Privy Council Appeal No. 61 of 1993

Mercury Energy Limited (successor company of the former Auckland Electric Power Board) *Appellant*

v.

Electricity Corporation of New Zealand Limited *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 7TH FEBRUARY 1994. DELIVERED THE 28TH FEBRUARY 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD GOFF OF CHIEVELEY
LORD MUSTILL
LORD SLYNN OF HADLEY
LORD WOOLF

*[Delivered by **Lord Templeman**]*

There are two principal questions involved in this appeal. The first is whether proceedings for judicial review will lie against a New Zealand State enterprise. If a remedy by way of judicial review is obtainable against a State enterprise, then the second question is whether in the present proceedings the appellant should be allowed to proceed with such a claim.

By the State-Owned Enterprises Act 1986, the respondent, Electricity Corporation of New Zealand Limited ("the Corporation") was designated a State enterprise. Pursuant to the Act, responsibility for the generation and transmission of bulk electricity throughout New Zealand was transferred from the electricity department of the Government to the Corporation.

By section 4 of the Act:-

"(1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be -

(a) As profitable and efficient as comparable businesses that are not owned by the Crown; and

(b) A good employer; and

(c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so."

Pursuant to the Act, the Corporation is registered under the Companies Act 1955 and its shares are held by the Minister of Finance and the Minister for the time being responsible to the House of Representatives for the Corporation. The current annual statement of corporate intent delivered by the Corporation to the shareholding Ministers in accordance with section 14 of the Act and laid before the House of Representatives as required by the Act commits the Corporation to provide:-

"Customers with quality electricity services at competitive prices.

Shareholders with favourable returns earned by competitive performance.

Staff with job satisfaction in serving customers, the Company and New Zealand."

The Corporation distributes bulk electric power throughout the country to local supply authorities. The appellant, Mercury Energy Limited ("Mercury"), distributes that power to some 583,000 domestic, commercial and industrial users in Greater Auckland.

By a written agreement dated 19th November 1987 supplemented by agreements dated 23rd December 1988, 25th July 1990, 3rd October 1991 and 20th October 1992 ("the contractual arrangements"), the Corporation agreed to supply bulk electricity to Mercury on the terms therein mentioned and at prices which have been agreed down to the year ending 31st March 1993. By a letter dated 27th March 1992 the Corporation gave notice to determine the contractual arrangements on 31st March 1993. In these proceedings Mercury claim that upon the true construction of the contractual arrangements, the Corporation had no power to determine the contractual arrangements. This dispute remains to be resolved at the trial of this action due to be heard in May of this year. In the meantime the Corporation has continued to provide Mercury with bulk electricity and in this action conceded that it is bound to do so at fair and reasonable prices. In recording this concession their Lordships must not be taken to accept or reject the "common ground" statement accepted by the Court of Appeal, that in default of agreement "a fair and reasonable price would ultimately be fixed at law". This statement would result in commercial decisions confided by

Parliament to the members of the Corporation by section 4 of the Act of 1986 becoming decisions made by members of the High Court or the Court of Appeal. In the absence of argument their Lordships are unable to express any views with regard to the authorities which are said to justify the statement or as to the applicability of those authorities to a State enterprise established by the Act of 1986.

The statement of claim made eight separate assertions that the notice of termination dated 27th March 1992 was either invalid, incompetent, ineffective or unauthorised. Mercury pleaded that the notice was in breach of express or implied terms of the contractual arrangements, in breach of statutory duty, an abuse of monopoly and vitiated by administrative impropriety. The Court of Appeal struck out all the causes of action pleaded except those based on express or implied contractual terms and Mercury now appeal to Her Majesty in Council.

The statement of claim, as amended by agreement before the Board, seeks a remedy for administrative impropriety by way of an application for judicial review pursuant to the Judicature Amendment Act 1972 or pursuant to common law. By section 4 of the Act of 1972:-

> "(1) On an application ... which may be called an application for review, the High Court may, ... grant, in relation to the exercise, refusal to exercise or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition or certiorari or for a declaration or injunction, against that person in any such proceedings."

Counsel for the Corporation submitted that the decision made by the Corporation to determine the contractual arrangements was not in relation to the exercise of a statutory power within the Act of 1972. Counsel however conceded that the Act of 1972 supplemented but did not derogate from the power of the court to grant judicial review at common law by way of mandamus, prohibition or certiorari. Their Lordships are content to accept this concession and in the result the first question which must now be determined is whether the Corporation is a body against which relief can be obtained by judicial review.

Judicial review was a judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong. A State enterprise is registered under the Companies Act 1955, it is accountable to its shareholders and carries on commercial activities. The power of the Corporation to determine the contractual arrangements was derived from contract and

not from statute. The Court of Appeal concluded that the decision taken by the Corporation to terminate the contractual arrangements by the notice dated 27th March 1992 was no different from any other commercial decision taken by a private body and was not liable to be quashed by judicial review under the Act of 1972. No argument was presented to the Court of Appeal based on the common law remedy of certiorari to quash a decision.

A State enterprise is a public body; its shares are held by Ministers who are responsible to the House of Representatives and accountable to the electorate. The Corporation carries on its business in the interests of the public. Decisions made in the public interest by the Corporation, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the Corporation are in principle amenable to judicial review both under the Act of 1972 as amended and under the common law.

It does not follow that Mercury are entitled to proceed with their claim for judicial review in the present case. Judicial review involves interference by the court with a decision made by a person or body empowered by Parliament or the governing law to reach that decision in the public interest. A litigant may only invoke interference by the court with such a decision if the litigant pleads plausible allegations which, if substantiated at the trial, will demonstrate that the decision was not reached in accordance with law. In *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155 at 1173 Lord Brightman said:-

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will ... under the guise of preventing the abuse of power, be itself guilty of usurping power."

