

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Hamilton Gas Company, Limited v. The Mayor, Councillors and Burgesses of the Borough of Hamilton, from the Supreme Court of New Zealand; delivered the 18th March, 1910.

Present at the Hearing :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

SIR ARTHUR WILSON.

[Delivered by Lord Shaw.]

This Appeal is made from a Judgment of the Supreme Court of the Dominion of New Zealand of date the 26th February, 1909. That Judgment was pronounced by that Court formally and in accordance with the opinion expressed by the Court of Appeal of that Dominion, so as, it is stated, to put the proceedings in proper form for the Appeal to His Majesty in Council; and leave to appeal was given.

The Judgment accordingly to be considered is that of the Court of Appeal. That Judgment was pronounced upon a special Case stated by Mr. Goldie, who, as umpire in an arbitration between the parties, made certain alternative findings with reference to the interpretation to be placed upon the term "Gas Works and Plant," which were being taken over by the Corporation

from the Hamilton Gas Company. Other points were submitted to the judgment of the Court of Appeal and settled by it, but these are not in controversy.

The alternative upon which a very large difference of valuation depends is thus stated in the special Case :—

“At the hearing the Gas Company contended that the price to be paid for the purchase of the gas works and plant should be the commercial value thereof as a going concern, taking into consideration their present condition, rental value, earning power, and all surrounding circumstances, and not merely as on a sale of apparatus *in situ* and land and buildings, and that the arbitrators and umpire, in arriving at and determining such price, were entitled to capitalize the net annual profit or rental which, in their opinion, the Gas Company was, and might reasonably be expected to be, able and continue to earn and receive thereby and therefrom.”

On the other hand, the position of the Borough Council is thus stated :—

“The Borough Council claimed that the price should be merely the value of the gas works and plant regarded as gas works and plant *in situ* capable of earning a profit, and that this value should be arrived at—

(a) by taking the present value of the land and buildings and adding thereto what would be the present cost of the machinery and materials of a similar gas works and plant and of placing such gas works and plant *in situ* and making good the ground and deducting a sum for depreciation ; or

(b) by taking the cost of the land, buildings, gas works and plant, and of laying down the gas works and plant, and making good the ground, and deducting a sum for depreciation.”

Being stated in the briefest terms, the controversy between the two parties is accordingly this—whether the gas works and plant should be treated as merely the material thing or as truly the undertaking for which that thing existed.

This alternative, however, produces great difference in the amount of the award arrived at, and their Lordships are not surprised to observe the care with which the case has been considered by the learned Judges of the Court of Appeal. Such an alternative has not infrequently been presented in previous cases, which seem to have been fully under the consideration of that Court. Their Lordships, however, are of opinion that each of these cases, and also the present case, depended and depends, not upon any rule or principle of law of general application, but solely and entirely upon what is the just construction of the language, whether of Statute or agreement, regulating the measure and nature of the claim. Illustrations might easily be given of this fact, as, for instance, the decision in the case of *The Stockton and Middlesbrough Water Board v. The Kirkleatham Local Board*, A.C. 1893, p. 444. In that case, a Water Board constituted by a special Act was bound, when so required, to sell to the Sanitary Authority the mains, pipes and fittings belonging to the Board within that district. It was held, upon a construction of certain statutory provisions, and upon the terms above quoted, that the sum to be awarded was merely as a price for the mains, pipes and fittings themselves, and not as a compensation for the loss of statutory rights of supply as a revenue-earning undertaking. The case was treated purely as one of construction, and the same method of treatment appears in *The Toronto Street Railway Company v. The Corporation of the City of Toronto*, A.C. 1893, p. 511, and the other cases cited in the Court of Appeal. In none of these did the decision invoke any general principle whatever, except that the language employed by the parties must be carefully looked to in order to attach to it its accurate meaning.

Much reliance was placed by Counsel for the Respondents upon the view that language such as "gas works and plant" must, in the first instance, be given only its primary and natural meaning, that is to say, a meaning which is confined to the material thing and not to the business or undertaking without which that thing would disappear. In this connection, the language used by Lord Watson in *The Edinburgh Street Tramways Company v. The Lord Provost, &c., of Edinburgh*, A.C. 1894, p. 471, was referred to and with perfect propriety relied on. It is as follows:—

"I see no reason to doubt that these words 'the tramway' are capable of being so employed as to indicate that they embrace the use and occupation of the fabric as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking. But in their primary and natural sense the words appear to me to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning, as they occur in the enumeration of particulars to be valued under Section 43, I think it is incumbent upon the Appellants to show, by reference to their context or to the general scheme of the Statute, that they were intended by the legislature to have that wider significance."

