THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal S-231/2014
Civil Appeal S-244/2014

BETWEEN

The Minister of Energy and Energy Affairs

Appellant

AND

Adesh Maharaj and Prakash Maharaj

Respondents

PANEL: **I. Archie, C.J.**
P. Jamadar, J.A.
N. Bereaux, J.A.

APPEARANCES:

Mr. Russel Martineau S.C., Mr. K. Ramkissoon instructed by Mrs. Zelica Haynes-Soo Hon for the Appellant.

Mr. Ramesh Lawrence-Maharaj S.C., Ms. V. Maharaj instructed by Mr. Rajiv Katwaroo for the Respondents.

Date Delivered: 3rd November, 2017.

Delivered by Jamadar, J.A.

JUDGMENT

Introduction

1. I have had the benefit of reading a draft of the judgment of the Honourable Chief Justice. Justice Bereaux agrees with both the reasoning and result (and has also added some of his own comments). I also agree with parts of the analysis, but I am however constrained to disagree with the final outcomes that my colleagues have arrived at.

2. The judgment of the Chief Justice sets out in detail a concise statement of the relevant facts and of the parties positions, as well as the Trial Judge's findings and conclusions, and the grounds of appeal. I do not need to restate any of these.

3. I also wish to record my deepest apologies for the delay in the delivery of this judgment of the Court of Appeal. Collective responsibility demands that I share responsibility.

4. In these circumstances and for pragmatic reasons I will only summarize my position.

Valid and Enforceable De Facto Licences

5. I agree that the two Respondents did have valid and enforceable de facto licences. In my opinion the Trial Judge's findings of fact and conclusions on this issue have not been impeached – see, paragraphs 4 – 10 and 24 – 40 of the judgment. The Judge examined the history, representations and conduct of all the parties in the context of their historical relationships and concluded that, both as a matter of fact and law, the Respondents were the holders of de facto licences to operate service stations, with legitimate expectations to be treated accordingly, and that the Appellant was estopped from denying this. On the facts and in the circumstances, I can find no legitimate basis for concluding that the judge was wrong or in error.

6. On the issue of estoppel in public law, the comments of Lord Denning M.R. in **Wells v Minister of Housing**[1] are apposite:

> **Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on technicalities;** and this is a technicality, to be sure. We were told that for many years the planning authorities, including the Minister himself, have written letters on the same lines as the letter of March 1, 1963. It has been their practice to tell applicants that no planning permission is necessary. Are they now to be allowed to say that this practice was all wrong and their letters were of no effect? I do not think so. **I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid.**

7. In both of these appeals, the Trial Judge held that the Appellant was estopped from denying the existence of a valid licence on the basis that no written licence document had been signed. The estoppel was based in circumstances where the Respondents were given permission to operate, paid the necessary licence fees and were issued receipts, and were in fact treated as licencees (even in relation to the purported suspension of their licences). Indeed, this finding was based on evidence of a widespread practice, even a policy, of the Appellant. In fact the estoppel in these appeals also does not interfere with the Appellant performing its public duty; it operates rather to prevent the Appellant relying on a technicality to deny what it had previously represented to be true in relation to the Respondents being licencees.

[1] [1967] 1 WLR 1000 at 1007. And see the comments of Megaw L.J. in **Western Fish Products v Penwith DC** [1981] 2 All ER 204, at pages 220 – 222. Of note, Megaw L.J. in reaffirming the general principle that a statutory body cannot be estopped from performing its statutory duties, acknowledged that there were two established exceptions. The second of these he explained as follows (at page 222): "If a planning authority waives a procedural requirement relating to any application made to it for the exercise of its statutory powers, it may be estopped from relying on lack of formality" – citing **Wells v Minister of Housing**. [The limitations expressed by Magaw L.J. are in the context of planning permission cases, which comprise a special category of cases.]

8. On the issue of legitimate expectation, it is trite, that a settled course of conduct (as the Trial Judge found there was) can be the basis for concluding that there was a legitimate expectation that a certain process would be followed – in this case, that where there were complaints of non-compliance by licencees, that they would be granted an allowance of reasonable time to take corrective measures.[2]

9. These factual circumstances and this legal status are, in my opinion, the foundations of any analysis. They bear directly on the assessment of the treatment meted out to the Respondents and the interpretation and application of the relevant principles of review. In relation to these principles, there is also little disagreement among us. It is really in the application of these review principles in the particular circumstances of these appeals, that I have come to a different conclusion.

Implied Power to Suspend

10. I also agree that the Appellant (The Minister of Energy and Energy Affairs **(**MEEA)), as a question of law, had an implied power to suspend operations at these two service stations, where as in the circumstances there were no written licences to operate the service stations and where the justification for exercising the power included allegedly urgent public safety and institutional integrity considerations. The statutory underpinning for this implied power is s. 45 (3) (c) of the Interpretation Act: "... where a written law confers power - (c) to approve any person or thing, such power shall include power to withdraw approval thereof"'. The power is not to be found specifically in s. 17 (1) – (5) of the Petroleum Act per se. And, it is not contained in the standard form licence issued by the Appellant, as the Trial judge correctly concluded. The President of the Republic may however order 'temporary discontinuance' of the operations provided for in the licences (s. 17(6) of the Petroleum Act).[3] We also all agree on all of this. In my opinion however and in such circumstances, the exercise of this kind of 'unregulated' power must be fairly, reasonably and proportionately exercised and must also be very carefully scrutinized for arbitrariness, excess and abuse; as well as for lack of reasonableness and proportionality.

