

IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS

Case no: CL 138/08

BETWEEN

OSWALD SKIPPINGS

And

NOEL SKIPPINGS

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Plaintiffs

AND

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TURKS AND CAICOS UTILITIES LIMITED

Defendant

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G Chapman for defendant

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Judgment

1. The defendant is the public supplier of electricity to Grand Turk, Salt Cay and South Caicos, licenced under the provisions of the Electricity Ordinance. The plaintiffs are both consumers on Grand Turk.

2. Consumers are billed monthly for the units of electricity they consume. Charges are made in accordance with a tariff of rates prescribed by the Electricity Rates and Charges Regulations (Grand Turk, Salt Cay and South Caicos) ["the Regulations"] supplemented by a Power Cost Adjustment ["PCA"] calculated on the amount the landed cost of diesel fuel exceeds \$1.00 per gallon in respect of Grand Turk and Salt Cay and \$0.80 in the case of South Caicos.

3. This has been the position since 1986 when the Regulations were first promulgated. At that time, the notional landed cost for Grand Turk and Salt Cay was \$1.40 but that was reduced to \$1.00 by the amendment regulations in 1999. Over the years, there has been an overall increase in the price of oil on the international market and so the PCA has increased proportionately. The sudden escalation of the price of oil during 2007 and 2008 resulted in dramatic increases in the charge to consumers caused by an increasing PCA effectively doubling the cost in a matter of months.

4. The plaintiffs bring this action challenging the right of the defendant to impose the PCA. They seek a declaration that the PCA is unlawful, an account and restitution of the rates charged under the PCA to the plaintiffs and an injunction restraining the defendant from imposing a PCA in future. A further claim under the Constitution has been abandoned by the plaintiffs.

5. Counsel for the parties agreed that a determination of the legality of the imposition of the PCA as a preliminary issue would determine the case and it was set for hearing on that basis.

6. Section 32(1) of the Electricity Ordinance provides:

"(1) Except in such cases as may be prescribed and subject to subsection (5) and section 33, the charges made by a public supplier for electricity supplied by him to a consumer shall be in accordance with such tariff of rates as the Governor shall prescribe by regulations."

Subsection (5) reads:

"(5) A tariff of rates prescribed under subsection (1) may include provisions —

- (a) empowering the Governor to authorise a public supplier, by order, to increase any charges made by the supplier to consumers in accordance with the that tariff by such amount or by such percentage as shall be specified in the order, if the Governor is satisfied that there has been an increase in the cost of oil fuel used by the public supplier to generate electricity under his licence to such an extent as to justify the making of the order.
- (b) empowering the Governor to require a public supplier, by order, to reduce any charges made by the supplier, to consumers in accordance with that tariff by such amount or by such percentage as shall be specified in the order, if the Governor is satisfied that there has been a decrease in the cost of such fuel to such an extent as to justify the making of the order."

7. For many years, the changes have generally been increases under paragraph (a) which reached their peak here in mid-2008. Since then, the decline in the world cost of fuel has resulted in a corresponding reduction in the charges in accordance with paragraph (b).

8. Regulations were made by the Governor under section 32(1) in December 1986 and amended in 1999 to the limited extent already stated. Regulation 2 provides:

"2. The rates and charges for electricity supplied by a public supplier to a consumer shall be those specified in the Schedule"

9. The Schedule commences with an interpretation paragraph and then provides:

"2. (1) Subject to paragraphs (2), (3) and (4), the rates for electricity supplied by a public supplier to premises of any description set out in the first column of the Table opposite the reference to premises of that description:

Description of premises	<i>Rate-cents per unit</i>	
	<i>Grand Turk and Salt Cay</i>	<i>South Caicos</i>
1. Residential premises	27.3	26.6
2. Non-residential premises	32.3	31.6
3. Official premises	27.3	31.6
4. Street Lighting	27.3	(a)

Note (a) [omitted]

(2) Where the cost per gallon of oil fuel imported into the Islands by a public supplier for the purposes of generating electricity under his licence is more than \$1.00 in the case of Grand Turk and Salt Cay or \$0.80 in the case of South Caicos and the increase has been authenticated by the Electricity Commissioner, the rate chargeable under paragraph (1) in any account rendered in consequence of a reading taken by the supplier at any time after the date of the importation of that fuel may, until any subsequent increase or decrease in that rate is effected in pursuance of this regulation, be increased at the rate of 0.08 cents for each cent of the amount by which the cost per gallon of that fuel, as authenticated by the Commissioner, exceeds either \$1.00 or \$0.80 as the case may be."

Paragraph (3) repeats the equivalent provisions in respect of a decrease in the landed cost of oil and paragraph (4) sets a minimum monthly charge of \$5.00.

10. The plaintiffs challenge the legality of the imposition of the PCA on two grounds. First, they suggest that the terms of section 32(5) empower the Governor to authorise any increase only by order and that may only be when and if he is satisfied that there has been an increase in the cost of fuel oil sufficient to justify such an order. Their second contention is that neither regulation 2 nor paragraph 2(2) of the Schedule makes any provision, as required by section 32(5), empowering the Governor to authorise the public supplier to increase any charges.