In *Regina v. Independent Television Commission ex parte TSW Broadcasting Limited* in a speech delivered on 26th March 1992 Lord Templeman said:-

> "Parliament may by statute confer powers and discretions and impose duties on a decision-maker who may be an individual, a body of persons or a corporation ... Where Parliament has not provided for an appeal from a decision-maker the courts must not invent an appeal machinery. ... The courts have invented the remedies of judicial review not to provide an appeal machinery but to ensure that the decision-maker does not exceed or abuse his powers."

The principles upon which the court is permitted to interfere with a decision of a decision-maker are to be found in the definitive judgment of Lord Greene M.R. in *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 ("the *Wednesbury* case"). The *Wednesbury* case involved a local authority

exercising a statutory discretion to grant cinema licences. The principles apply equally to the Corporation exercising a discretion to terminate a contract. Lord Greene M.R. said at pages 228-230 that the courts:-

> "... can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. ... It is not to be assumed *prima facie* that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. ... it must always be remembered that the court is not a court of appeal. ... the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion ... is an absolute one and cannot be questioned in any court of law.
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> What then are those principles? They are well understood. ... The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. ... Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. ... It is true the discretion must be exercised reasonably. ... Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration

matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

... It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter ... is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming ... (Counsel) in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether."

By and pursuant to the Act of 1986, the Corporation is empowered to operate the business of generating and distributing bulk electricity and for that purpose to enter into and determine contracts with customers and others. It was for the Corporation and nobody else to decide in its discretion whether the contractual arrangements with Mercury should be allowed to continue or should be determined. The court can only interfere if Mercury allege and prove that the decision was not made according to law. The decision which is impugned is the decision to terminate the contractual arrangements. There has been no decision to refuse to supply electricity to Mercury at a price which the Corporation believes to be reasonable having regard to its statutory principal objective and to its statement of corporate intent.

Mercury claimed relief by way of judicial review to quash the decision of the Corporation to terminate the contractual arrangements by the notice dated 27th March 1992. Paragraph 32 of the statement of claim pleads that, in reaching that decision, the Corporation, given the terms of the contractual arrangements and having regard to the Corporation's effective monopoly position, acted:-

"(a) Unreasonably; and/or

(b) In breach of good faith, and/or from improper motives and/or with ulterior objects (notably, a desire to increase prices to the plaintiff above 'fair and reasonable' levels); and/or

(c) In breach of its express statutory duty in terms of section 4(1)(c) State-Owned Enterprises Act 1986 ..."

The terms of the contractual arrangements and the existence of a monopoly are no indication that when the Corporation decided to terminate the contractual arrangements they were acting unreasonably in the sense indicated by the *Wednesbury* case or that the Corporation were acting in bad faith or for improper or ulterior motives. The express statutory duty of the Corporation is to pursue its principal objective of operating as a successful business, by becoming profitable and efficient, by being a good employer and by exhibiting a sense of social responsibility. It was for the Corporation to determine whether its principal objective would best be served by allowing the contractual arrangements to continue or by terminating the contractual arrangements. The general and vague assertions of impropriety in paragraph 32 are not supported by any reference to a single alleged fact. The Corporation sought particulars of paragraph 32. The reply dated 3rd August 1992 consisted of unhelpful references to paragraphs in the statement of claim, a reference to the contractual arrangements and the repetition of the allegation of improper motives unsupported by a single fact. Ironically, Mercury complained that the Corporation desired "to compel the plaintiff to accept a replacement contract on new terms more consistent with, or similar to, those accepted by other electrical supply authorities ...". There is nothing in the statement of claim or the particulars which supports a claim to judicial review.

It does not seem likely that a decision by a State enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith. Increases in prices whether by state-owned or private monopolies or by powerful traders may be subjected to voluntary or common law or legislative control or may be uncontrolled. Where a State enterprise is concerned, the shareholding Ministers may exercise powers to ensure directly or indirectly that there are no price increases which the Ministers regard as excessive. Retribution for excessive prices is liable to be exacted on the directors of the State enterprises at the hands of the Ministers. Retribution is liable to be exacted on the Ministers at the hands of the House of Representatives and on the elected members of the House of Representatives at the hands of the electorate. Industrial disputes over prices and other related matters

can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of the law.

The statement of claim, which is more remarkable for repetition and abuse than for clarity and facts, asserts seven causes of action, four in contract and three based on breach of statutory duty, abuse of a monopoly position and administrative impropriety. There are seven separate prayers in identical terms for a declaration that the contractual arrangements "remain extant and effective, and will continue to subsist until the commencement of a new substantive agreement to be negotiated between the plaintiff and the defendant". There is nothing in the Act of 1986 which imposes a statutory duty on the Corporation to allow the contractual arrangements to continue. If abuse of a monopoly is actionable Mercury produced no facts in support of the allegation of abuse. The lawful termination of a contract is not an abuse. Refusal to supply bulk electricity or to supply only at an excessive price might be an abuse but no such refusal has been threatened. Mercury produced no facts to support an allegation of administrative impropriety.

The causes of action based on breach of statutory duty, abuse of a monopoly position and administrative impropriety are only relevant if the causes of action based on contract are rejected. If the causes of action based on contract are rejected, the other causes of action will only constitute attempts to obtain, by the declaration sought, specific performance of a non-existing contract. The exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged.

At the conclusion of the hearing of this appeal their Lordships announced that they would humbly advise Her Majesty to dismiss the appeal for reasons which they now give. Mercury must pay the costs of the Corporation of this appeal.