

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 0059 of 2019

BETWEEN

CASA GRANDE INC.

APPLICANT

AND

BARBADOS WATER AUTHORITY

RESPONDENT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

**2019: March 13
April 23**

Mr. Ezra E. Alleyne and Mr. Ernest Jackman, Attorneys-at-Law for the Applicant.

Ms. Suzanna E. Y. Thompson, Attorney-at-Law for the Respondent.

DECISION

Introduction

- [1] This is an urgent application for the judicial review of the Respondent's decision to disconnect the supply of water to the Applicant's property.

Background

- [2] The Applicant is a limited liability company incorporated and registered under the Companies Act, Cap. 308. Its registered office is at Cumberland Street in the City of Bridgetown. The Applicant is engaged in a business known as Casa Grande Bowling Alley at Lot 2A Oldbury, St. Philip.
- [3] The Respondent is a statutory corporation established under the Barbados Water Authority Act, Cap. 274A, (“the Act”). One of the functions of the Authority is to supply potable water for commercial purposes. (S.6(1) of the Act).
- [4] In keeping with its mandate, the Respondent supplied water to the Applicant’s premises at Lot 2A Oldbury, St. Philip. The relevant particulars of the Respondent’s agreement with the Applicant are Account No. A101256634, Meter No.53662263 and Property No.100741537.
- [5] On 22 November 2018, the Respondent disconnected its water supply to the Applicant’s property. At that time the Applicant’s account was not in arrears.
- [6] By a fixed date claim form filed on 14 January 2019, the Applicant brought an urgent judicial review proceeding against the Respondent.

The grounds for the application are, inter alia, that:

1. the Respondent has no power or jurisdiction under section 30 of the Act to impose any penalty of disconnection on the Applicant in the circumstances disclosed by the occurrence of the events which form the basis and background to the judicial review application;
2. the Respondent has no power or jurisdiction under section 30 of the Act or the regulations to impose any penalty on the Applicant in the circumstances disclosed;
3. the decision of the Respondent to deny the Applicant access to a supply of water was unlawful and unreasonable and took into account irrelevant matters;
4. the Respondent misinterpreted the Act and the regulations in purporting to impose the penalty of disconnection on the Applicant;
5. the unlawful usurpation and exercise of the purported power of the Respondent resulted in a loss of profits and damage and loss of business reputation to the Applicant; and
6. the denial of access to the supply of water implies that the Applicant has not paid its just duties and penalties lawfully levied

under the Act, an assertion which is not true of the Applicant, but which assertion was made by the disconnection of the supply of water to the Applicant.

[7] The Applicant seeks the following relief.

1. a declaration that the penalty imposed by the Respondent is unlawful pursuant to section 5 of the Administrative Justice Act (“the AJA”);
2. an order of Certiorari quashing the decision of the Respondent to disconnect the Applicant’s supply of water pursuant to section 5 of the AJA;
3. an order directing the Respondent to reconnect the supply of water to the Applicant’s premises pursuant to the contract between the parties;
4. damages pursuant to the AJA for loss of reputation and loss of profits;
5. interest; and
6. such further or other relief as the court thinks fit.

The Affidavit Evidence

[8] The application was supported by the affidavit of the Applicant’s managing director Mrs. Ram Mirchandani. In that affidavit she asserted

the facts alleged, including that the business continued to be adversely compromised by the disconnection of the water supply; and she expressed concern about the damage to the Applicant's name by the ongoing disconnection. An invoice in the sum of \$9,700.00, estimating the cost of repairs to excavations allegedly done by the Respondent, was annexed to this affidavit.

[9] On 31 January 2019, the Respondent's General Manager Mr. K.A. Halliday filed an affidavit in response, which was accompanied by two affidavits in support by Mr. R.R. Sealy an Inspector, and by Ms. D.A. Jones the Revenue Manager.

[10] Mr. Halliday deposed that the Respondent disconnected the Applicant's water supply under the authority of Regulations 5(2) and 18 of the Barbados Water Authority (Water Services) Regulations 1982, S.I. No.150 of 1983 ("the Regulations"). Although the Applicant was not in arrears, the Respondent had discovered an illegal connection on the Applicant's premises that supplied water to adjoining premises at Knitwear Ltd.

[11] The illegal connection was alleged to constitute an offence under the Regulations, and the Respondent therefore claimed the jurisdiction to disconnect the Applicant's water supply. The disconnection was said to

be “necessary in all the circumstances to avoid the reconnection of the illegal supply and/or the erection of another unauthorized connection”.