1. The requirement for an order

11. Interpretation of subsection (5) is not without difficulty. As I have stated, the plaintiffs argue that it requires an order by the Governor. Mr Chapman for the defendant counters that the meaning of the opening words of paragraph (a) should be read as giving the public supplier the right to order the increase. In other words, the plaintiffs would read it as meaning; "(a) empowering the Governor to authorise by order a public supplier to increase ..." whereas the defendant contends it should be read as meaning; "(a) empowering the Governor to authorise a public supplier to increase by order ..."

12. I consider that the use of commas before and after the words 'by order' allow either interpretation but two factors persuade me that the plaintiffs' reading is correct. I consider that the use of the term 'order' is appropriate and necessary if the Governor is to authorise an action by another person or body. It is not necessary for a company seeking to increase its charges. The paragraph also requires the Governor to be satisfied that the increase in fuel cost is sufficient to justify the making of the order. I accept that the Governor's requirement, in paragraph 2(2) and 2(3), that the Electricity Commissioner should authenticate the increase in the price of oil gives the Governor sufficient information to be satisfied it will justify the order. I consider that is appropriate to an order authorising the increase rather than to a demand for an increased charge by the supplier.

13. The issue, however, is whether that means that, in the absence of a specific order, the Governor has not validly authorised the increase. It is not disputed that the Governor properly made the Regulations prescribing the tariff of rates in accordance with section 32(1). Any regulation made under a statutory power has the force and effect of an order by the person promulgating the regulations and I consider that sufficiently satisfies the reference to an order in subsection (5) (a) and (b). That, however, is still dependent on the answer to the second challenge raised by the plaintiffs.

2. The power of the Governor

14. The provisions of section 32(1) require the charges made by a public supplier to be in accordance with a tariff of rates prescribed in regulations by the Governor. The Governor has done so by regulation 2 of the Regulations

15. The plaintiffs contend that the manner in which this must be done is set out in section 32 (5). The words of that subsection give the Governor a discretion to include in the tariff of rates "provisions empowering the Governor to authorise" a public supplier to increase any charges made to the consumer.

16. The plaintiffs point out that those words suggest that the Governor has no such power unless and until there is a provision included in the tariff of rates so empowering him. It is correct that, where a provision is intended to give a particular power, it requires a specifically worded provision. Mr Skippings points out that there is no such provision in paragraph 2 of the Schedule and, without it, he contends, the Governor has no such power.

17. Some difficulty arises from the fact that section 32(1) gives the Governor the power by regulations to prescribe the tariff of rates and section 32(5) allows the same person, namely the Governor, to include in the tariff a provision giving himself the power to authorise increases. The difficulty is demonstrated by considering the provisions if the Governor was, under subsection (5), granting the power to a person other than himself. In such a case, Mr. Skippings suggests, the second person undoubtedly would only have the power if it was granted by a clear and specifically worded provision and the same should apply if the Governor is giving himself the power. Without it, he cannot simply assume the power.

18. I accept the force of his argument but I cannot accept it is the correct answer to his challenge. What the Governor has done is to prescribe the tariff of rates by the terms of his Regulations. As has been stated, regulation 2 provides that the rates and charges "shall be those specified in the Schedule".

19. The Schedule is headed 'Tariff of Rates and Charges'. Paragraph 2 relates specifically to the Tariff of Rates and is headed as such. Paragraphs 3 and 4 relate to Charges and paragraph 5 to Deposits.

20. The Tariff of Rates prescribed in the Schedule includes the provisions for increases (paragraph 2 (2)) and decreases (paragraph 2 (3)) in accordance with the landed price of fuel oil. Subsection (5) allows the Governor to grant himself the power to include such provisions but, as they already formed part of the tariff of rates, he had no need to invoke such a provision.

21. I am satisfied that those provisions are lawfully prescribed by the Governor as part of the tariff of rates under section 32(1).

3. The right to vary the tariff

22. The plaintiffs raised a further issue relating to the right of the Governor to vary the tariff. Section 33 of the Ordinance deals with variation of the tariff of rates prescribed under section 32(1). It is a provision requiring the Governor to give notice to the public supplier of any intended variation in the tariff and enabling the public supplier to challenge it. Section 33(2) provides:

"(2) The variation of a tariff of rates prescribed under subsection (1) of section 32 shall not be effected more than once in any period of twelve months."

24. The repeated changes in the price of oil on the world market over the last few years has resulted in the landed cost of oil and, in consequence, the PCA changing frequently with the result that charges to the consumer have changed every month. The plaintiffs suggest that is a breach of section 33(2). I cannot accept that is the case. It confuses changes to the tariff of rates with changes in the charges to the consumer. I have found that the provisions allowing, and setting the formula for, adjustment to the charges form part of the tariff of rates. That has been applied without alteration except to the notional cost of oil, since it was first prescribed in 1986. If it had, it would have had to be done in

accordance with section 33. What have been repeatedly changed are the charges under those provisions in the tariff of rates.

25. I find against the plaintiffs on the question of law. I consider that has also extinguished the claim in its entirety and I give judgment for the defendant with costs to be taxed if not agreed.

3 March 2009

Gordon Ward
Chief Justice