may be, to each of those persons who joins in doing so.

(4) Where a duty is owed by virtue of subsection (3) to any person, any breach of that duty which causes that person to sustain loss or damage shall be actionable at the suit of that person; but, in any proceedings brought against a water undertaker in pursuance of this subsection, it shall be a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach.

Duty to make connections with main

39. (1) Subject to the following provisions of this section and to section 40, it shall be the duty of a water undertaker to make a connection under this section where the owner or occupier of any premises in the undertaker's area which—

(a) consists in the whole or any part of a building; or

(b) are premises on which any person is proposing to erect any building or part of a building, serves a notice (a "connection notice") on the undertaker requiring it, for the purpose of providing a supply of water for domestic purposes to that building or part of a building, to connect a service pipe to those premises with one of the undertaker's water mains.

(2) Where a connection notice has been served for the purposes of this section, the duty imposed by subsection (1) shall be a duty, at the expense of the person serving the notice, to make the connection required by the notice if—

(a) the main with which the service pipe is required to be connected is neither a trunk main nor a water main which is or is to be used solely for the purpose of supplying water otherwise than for domestic purposes; and

(b) such conditions as the undertaker may have imposed under section 40 have been satisfied.

(3) The duty imposed on a water undertaker by this section shall be owed to the person who served the notice by virtue of which the duty arises.

(4) Where a duty is owed by virtue of subsection (3) to any person, any breach of that duty which causes that person to sustain loss or damage shall be actionable at the suit of that person; but, in any proceedings brought against a water undertaker in pursuance of this subsection, it shall be a

defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach.

(5) Where a water undertaker carries out any works which it is its duty under this section to carry out at another person's expense, the undertaker shall be entitled to recover from that person an amount equal to the expenses reasonably incurred by the undertaker in carrying out the works."

22. Leeward says that Section 25(7) is clearly drafted on the basis that there can be only one company as a water undertaker, i.e., *"… another company becomes the undertaker for that area …*" and then *"…two or more companies each become the undertakers for one of a number of different areas…"* Section 25 (7), it says, cannot be reconciled with the concept that there can be more than one water undertaker for any geographical area.

23. Leeward says that Section 34(1) clearly envisages that only one company can be responsible for "all such arrangements" and that one company must meet statutory duties imposed by the Ordinance. They say that it would be bizarre and unworkable if there were to be competing water utility suppliers each supposedly responsible for providing two or more sets of "all such arrangements", or each able to blame the other for not meeting the statutory duty.

24. In respect of sections 35(1) and 39(1) they say that the expression "its area" is utilized in relation to the duty to provide water, a duty which could only logically apply to a single water undertaker. Similarly, they argue that section 39(1) refers to a duty to connect to a consumer "in the undertaker's area" clearly indicating that the undertaker has exclusivity in that area (and a corresponding duty to supply). According to Leeward these duties under these sections can only be reconciled if there is a single public utility supplier.

25. The learned judge adequately answered the points now raised by Leeward, which were raised below. After indicating that he did not find sections 34, 35 and 39 to be of much assistance, the Learned Judge stated at paragraphs 32-35 of his decision:

> "[**32**] First, the reference to "its area" does not necessarily suggest that the area belongs to only one undertaker (i.e., ownership). It could equally mean the area in relation to which that undertaker has been appointed.
>
> [**33**] The Plaintiff's counsel also pointed out that the section imposes a duty on every water undertaker to develop and maintain an efficient and economical system of water supply and to

ensure that suitable arrangements have been made for the supply of water. I am not persuaded that there is anything unworkable or bizarre about those obligations being placed on more than one water undertaker.

[**34**] Each undertaker would be required to ensure that its system is efficient and economical and that it has made suitable arrangements to provide supplies of water in the area. The fact that another undertaker has done so in relation to its system would not be a defence or an excuse.

[**35**] The court accepts that if multiple undertakers are appointed there may be practical problems depending on the size of the area and other factors, but those considerations may raise questions as to the Minister's decision. In my view, they do not raise questions as to the Minister's power."

26. In respect of section 25(7) of the Ordinance, I accept the submission of the Attorney General that a fair reading of section 25(7), when read with section 22(6), was to ensure that in respect of prescribed areas there is always a company that has been appointed as a water undertaker or sewerage undertaker. Section 22(6) provides:

> 22(6): It shall be the duty of the Minister to secure that such appointments are made under this Part as will ensure that for prescribed areas of the Islands there is at all times a company holding an appointment under this Part as a water undertaker or a sewerage undertaker.

27. I am therefore not convinced that the construction advanced by Leeward is the only possible interpretation or as their counsel, Mr. Griffith KC asserts, is unanswerable. There is no language which restricts the number of undertakers that may be appointed to a defined geographical area.

28. In the course of the consideration of the proper construction of Section 22 of the Ordinance, the Electricity Ordinance and the UK's Water Industry Act were examined to aid in the interpretation.