(Para.8). Mr. Halliday asked the court to refuse the relief sought by the Applicant, on the basis that “to grant the said relief would be detrimental to good administration given the circumstances”. (Para.13).

[12] Ms. Jones in her affidavit detailed the relationship between the Applicant’s premises and the Knitwear Ltd. premises. Mrs. Mirchandani is a principal of that company; and Knitwear Ltd. is also a customer of the Respondent with its own account, property and meter numbers. The Respondent disconnected the water supply to Knitwear Ltd, on 25 October 2018, for non-payment of arrears in excess of \$260, 000.00. It was subsequently discovered that Knitwear Ltd. obtained a supply of water via an unauthorized connection from the Applicant’s premises.

[13] Mr. Sealy is the Inspector in the Respondent’s Commercial Division who was detailed to investigate and confirm the existence of an illegal connection from the Applicant’s premises, which provided a supply of water to the premises of Knitwear Ltd. He deposed in his affidavit of 31 January 2019 that:

“Upon conducting the inspection and tracing the pipe running from the premises of Knitwear Ltd to the Applicant’s premises....I

had cause to cut the pipe comprising the illegal connection to verify whether water was passing through the same. The pipe was reconnected...the following day after the connection was verified". (Para.5).

[14] Mr. Sealy's report is annexed to this affidavit as Exhibit RRS1. The report is entitled "Report on Activities Related to Inspection of Casa Grande Hotel subsequent to the disconnection of the water supply". The first page of the report, under the heading "Background", reveals that the service at Knitwear Ltd was reconnected following an instruction issued by the Respondent's General Manager on 29 October 2018. The service was again disconnected on 08 November 2018.

[15] Sealy described a visit to the Knitwear Ltd premises on 19 November 2018, where the Respondent's lock on the water meter was still in place and:

"....it appeared as though the water was still off. I then broke the meter union on the opposite side of the ballvalve to see if there was any water flow from the property. No water was seen flowing....I took a walk around the property and saw two taps which I turned on and water flowed from the taps....

I am of the opinion that there is an illegal supply of water on the compound, either a bypass or an illegal connection". (Page 1 of report).

[16] On 19 November 2018, Sealy suspected that Knitwear Ltd was receiving water from an unauthorized source, even though its supply was still officially disconnected. Two days later Sealy reported that together with other employees of the Respondent:

“...we were able to establish that Knitwear has sought to circumvent the effects of the disconnection of their water supply on 8th November 2018 by using water from another meter in the name of Casa Grande Hotel, Lot 2A Oldbury, St. Philip.

...Significant pipe work is in place to transport the water from two large storage [tanks] at the back of the compound to the tanks at the front of the complex which provide water to the hotel. Below are photos of the set up. It should be noted that there are two inlets (the two polyblue lines). We are confident that one of the lines is the meter as mentioned above however the second source is unknown”. (Page 2).

[17] Further investigations revealed that the water main at the back of the property has an elbow fitting that guided the main towards the property. (Page 4). Mr. Sealy records that the Applicant’s water supply was disconnected by him on the instructions of the Board Chairman. (Page 7). Checks were made to determined whether other unauthorized connections existed. After a final inspection of the premises on 11 December 2018, Mr. Sealy concluded that:

“...no illegal connections were discovered during my course of internal and external inspections”. (Page 11).

[18] Mrs. Mirchandani filed a second affidavit on 06 February 2019 in which she responded to the affidavits filed on 31 January 2019 on behalf of the Respondent. Much of this affidavit is taken up with the ongoing dispute between Knitwear Ltd. and the Applicant, and is largely irrelevant to the determination of the application now before this Court.

[19] Mrs. Mirchandani’s second affidavit is relevant in so far as it appears to take issue with Mr. Sealy’s report. In this regard she deposed that:

“5(A) As regards the Affidavit of Mr. Rueben Sealy I herein state:

(i) I did not give permission to Mr. Sealy to enter the premises of Lot 2A or to cut any pipes on the premises of Casa Grande Bowling Alley.

(ii) The pipes which Mr. Sealy cut on the premises of Casa Grande Bowling Alley are polyblue pipes of which one is the main pipe from the BWA Meter to the building and one is a polyblue pipe which supplies water to the Fire Hoses. The pipes are the property of Casa Grande Bowling Alley. **From Exhibit 3 of RRS1** it should be clear that these pipes are covered with concrete and excavation is required to replace these. **Exhibit RM9 shows one of these Fire Hoses.**

- (iii) On the report re visit on 19th November, 2018 Mr. Sealy has not taken into consideration the stored water in Water Tanks on the property. A fact that [the Respondent] was fully aware of and highlighted in their history report dated 14 March, 2012 of which a copy was given to me by [the Respondent] on the 29th day of October, 2018. It is exhibited herewith as **RM2 I**.
- (iv) Mr. Sealy has concluded in his investigation RRS1 on the 11 December, 2018, and states “I conclude from my investigations that no illegal connections were discovered during my course of internal and external inspections” ”.

