Privy Council Appeal No. 76 *of* 1933.

The Western Power Company of Canada, Limited - - - *Appellant*

v.

The Corporation of the District of Matsqui - - - - *Respondent*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1934.

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
LORD WRIGHT.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD WRIGHT.]

This appeal is from a portion of a judgment given against the appellant, who was defendant in the Court below, in the Supreme Court of British Columbia and affirmed by the Court of Appeal of British Columbia. The portion of the judgment appealed from is in these terms :—

> " This Court doth declare that the defendant has committed a breach of the contract in the pleadings mentioned, dated the 29th March, 1913, and made between the plaintiff [now the respondent] and the Western Canada Power Company, Limited, which contract was assigned by the Western Canada Power Company, Limited, to the defendant on the first day of November, 1916, in that it has made charges for the supply of electrical energy to the plaintiff and to the inhabitants of the plaintiff Municipality greater than that paid by the District Municipality of Burnaby, in the Province of British Columbia, and its inhabitants, for the supplying of electrical energy for similar services.
>
> " And this Court doth adjudge that the defendant be and it is hereby restrained and ordered to desist from charging for the supply of electrical energy to the plaintiff and to the inhabitants of the plaintiff Municipality rates greater than that paid by any other municipality or the inhabitants thereof other than a city for the supplying of electrical energy for similar services."

The question in the appeal depends on the true construction of clause 11 of the contract dated the 29th March, 1913, which was made between the respondent, who was plaintiff in the action, and the predecessors in title of the appellant. The term appellant is used herein indifferently to describe either the actual appellant or its predecessors in title, since no distinction need be drawn for purposes of this appeal. The appellant is and was a company making and supplying electric energy for light and power in British Columbia in the vicinity of Vancouver City. In the territory served by it is the respondent Municipality. By the contract in question the respondent granted to the appellant the right and privileges to sell electrical energy for lighting, heating, power, industrial and other purposes incidental thereto within the respondent's limits for a period of forty years from the date of the contract: the appellant was given power within the respondent Municipality to erect steel towers, poles and other apparatus along streets and across or under highways " and to do all things which may be necessary in the supplying of electrical energy for lighting, industrial power, heating or other purposes," subject to the approval of the respondent's Board of Works. No monopoly rights were granted to the appellant. Clause 11 of the contract on which the present dispute turns was in these terms :—

> " The Company covenants and agrees with the Corporation that the Company will not make any charge for the supplying of electric energy to the Corporation or any of the inhabitants of the Municipality greater than that paid for similar service by any Municipality or the inhabitants thereof other than a city, and will not in any way discriminate against the Corporation or residents of the Municipality."

The respondent's complaint in the action was that in breach of that stipulation the appellant had charged and was charging to the inhabitants of Matsqui a higher rate for electrical energy than was being charged to the inhabitants of the Municipality of Burnaby.

Before dealing with the construction of the clause some facts may be stated. Matsqui and Burnaby are both municipalities under the Municipalities Incorporation Act of British Columbia : in that Act a distinction is made between City Municipalities and Township or District Municipalities, the former class consisting of municipalities of an area not exceeding 2,000 acres and of a population of not less than 100 male British subjects, the latter class consisting of municipalities of an area not defined by the Act and of at least 30 male British subjects. Both Matsqui and Burnaby are of the latter class : neither is a City Municipality. But at the date of the trial, about which date alone evidence was given, no evidence being led as to the position at the date of the contract, Burnaby was a suburban district, close to the City of Vancouver, with an area of 24,320 acres and a population of 26,000, whereas Matsqui was of larger area and sparser population,

namely, 54,542 acres and a population of 7,200. It was about 30 miles from Vancouver City and was rural in character, whereas Burnaby was a somewhat more industrial district.

The appellant's case was that it was more costly to supply electrical energy to a scattered and rural population over a large area, because greater length of cable and greater equipment were required, involving greater original cost and greater expense of upkeep, and because in various other respects the cost of distribution of power and collection of rates was greater in Matsqui than in a compact area like Burnaby. It was calculated that the distribution cost per customer was two and one-half times as much in the former as in the latter district.