Lord Watson had already classified the right of property in a tramway line as possibly of three different degrees (p. 469), stating that

"although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases."

Their Lordships do not think further reference to the authorities would carry the matter beyond the point stated.

On the 30th August, 1895, the Act of New Zealand, 59 Vict., No. 1, was passed. It is an Act "to enable the establishment of Gas Works

at the Town of Hamilton, in the Provincial District of Auckland, to supply the said Town and its Suburbs with Gas." Under that Act Henry Atkinson, of the City of Auckland, received statutory power to construct and maintain gas works, with all the incidental powers of breaking up streets and the like. Certain provisions are made with regard to the area of supply and its possible extension, and in general it may be said that the Act makes the usual provisions, which would permit of the establishment of gas works, with powers of extension of the area to be supplied, and all the provisions usual in such cases.

By Section 44 it is provided that, should the profits exceed 15 per cent. on the capital invested, a rateable reduction was to be made in the price of gas furnished, so as to ensure to Mr. Atkinson "a profit as near as may be to the prescribed rate."

By Section 45 provision is made for annual balance-sheets, showing receipts and expenditure and the total amount of capital invested. A copy of the balance-sheet was to be deposited with the Borough Council, and Mr. Atkinson, upon demand, was bound to produce to the Borough Council all his books of account and vouchers, so that the balance-sheet might be verified.

Then follows Section 46, the first two subsections of which are in these terms:—

"(1) The Hamilton Borough Council shall be entitled, at any time after the expiration of twelve years from the date of the coming into operation of this Act, to purchase the gas works and plant, at a price to be determined by arbitration.

"(2) If the said Henry Atkinson shall not have received profit from the gas works equivalent to an average of 10 per centum over the whole period from the date when gas shall first be supplied from the gas works until the date when the purchase by the

P.C.J. 230.

Hamilton Borough Council is completed by payment of the purchase money, then the arbitrators shall add to the price assessed as aforesaid a sum which, together with the profit actually received by the said Henry Atkinson would be the equivalent of such average annual profit of 10 per centum; but, in arriving at such equivalent, interest upon income shall not be computed."

In support of the argument that "the gas works and plant" fall to be construed as merely the works *in situ* capable of earning a profit, and not as equivalent to the gas works undertaking, stress was laid upon two facts—first, that the scheme of the Act was shown by sub-section (2) to be to secure for Mr. Atkinson, as, it may be, a speculative undertaker, an assured profit of 10 per cent. from the date when gas was first to be supplied until the expiration of the twelve years, when the option of taking over by the Corporation would come into effect. It was argued that this assurance of profit, *plus* the guarantee for the full value of the material, gas works and plant themselves, threw light upon the scheme of compensation and restricted the amount to be awarded by the arbitrator under the head of "gas works and plant" accordingly. On the other hand, it was argued that the provision of making up profits to 10 per cent. applied solely to the past.

In their Lordship's opinion, the stipulation in sub-section (2) as to making up profits to 10 per cent. does not afford any real assistance in the construction of the term "gas works and plant" employed in sub-section (1), and for this simple reason—that sub-section (2) provides that the difference of profit is to be added "to the price assessed as aforesaid," that is to say, to the price to be assessed for gas works and plant in sub-section (1). In short, the making up of profit to 10 per cent. forms no part of the elements or

principle of ascertainment of the price, but is expressly stated to be an addition to the price when it is ascertained.

It was further argued that the Gas Company had no franchise of supply or undertaking in the sense of either monopoly or good-will to dispose of, because of the limitations under which they stood by the Act of Parliament, they being liable to be bought out and taken over at the expiry of twelve years from the date of the Act. Their Lordships think that this argument would have had much weight if the Gas Company had been incorporated with a twelve years' life. In the present case, however, this was not so. Circumstances might have so shaped themselves in the town and district as to make it unwise for the Corporation to take over the scheme of gas supply, and the Company as undertakers might have been left—and, had the profit been small or dwindling, probably would have been left—for an indefinite period undisturbed. Such were the risks incident to the undertaking itself. Furthermore, the option to take over the undertaking at the end of twelve years was only open to the Corporation upon terms, and those terms were to make payment of a price, not definite, but to be ascertained by arbitration. It does not appear to be legitimate to introduce as a principle of assessment of such a price the fact that the Corporation were to acquire at a price to be assessed by arbitration.