[20] Mr. Sealy responded to Mrs. Mirchandani’s second affidavit with his second affidavit filed on 15 February 2019. In this second affidavit Mr. Sealy sought to clear up any ambiguities arising from his first affidavit. He explained that the first stage of his investigation on 19 November 2018 was confined to the premises of Knitwear Ltd. Having discovered that water was still flowing from taps on those premises, the source of the water was traced to the premises of the Applicant. (Paras. 5 and 6 of affidavit).

[21] Mr. Sealy said in this affidavit that the only pipe cut was on the Applicant’s premises. It was when this pipe was cut that it was confirmed that the source of the water was the tanks on the Applicant’s

premises. The cut pipe was repaired, and Mr. Sealy denied that any excavation was done around that pipe. The pipes referred to at paragraph 5(A)(ii) of the second Mirchandani affidavit were never touched by Mr. Sealy or his crew. (Paras.7 to 9).

[22] The water tanks on the Applicant's premises were the means by which water was supplied to the premises of Knitwear Ltd. A pump was used to propel the water from the tanks on the Applicant's premises to the tanks on the premises of Knitwear Ltd. The statements made in his report pertaining to his visit to Casa Grande on 11 December 2018 were merely "to confirm that the disconnection was successful and the illegal connection between the two (2) premises was not restored". (Para.12).

[23] Two additional affidavits were filed on behalf of the Respondent on 15 February 2019. The Court finds that the affidavits of Denise Jones and Shenelle Bayley are tangential to the issue at hand.

Analysis

[24] The Respondent's governing legislation provides for the establishment, constitution and functions of the Respondent (ss.4-6); its administration (ss.7-11); water and sewerage works (ss.12-18); finances (ss.19-21); accounts (ss.22-25); and miscellaneous matters (ss.26-32). The Act came into force on 08 October 1980. The Respondent is constituted as a

body corporate (s.4(2)), with a multiplicity of functions relating to the management of water resources and the supply of water (ss.5 and 6).

[25] By section 6(1), the Respondent is mandated to:

“...provide to the public a supply of potable water for domestic purposes and a potable or otherwise satisfactory supply of water for agricultural, industrial and commercial purposes and for such other purposes as are prescribed”.

Section 6(6) defines “water for industrial or commercial purposes”, when used in relation to a supply of water, as “water used in connection with any profession, trade, business or industrial or commercial enterprise”.

[26] The Applicant received a supply of water from the Respondent under the auspices of section 6. The Applicant also acknowledged that its relationship with the Respondent is a contractual relationship. (See para. [7] 3 supra). As a body corporate to which section 21 of the Interpretation Act, Cap.1 applies, the Respondent is vested with “the power to enter into contracts in its corporate name, and to do so that, in relation to third parties, the body shall be deemed to have the same powers to make contracts as an individual has”. (See s.4(2) of the Act, and s.21(1)(a) (ii) of Cap.1).

- [27] There is no evidence before the Court as to any written agreement between the parties for the supply of water to the Applicant's premises. Therefore, the Court has to interpret the powers and duties of the Respondent, and any implied terms in the contract, according to the Act and any relevant regulations made thereunder.
- [28] The Respondent is a corporate entity and a government authority. As such, its powers and duties are exercised through its officers and employees. Administrative decisions made by these persons are amenable to judicial review. The AJA allows relief in a number of areas of administrative misfeasance (see s.4); with appropriate remedies (s.5). The Applicant is claiming relief as a person whose interests are adversely affected by the Respondent's decision to disconnect its supply of water.
- [29] In order to determine whether the Applicant is entitled to the relief sought, the Court must first consider if the Respondent unlawfully exercised any of its powers or duties. The Respondent relies on Regulations 5 and 18 as the basis for its authority to disconnect the Applicant's supply of water. These provisions will be addressed seriatim.

(1) Regulation 5

[30] Regulation 5 provides that:

“(1) All pipes or other fittings necessary for the conveyance, delivery or storage of water

(a) that are to be laid on an occupier’s property; or

(b) that are to be connected to pipes and fittings belonging to the Authority

must be of a type approved by the Authority and shall be kept in a serviceable condition by the occupier at his own expense and to the satisfaction of the Authority.