[2] See paragraphs 69 to 71 of the judgment.
[3] See paragraphs 47 to 52 of the judgment.

11. That is to say, unregulated and unfettered power to suspend, withdraw or revoke a licence to run service stations such as the Respondents, in the circumstances that must exist to facilitate the setting up, maintenance and running of same - including the economic and human resource investments and commitments to do so (all relevant to the potential impact/effects of any such exercise of power), must be subject to robust principles of fairness, reasonableness and propriety. Effectively shutting down such a service station has real impact, on the real lives, of real people, and can have lasting and irreparable consequences. In my opinion and in the circumstances of these appeals, the threshold question is therefore: Whether the actions taken by the MEEA were reasonable, fair and proportionate - necessary, suitable, and not excessive?

Parting Company

12. It is on the answer to this question that I most respectfully part company with my colleagues. First and as a matter of law, we are not to overturn the Trial Judge unless we can conclude, based on the undisputed facts and her findings/inferences of fact, and in light of the applicable legal principles, that her core assessments and conclusions were clearly erroneous. Though clothed in the garbs of legal jargon, what the Trial Judge found on the facts of these appeals, was that the decision to suspend the Respondents licences/operations and to effectively deny them a reasonable opportunity to explain, address and/or remedy the several gaps in operational processes and standards at the two service stations, in the circumstances of the suspensions, amounted to an effective and permanent 'shut down' of the service stations[4] and was contrary to a practice settled by course of conduct and therefore to the principles of good public administration. In my opinion, the Appellant has not demonstrated (within the margin of appreciation to be afforded Trial judges in relation to fact finding),[5] that the Trial Judge's findings and inferences on the facts were plainly

[4] See paragraphs 45 and 46 of the judgment.

[5] See, **Petroleum Company of Trinidad and Tobago Limited v Ryan** [2017] UKPC 30, at paragraph 15: Both sides recognised the familiar limitations of the scope for an appellate court to interfere with findings of fact by the trial judge. It is sufficient to refer to Lord Reed's summary in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, para 67:

> "67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will

wrong. These findings and inferences therefore stand as stated in the Trial Judge's thorough assessment of the facts - and are adequately set out in the judgment of the Chief Justice. Speaking for myself, I have found the Trial Judge's findings of fact and her inferences to be reasonable on the available evidence and in the circumstances of these matters taken in context (and based no doubt on an acute appreciation of the local *sitz im leben*).

Prakash Maharaj

13. The 28th November, 2012 visit revealed ten (10) alleged safety and compliance concerns. All of these, but for one - 'possible use of fuel in terrorist activities', were both:

(i) legitimate causes for concern and suspension of activities in the public interest and for the protection of institutional integrity/reputation; and also

(ii) capable of being potentially remedied by this Respondent and tested/verified by the Appellant within an ascertainable and certain timeframe (if necessary) and according to set standards.

14. Following this visit the concerns of the MEEA were reduced into writing and sent to Prakash Maharaj. In this regard see the letter of the 18th December, 2012 and the five (5) citations in the formal Notice of Non-Compliance. These were as follows:

a. unauthorized warehouse;
b. unapproved petroleum storage;
c. unsafe conditions at the station;
d. unapproved modifications at the station;
e. unauthorized petroleum fluids found at service station.

15. On the available evidence, all of these citations could also possibly have been addressed and remedial steps taken and verified according to set standards (and within specified time-frames if this was deemed necessary). Noteworthy is that the concern of 'use of fuel in terrorist activities' was not listed.

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interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

16. Given these citations and in the circumstances of these appeals, what was necessary (applying an aims/means test for proportionality), was the adequately particularized disclosure of concerns and a fair, reasonable and proportionate opportunity to remedy them. Neither was effectively provided. That is to say, in my opinion, what would have been reasonable and proportionate in these circumstances, would have been for the Appellant to indicate to this Respondent, that he had an opportunity to explain and/or address and remedy the Non-Compliance findings/complaints (which ought to have been accompanied by sufficient, proper/adequate and timely particularisation of the existing gaps and of the required standards/expectations to be met); and that upon satisfactory objective and reasonable acceptance or verification, resumption of service would be considered and/or permitted. The Trial Judge found that no such opportunity was given.