These matters have been dealt with thus fully so as to clear away elements which were carefully dealt with in the arguments presented, and appear to have been treated as material by the learned Judges of the Court of Appeal. In their Lordships' view, however, they are not of assistance.

While the position of the Gas Company is measured by the language of the Statute, it is

true to add that the position of the Corporation must also be looked at in the light of their powers of acquisition. At the time of the passing of the Act of 1895 referred to, the Municipal Corporations Act in operation in New Zealand was the Statute of 1886 (50 Vict., No. 50). Under the section of that Statute applicable to lighting, provisions were made for the purchase by Town Councils of private gas works theretofore constructed in boroughs and for the sale by Gas Companies of their private undertakings to Corporations. Section 369 is to the following effect:—

“The Council may, out of any moneys which may be applied to the construction of gas works under this Act, purchase any gas works theretofore constructed in the borough; and such gas works shall, when so purchased, be deemed to be constructed under this Act.

“Where gas works are at any time established for the supply of gas in any borough under the authority of an Act of the General Assembly, it shall not be lawful for the Council to establish any other gas works to supply the same locality or any part thereof except under the authority of a special Act in that behalf.”

It is important to note that, while Town Councils are thus permitted to purchase “gas works” without any reference to the scope of that term as in the full sense of the undertaking itself, no doubt is left upon the scope of the term when the correlative section, dealing with what gas companies were to sell to the borough, is reached. That section is 370, and it is in the following terms:—

“The directors of any gas company, in pursuance, in the case of a company registered under ‘The Companies Act, 1882,’ of a special resolution of the

members passed in manner provided by that Act, and in the case of any other company of a resolution passed by a majority of three-fourths in number and value of the members present, either personally or by proxy, at a meeting specially convened, with notice of the business to be transacted, may sell and transfer to the Corporation of the Borough, on such terms as may be agreed on between the Council and the Company, all the rights, powers, and privileges, and all or any of the lands, premises, works, and other property of the Company, but subject to all the liabilities attached to the same at the time of such purchase."

It thus has become very plain that, had the Corporation of Hamilton attempted to exercise its general powers under the Statute Law of New Zealand for the acquisition of the Hamilton Gas Works, there could have been no doubt that they would have bought, not only the works themselves in the material sense, but all rights, powers and privileges, in connection therewith, and that, on the other hand, so strong were these rights, powers and privileges, that the Corporation were prohibited from establishing rival works in the same locality or any part thereof, except after obtaining the authority of the Legislature to do so by a special Act. The Corporation accordingly were apprised of the wide scope of the term "gas works" so far as the general law of New Zealand as to the acquisition of such works was concerned. On the other hand, the Hamilton Gas Company were apprised of the same fact, and in these circumstances it appears to their Lordships that, if a more limited signification of the term was to be introduced by the Hamilton Act of 1895, such limitation should plainly, and could easily, have been made in language which would have excluded either monopoly, good-will, or undertaking as such, from being included within the term "gas works and plant" employed. One limit to the profit-earning power of the undertaking does

appear in the Act, viz. : that its profits could never be declared at more than 15 per cent., any balance that might, so to speak, be earned over that figure was by anticipation drawn off for the benefit of the community in relief of the price of gas. Below that figure and down to nil or a loss—all these considerations going to its value—were elements for the arbitrator in ascertaining the price to be paid under S. 46 (1). At the price so determined the Corporation could acquire, and to that price so determined the addition, if any, as to just profits provided for in sub-section (2) fell to be made.

In their Lordships' opinion accordingly, the decision of the Court below on the point submitted in this Appeal was wrong, and they will humbly advise His Majesty that the Appeal should be allowed and that the answer to the question (*a*) put by the umpire in the special Case should be that the price to be paid for the gas works and plant and to the Appellants is the sum of £31,382 7s.

The Respondents must pay the costs of the Appeal.

In the Privy Council.

**THE HAMILTON GAS COMPANY,
LIMITED**

v.

**THE MAYOR, COUNCILLORS AND
BURGESSES OF THE BOROUGH OF
HAMILTON.**

LONDON:
Printed for His Majesty's Stationery Office,
By LOVE & MACCOMSON, LTD., Dane Street,
High Holborn, W.C.
1910.