(2) Pipes and fittings that are not approved by the Authority or are not kept in a serviceable condition may be removed by, or at the direction of the Authority; and the Authority may, where it considers it necessary, discontinue the supply of water to an occupier who fails to comply with this regulation”.

[31] Counsel for the Applicant argued that Regulation 5 does not address the situation before the Court. Mr. Alleyne contended that it deals with pipes, fittings and standards and does not contemplate any illegality. Counsel for the Respondent maintained that the disconnection is authorized by Regulation 5(2).

[32] The Court is not inclined to the submission by counsel for the Respondent. Regulation 5 (2) must be understood and interpreted in the

context of Regulation 5(1). The pipes and fittings referred to in Regulation 5(2) are the pipes and fittings of the type approved by the Respondent under Regulation 5(1). The word “type” is not defined in the Act or the regulations. Its ordinary meaning suggests a category or specification approved by the Respondent.

[33] To interpret Regulation 5(2) as permitting the Respondent to disconnect the water supply is at best an artificial construct. An unauthorized or illegal connection may very well utilize pipes and fittings of a type authorized by the Respondent for use on the Applicant’s premises. However, Regulation 5(2) does not penalise the use of authorized materials for an unauthorized or illegal purpose.

(2) Regulation 18

[34] Regulation 18 provides in part that:

“A person who

(a) being an occupier of property

- (i) connects, or causes or permits the connection of pipes on the property to the mains of the Authority, or
- (ii) uses, or causes or permits the use of water from a pipe on the property when he knows or ought reasonably to have known that the pipe has been

illegally connected to the mains of
the Authority;

....

is guilty of an offence and liable on summary
conviction to a fine of \$500 or to
imprisonment for 3 months”.

[35] Assuming that an illegal connection existed on the premises of the Applicant, there is no evidence that that illegal connection was also connected to the Respondent’s main. Furthermore, the penalty under Regulation 18 (a) for an illegal connection to the Respondent’s main, is criminal prosecution with a fine or period of imprisonment if convicted. There is nothing in Regulation 18 that authorizes the Respondent to disconnect the water supply if a pipe is illegally connected to the main.

Resolution

[36] The Respondent cannot successfully resist the judicial review application on the basis that it lawfully exercised powers under Regulations 5 and/or 18. But that is not the end of the matter. There is another Regulation to which neither side has referred. It is Regulation 13. The marginal note to this Regulation says “Avoidance of waste or misuse”. There are five subsections to this Regulation, and two of them are relevant to the resolution of this matter.

[37] Regulation 13 provides inter alia that:

“

(4) No person supplied with water from the Authority for purposes other than domestic purposes shall use the water for purposes other than those for which it was supplied.

(5) Where an occupier contravenes, or causes or permits the contravention of this regulation, the Authority may discontinue the water supply services of the occupier and may cease to supply the occupier with water for the duration of the contravention”.

[38] As a business enterprise, the Applicant received a supply of water for trade, business or commercial purposes on its premises. (See ss.6(1) and (6) of the Act). Regulation 13(4) prohibits the Applicant from using that supply for purposes other than the trade, business or commercial purposes occurring on its premises. The Court accepts the evidence of Reuben Sealy, as contained in his two affidavits, that the Applicant was supplying water from its premises to the adjoining premises at Knitwear Ltd. That was not the purpose for which the Respondent supplied water to the Applicant. The Applicant was using the water supplied to it by the Respondent for an unauthorized purpose.

[39] The penalty for unauthorized use is disconnection under Regulation 13 (5). The Applicant’s water supply was disconnected pursuant to the discretion contained in Regulation 13(2). Disconnection of the water

supply was the method used by the Respondent to prohibit the Applicant's use of its water supply for an unauthorized purpose. The Respondent's exercise of this discretion was neither unlawful nor unreasonable; nor did it take into account irrelevant matters. The Respondent's error was to incorrectly cite the source of its power to disconnect the Applicant's water supply.

[40] Regulation 13(5) also permits the Respondent to continue the disconnection for "the duration of the contravention". The onus then is on the Applicant to demonstrate to the Respondent that it has removed all pipes and fittings that facilitated the delivery of its water supply to the adjoining premises of Knitwear Ltd. There is no evidence before the Court that the Applicant has done so. Therefore, it cannot be said at this time that the Respondent is abusing its discretion under Regulation 13 (5).

Disposal

[41] The application is dismissed and costs are awarded to the Respondent to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court