Rates Schedules of charges were put in at the trial. From these Rates Schedules it appeared that distinctions were drawn on the basis of the nature of the purpose and the character of the demand of the electric energy supplied; in particular there were in the Schedules "Domestic Lighting Rates," including residence lighting, heating, cooking, according to the floor area of the consumer's house, and "Commercial Lighting Rates," for stores, offices, warehouses, workshops, and so forth, "Sign Lighting Rates," "Small Power Rates," "General Power Rates," and "Wholesale Power Rates." The Schedules applied both to Burnaby and to Matsqui, because they were issued by a combination of companies, which embraced the appellant, engaged in the supply of electrical energy; but in fact the appellant, notwithstanding that it was party to an agreement made on June 27th, 1921, under which it transferred to the British Columbia Electric Railway Company, Limited, in return for a fixed rental the operation and maintenance of its undertaking, retained its identity as a company and as the holder of the franchise under the contract with the respondent, and accordingly for the purposes of this case must be taken to have continued to be the supplier of electrical energy to the respondent Municipality and its inhabitants, whereas Burnaby was supplied by the Electric Railway Company. The Rates Schedules, which covered all the operations of this character of the combined companies, contained rates varying not only with the character and purpose of the power supplied, but also with the character of the various districts; thus different rates were respectively quoted for supplies for the same category of power to such areas as Vancouver City, Burnaby, and the respondent Municipality.

The appellant raised two main contentions of principle, each involving the construction of clause 11. The first was that the prohibition against making higher charges was limited to the charges made by the appellant itself to its various customers, municipalities and inhabitants, and did not bring into comparison charges made by other electric supply companies; the second was that the words "similar service" referred to the character of the areas supplied, according as they involved more or less costly service, and not to the character of the demand, that

is, purpose or user, as being, for instance, domestic or industrial of the electric energy supplied. These contentions call for separate discussion.

Clause 11 does not in express terms define its geographical application, nor are there words following the word " paid " defining the payees contemplated. The appellant's contention was that words are to be added by necessary implication after the word " paid " and that the words to be necessarily or reasonably added as being so implied are " to the Company "—that is, the appellant; if not, it is contended, there can be no limitation imposed save one which is world-wide. Their Lordships cannot accept that contention. No doubt words can be supplied to give effect to the obvious or apparent purpose of a contract. But this can only be if the language taken as a whole in connection with the circumstances carries with it the meaning sought to be attached to it. Unexpressed intention is of no legal effect. In their judgment the words " to the Company " would be words of specific limitation outside what can be inferred from the general tenor of the contract. If intended these words must have been expressed, but if not expressed they cannot be implied. There is here no question of rectification. The word " paid " no doubt necessarily involves that payment is made to someone, but the person obviously intended is whoever earns the payment by supplying the electric energy. To use a common phrase, these words go without saying; but to insert the name of some specific payee, such as the appellant, goes beyond what is permissible in construing the contract and adds a new term which cannot truly be said to be involved in the purpose of the contract. It is, however, further objected that the construction of the contract must be reasonable and that if the limitation of clause 11 to the appellant is not inserted, no alternative limitation is possible other than one of world-wide scope. Reasonable interpretation is certainly *prima facie* to be adopted if the words admit. But here there is, in their Lordships' judgment, a reasonable limitation which need not be expressed because it follows from the very nature of the contract—that is, a limitation to British Columbia. The distinction between city and other municipalities is a distinction drawn from the Act of British Columbia, cited above, even if it is to be found in the legislation of other Provinces; the parties were in British Columbia and the appellant's undertaking was operating in British Columbia, subject to the relevant sections of the Water Act, 1909, which applied to other such undertakings in the Province. To imply a limitation to neighbouring plants would, in their Lordships' opinion, be illegitimate as involving something specific and not necessarily involved. But the limitation to the Province flows from the nature and purpose of the contract, and must apply without express words and in the absence of clear manifestation of intention to the contrary.

It is objected that so wide a scope of comparison is unreasonable and oppressive to the appellant, since the Province covers an enormous area, and might expose the appellant to ruinous competition, because electric undertakings more favourably situated as regards natural resources and as regards conditions of demand, and perhaps even subsidised, might come into comparison. But no evidence was called to show that at the date of the contract there was any such practical danger or to show what was the position of the Province as regards electric undertakings at that date. The only evidence called had reference to conditions at the date of the trial—that is, at a date about twenty years later in a progressive Province. Even if, however, the contract may have been one which might appear improvident for the appellant to have made, yet the appellant was obtaining a valuable franchise for forty years, even though it was not a monopoly, and may well have been prepared to risk any possible competition.

Their Lordships accordingly construe the contract as meaning that the appellant will not make any charge for the supplying of electric energy greater than that paid to any person (that is, individual or company) in British Columbia for similar service by any municipality or the inhabitants thereof other than a city. The further words of clause 11 relating to discrimination do not affect the question here.