17. In my opinion therefore, the actions taken by the MEEA in the circumstances as found by the Judge, were disproportionate - unreasonable and excessive. They were neither entirely necessary nor circumstantially suitable to achieve the stated aims (which were unquestionably legitimate) and were in fact excessive and therefore also unreasonable in relation to these. This is so specifically because no reasonable and sufficiently proximate opportunity, with sufficient particulars of complaints and standards of what was required to remedy the situation, was given to this Respondent. The citations lacked sufficient particularity for a meaningful response with respect to either explanation or remedy.[6] To this extent they were also arbitrary and unfair.[7]

[6] This lack of sufficient particularity is self-evident. What rendered the warehouse 'unauthorized'? Which or what petroleum storage was 'unapproved' and why? What made conditions at the service station 'unsafe' and why? Which/what modifications were 'unapproved' and why? What were the 'unauthorized petroleum fluids found', and where? And what of the requisite standards and/or expectations to be met? These are not matters which expertise would shed light on; they are matters which common sense demands need to be explained in order to be fully understood, so that they may be explained and/or remedied.

[7] See paragraphs 68 to 73 of the trial judge's judgment, where the trial judge found as a matter of fact, that there was an established practice to supply information of alleged breaches and to allow reasonable time to take corrective measures, and that these were not cases which justified the denial of such opportunities on the bases of urgency and/or immanent risk.

Adesh Maharaj

18. A similar analysis applies to Adesh Maharaj given the Judge's findings, the stated observed breaches allegedly seen on the 28th November, 2012 and the 1st December, 2012, and the contents of the Non-Compliance Notice of the 21st February, 2013. This latter document listed four (4) citations as follows:

a. unauthorized warehouse;
b. unapproved petroleum storage;
c. unacceptable health and safety risk management policies;
d. questionable ability to manage the King's Wharf Service Station.

As with Prakash Maharaj, these citations self-evidently lacked sufficient particularity for a meaningful response with respect to either explanation or remedy.

The Fundamental Issue

19. Therefore the fundamental issue in these appeals reduces itself to the question: What fair, reasonable and proportionate opportunities were given to the Respondents, as the holders of valid and enforceable licences, to remedy alleged concerns and gaps in operational process, structures, policies and standards, and to address institutional integrity and reputation (all of which could have potentially been remedied on the available evidence – within fixed timeframes if necessary – once sufficient particularity of gaps, standards and expectations were identified)? To suspend all activities in circumstances which effectively denied the Respondents any effective opportunity to address the cited concerns was, in my opinion, unfair, unreasonable, arbitrary and disproportionate. Suspension of activities with a proximate, accompanying and reasonable opportunity to explain and/or address and remedy the stated complaints (properly particularized), is what would have been fair, reasonable and proportionate in the circumstances of these appeals. Such a course (the 'means') would have satisfied the articulated (and legitimate) concerns for public and facility safety, product quality and integrity, and institutional reputation (the 'aims'). Such a course would also have been helpfully pragmatic and aligned with the MEEA's claimed duties and responsibilities. It would have struck a fair balance between duty and opportunity.

Urgency

20. The Trial Judge acknowledged that in situations of urgency, a public body could override established procedural fairness and natural justice practices and procedures that would normally be afforded to a party. She however concluded that 'these are not such cases'.[8] On the assumption that this is a conclusion of fact that has not been impeached, I agree. Urgency may be a legitimate basis for overriding procedural fairness and natural justice requirements.[9] However, the exercise of any such decision making discretionary power, in this case the power of suspension/revocation, must be exercised fairly, reasonably and proportionately – having regard to the purpose (aims) of the proposed action, the means being considered to achieve these aims, and the foreseeable effects, particularly on the parties who are most directly affected. This balance is to be tested objectively. For the reasons given above, I am of the opinion, that in the circumstances of these appeals, the overall nature and effects of the suspension of operations at both service stations, made the decisions both unreasonable and disproportionate even if there was some initial justifiable urgency to act.

Conclusion

21. In these circumstances I cannot agree with my colleagues on the outcomes they have arrived at. I would have allowed the appeals in part, setting aside the declaration of entitlement to resumption of operations. I would also have varied the Judge's other orders to reflect what I have stated above, in relation to providing a fair, reasonable and timely opportunity to the Respondents to explain and/or remedy the stated complaints cited in the two Notices of Non-Compliance; and in the case of remedy, that upon satisfactory objective and reasonable explanation or verification, resumption of service to be duly considered and/or permitted.

22. [This short analysis does not include any detailed consideration of the natural justice requirements, in the context of de facto licence holders such as the Respondents,

[8] At paragraph 72 of the judgment.
[9] See **R v Secretary of State for Transport, ex parte Pegasus Holdings (London) Ltd** [1988] 1 WLR 990.

that arise in the circumstances of these appeals. However, in my opinion, it does not stand to reason in the circumstances of these appeals, that the initial urgency to suspend operations in the interest of public safety, product integrity, and institutional reputation etc. (even if justifiable), also reasonably necessitated a denial of a fair and proximate opportunity to participate in an enquiry and/or the decision making process with respect to recommendations. Both could co-exist, albeit subsequent to any initial suspension, yet sufficiently proximate to its occurrence, and in so doing public law standards of fairness and natural justice could be achieved. The resolution of this issue is however not necessary for the outcome that I prefer and is in a sense already somewhat interwoven into my analysis above.]

Peter Jamadar
Justice of Appeal