

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Municipality of Bulawayo v. The Bulawayo Waterworks Company, Limited, from the Supreme Court of the Colony of the Cape of Good Hope; delivered the 18th March 1908.

Present at the Hearing:

THE EARL OF HALSBURY.

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ARTHUR WILSON.

[Delivered by Lord Macnaghten.]

1895/ The matter in controversy on this Appeal is the meaning of certain expressions contained in a memorandum of agreement dated February 28th, ~~1907~~, and made between the British South Africa Company, called "the Company," of the one part, and three gentlemen, who are called "the Contractors," of the other part.

By this agreement the Company granted to the Contractors the right to supply the inhabitants of the town of Bulawayo and its suburbs with electric light and power. In consideration of that concession the Contractors agreed to establish an electric light central station in Bulawayo and to supply light to the inhabitants on certain terms and conditions contained in the contract. They also agreed (section 20), in case the Company should desire to avail themselves of the electric light in their streets, public places, or private property, to light such streets, public places, and private property. The agreement then proceeded to specify, in a

series of sub-sections, with more or less detail, the things which the Contractors would have to do in order to carry out their undertaking, and by sub-section 10 the Contractors undertook to provide everything, whether mentioned in the contract or not, which might be necessary for the purpose of supplying the electric light to the street lamps. Then comes sub-section 11, which is in the following terms:—

“(11) In consideration whereof the said Company undertakes and agrees to pay to the said Contractors or to their assigns at such rate as will yield to the contractors a return equal to 10 per cent. over the actual cost of generating the light, payments to be made quarterly at the office of the Company in Bulawayo.”

For the purposes of this agreement the British South Africa Company is now represented by the Municipality of Bulawayo. The Bulawayo Waterworks Company, Limited, are the assigns of the original Contractors.

The agreement contemplated that the public lighting of Bulawayo would or, at any rate, might be carried out by means of a separate station and separate works. But when the Contractors were called upon to light the streets (as they were shortly after the date of the agreement), it was found more convenient to supply light for public and private purposes from one and the same centre.

At first the Municipality was content to pay the Contractors so much per unit for lighting the streets in Bulawayo. After a time, however, disputes arose and the Contractors were required to supply light in accordance with the terms of sub-section 11. Then various questions sprang up, most of which were finally decided by the High Court of Southern Rhodesia in the present action in which the Contractors were Plaintiffs. Neither party, however, was altogether satisfied with the decision of that

Court, and there was an Appeal with a Cross-Appeal to the Supreme Court of the Colony of the Cape of Good Hope. The Supreme Court dismissed both the Appeal and the Cross-Appeal. Their decree, after dealing with certain points which are not now in dispute, proceeds to declare that "the Court finds that the expression 'actual cost of generating the light' means the actual expenditure incurred for the purpose of production and distribution, and includes depreciation and insurance."

The discussion before this Board was confined to the declaration made by the Supreme Court.

What is the meaning of the expression "generating the light"? And what is included in the "actual cost" of generating the light?

Their Lordships agree with the Chief Justice in thinking that "the term 'generating the light' was intended to include not only the generation of the current, but also the transmission of the current to the points where the light is finally evolved." The language is certainly not altogether accurate, but their Lordships are satisfied that this compendious expression was intended to cover the whole process—the whole series of operations—leading up to the production of the light in the street lamps.

The next question is, what is the meaning of the "actual cost" of generating the light? In their Lordships' opinion it covers and includes all that the production of the light costs the contractors and nothing more. Does it include depreciation and insurance? As the Chief Justice says: "The cost of the plant forms part of the actual cost of generating the light, but, as the use of that plant would extend over several years, it could obviously not have been intended that the whole of that cost shall be charged during the first quarter [of the contract]. But the same objection does not exist

“ to a distribution of the actual cost of the plant
“ over the whole period of the life of such plant.
“ The effect of allowing a certain sum for
“ depreciation in the quarterly accounts of the
“ Plaintiffs would simply be to distribute the
“ actual cost of the plant over the whole period
“ during which it would, in the ordinary course,
“ be of any service in the generation of elec-
“ tricity and light.”

Their Lordships have felt more difficulty about including insurance. In the Court of first instance it was held, apparently without serious objection, that the item “rent, rates, and taxes” in respect of the electric works and buildings ought to be allowed, and the Chief Justice states that it was assumed in the Court of Appeal on both sides that, in allowing that item, the Court below intended to include the charge for insurance also. In running works of this sort insurance is practically a necessity, and so expenditure on insurance may fairly be regarded as part of the actual cost just as much as rent, rates, and taxes. On the whole their Lordships see no reason to disturb the finding of the Court of Appeal.

Their Lordships will, therefore, humbly advise His Majesty that the Appeal ought to be dismissed.

The Appellants will pay the costs of the Appeal.