29. The Water Industry Act was passed in the UK in 1991, a few years prior to the introduction of the Ordinance. The wording of some provisions of Chapter I of Part II of the Water Industry Act 1991, relating to appointments of water undertakers, are the same as that in the Ordinance. It may seem that the drafters of the Ordinance considered the Water Industry Act, and understandably so. What is remarkable is that the reference in the Water Industry Act is made to "the water undertaker" rather than "a" water undertaker. That Act expressly contemplates that there can only be one water undertaker for any specific geographical area. For example, Section 6(1) of the Water Industry Act provides that a company may be appointed—

"…to be the water undertaker or sewerage undertaker for any area of England and Wales." (Emphasis mine)

When the legislation uses a word such as "the", it is presumed to do so precisely and for a purpose. It represents a choice of the definite article over the indefinite article. Considerable weight must be given to its clear and ordinary meaning[2] . The use of the definite article "the" before the words "water undertaker" connotes a specific and singular water undertaker or in other words that there is only one undertaker, who has control of the water supply in its appointment area. The use of "a" by the drafters of the Ordinance may suggest a deliberate shift by the drafters, to create a different regime than what pertains under the Water Industry Act. This also begs the question as to if the drafters intended a singular undertaker for a specified geographical area why didn't they simply use the word "the" rather than "a"?

30. Similar to the Water Industry Act, the Electricity Ordinance also predated the Ordinance by some 9 years. The learned judge, rightly in my view, recognized that a different regime was envisioned for the Water Industry than had already been established for the Electricity Industry. He described Leeward's comparison as comparing apples to oranges. It is accepted that the Electricity Ordinance contains provisions which are consistent with the concept of a singular public supplier in a geographical area which would be subject to certain responsibilities and benefits. The Ordinance contains no such provisions. The Electricity Ordinance sets up a regime of a public supplier and a private supplier unlike what pertains under the Ordinance. It seeks to draw a clear distinction between a public and private supplier of electricity. When a public supplier has been appointed for an area, no private supplier may also be appointed. The Ordinance therefore clearly contemplates that it is the public supplier who will have overarching duty to supply electricity, to the public, in a supply area.

31. Leeward argues that licensed utility suppliers of water are natural monopolies and are treated that way throughout the world, and as such it is inconceivable that it could have been intended to create a different regime in the Turks & Caicos Islands. No evidence was adduced to support these submissions. The learned judge below was invited to take judicial notice of this fact. The learned judge found at paragraph 42-45 of his decision as follows:

[2] A (A) v B (B) (2003) 225 DLR (4th) 371 at 380-382 (Ont. SCJ) at paragraph 34

42. There is judicial support and statements for the view that licensed utility providers are a natural monopoly. In **Albion Water Ltd v Water Services Regulation Authority (formerly Director General of Water Services) (Aquavitae (UK) Ltd and others intervening)** - [2006] All ER (D) 222, the Competition Appeal Tribunal observed:

> "It is contended by the Authority, and we accept, that the transportation element of the water supply system (i.e. the distribution of water though pipes and mains) has strong natural monopoly characteristics, mainly as a result of the high cost of duplicating the infrastructure. However, other activities such as water abstraction from underground or surface sources, or customer-facing services such as retailing do not exhibit the same "natural monopoly" characteristics."

43. Then, in **R (on the application of Welsh Water Ltd) v Water Services Regulation Authority** [2009] EWHC 3493 (Admin) Mitting J said:

> "The water supply industry is vertically integrated. Suppliers of water undertake all activities from extraction to delivery to the end user by a fixed infrastructure. The industry is therefore a natural geographically bounded monopoly on a regional or local scale."

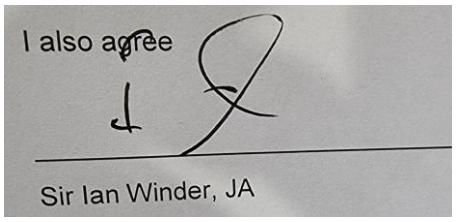
44. I ultimately concluded, however, that I could not properly conclude that:
    a) in a jurisdiction like the Turks & Caicos Islands a water supplier would be a natural monopoly;
    b) at the time of enacting the Ordinance, the legislators were aware of that fact; and
    c) the legislators therefore would probably not have intended to create a different and unique regime in the Turks & Caicos Islands.
45. In the absence of direct evidence, I do not know whether different considerations would apply in this jurisdiction. I therefore did not treat this as a factor in coming to my ultimate conclusion."

32. Before us, Leeward sought to point to references in judicial authorities to supplement the evidential shortfall in the submissions made below. I did not accept that Leeward had succeeded before us in meeting the evidential challenge identified by the learned judge. Respectfully therefore, in the absence of an evidential basis to do so, I therefore agree with the finding of the learned judge as to whether a natural monopoly was intended for the Turks and Caicos Islands as contended for by Leeward.

CONCLUSION

33. In all the circumstances therefore, the Court affirms the decision of the Learned Judge that the proper construction of section 22 of the Ordinance does not prohibit the appointment of more than one water undertaker for any specific geographical area.

34. In the circumstances therefore the appeal is dismissed. Costs to the Respondents to be taxed in default of agreement.



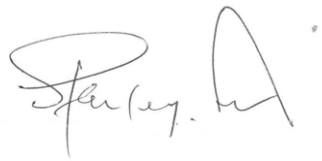
SUPREME COURT TURKS AND CAICOS ISLANDS

SIR IAN R. WINDER, JA

I agree

ADDERLEY JA, President (Actg.)

I also agree



JOHN, JA