It must now be considered what is meant by "similar service." It is claimed on behalf of the appellant that "similar service" has reference to "similarity," not merely in the electric energy supplied, but in the effort and cost to the appellant in supplying it: thus the same number of kilowatt-hours of light supplied to a resident in Matsqui may—indeed, must—involve greater effort and expense to the supplier than the same number of kilowatt-hours of light supplied to a resident in Burnaby, because of the difference in the general conditions of the two places described above. "Service," it is argued, is a word apt to emphasise the operations of the supplier, not the product supplied, and is a word which fixes attention on the supplier's effort and expenditure, not on the consumer's demand or his utilisation which is something that operates after the energy is supplied. When answer is made that such a construction would render impossible any comparison between services in different municipalities except by means of elaborate investigations of local conditions affecting supply, it is replied that such enquiries are not unknown where legislation provides against undue preferences; thus, it is argued, decisions in English Courts have proceeded on the basis of such comparison of the supplier's expense or effort and have given the word "similar" the meaning for which the appellant contends. In *Metropolitan Electric Supply Company, Limited*, v. *Ginder* [1901], 2 Ch. 799, questions arose under the Electric Lighting Act, 1882, Sections 19 and 20 of which were directed against undue preference being given to any particular consumer. Section 19

provided that every person in the area was entitled to a supply on the same terms on which any other person in the area was " entitled under similar circumstances to a corresponding supply." Buckley J. held that circumstances were not similar when one consumer was on the day load and another on the night load, and that a small consumer was on a different footing from a large consumer : " The cost," said Buckley J., " to the company may be different." Again, in *Attorney-General* v. *Hackney Corporation* [1918], 1 Ch. 372, it was held that if there were circumstances which rendered it less costly or otherwise more profitable to supply A. than B., that constituted a legitimate reason for making a lower charge to A. for the same supply. These authorities, however, were concerned with different words from those in the contract between these parties ; the words were " Supply under similar circumstances for a corresponding supply." But furthermore these authorities also recognise that a dissimilarity exists in the case of the supply to users of energy for power, who as a class are entitled to be charged at a lower rate than users of supply for light. That indeed is the principle for which the respondent here contends : he argues that " similar service " is not directly concerned with cost to the company supplying or to difference in local conditions of supply, such as exist, for instance, as between urban and rural municipalities, but simply to such difference or similarity in the energy supplied—that is, the " service "—as is illustrated by the words of the contract itself. Thus in clause 11 reference is made to " lighting and power service," which may be compared with the words " electrical energy for lighting, heating, power, industrial and other purposes " in clause 1. Again, in the Rates Schedules, quoted above, different rates are charged for the different purposes or demands ; phrases are used such as " lighting service," " lighting and electric range service," " alternating-current three-phase service." In the appellant's amended defence, paragraph 7 (*a*) 3 (*a*), reference is made to " the nature of the service, whether domestic, commercial or industrial." In their Lordships' judgment, the words " similar service," used as they are in clause 11 in connection with charges for supplying electric energy, have reference to such well-known categories as have just been illustrated ; such categories determine the rates to be charged. In that way a simple basis is available for comparing charges in one municipality with those in another, and no elaborate examination of local conditions or of comparative costs to the supplying companies is required or permitted. Every Electric Supply Company is required by Section 279 of the Water Act, (R. S. B. C. 1911 ch. 239), to publish its schedule of rates, which under Section 278, are subject to the approval of the Lieutenant-Governor in Council of the Province. What, therefore, the appellant was agreeing to in 1913 was that its Schedule of Rates should not be higher than

the Schedule of Rates of any other such Company in British Columbia for "similar service"—that is, on a comparison of the detailed charges of one with the other.

This comparatively simple method of comparison was intended, in their Lordships' judgment, to avoid the risk of the appellant securing an actual, if not contractual, monopoly, and then putting up its prices, which, even if sanctioned under the Act, might still be higher than those charged elsewhere. "Similar service" is service which is not indeed identical, but corresponds in similarity in accordance with classifications adopted in a Schedule such as the Rates Schedule.

It was sought to establish a technical or customary meaning in this contract of the words "similar service." It is enough to say that the attempt completely failed and the evidence was wholly insufficient. These words are words of ordinary user and must be construed in their natural sense in view of the circumstances of the case.

As already explained, the appellant and the company supplying in Burnaby are different concerns, so that any contention based on the theory that they are identical, may be put aside.

This conclusion agrees with the reasoning of the trial Judge and of the majority of the Court of Appeal. In their Lordships' judgment the appellant committed a breach of the contract in charging a higher rate for lighting than that charged by the British Columbia Electric Railway Company, Limited, for the similar service of lighting in the Municipality of Burnaby.

It follows that, notwithstanding the able argument for the appellant of Mr. Farris which loses nothing of merit because unsuccessful, their Lordships are of opinion that the appeal should be dismissed and the appellant should pay to the respondent its costs of the appeal.

They will humbly so advise His Majesty.

In the Privy Council.

THE WESTERN POWER COMPANY OF CANADA, LIMITED

v.

THE CORPORATION OF THE DISTRICT OF MATSQUI.

DELIVERED BY LORD WRIGHT

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