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R (THAMES WATER UTILITIES LTD) v WATER SERVICES REGULATORY AUTHORITY

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REGULATORY AUTHORITY [2010] EWHC 3331 (ADMIN)

OWAIN DRAPER
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Mr Justice Mitting was asked in this case to hold that a decision by the Water Services Regulatory Authority (“Ofwat”) to appoint a company as the water and sewerage undertaker for a brownfield site in London was unlawful as falling outwith the statutory authority granted to Ofwat by section 7(4) of the Water Industry Act 1991 (“the Act”).

It was the first time that a court has considered the application of the legislation governing the “inset appointment” regime to a large brownfield site. The case raised several difficult points of statutory construction, and the Judge granted permission to appeal to Court of Appeal on the two key issues.

In light of this and the potential significance of the judgment (if upheld on appeal), it is surprising that the case has not as yet been reported.

SUMMARY FACTS

Thames Water Utilities Limited (“TUWL”), the claimant, is the statutory water and sewerage undertaker for London. It challenged in this judicial review the appointment by Ofwat of another company (and relative newcomer), Independent Water Networks Limited (“IWNL”) as water and sewerage undertaker for an area amounting to most of a 67 acre brownfield site to the north of King’s Cross Station. The decision challenged effected an “inset appointment”, meaning that IWNL replaced TUWL in respect of the area specified in the appointment.

The site in question, which contained mostly derelict land and buildings, was owned by trustees on behalf of a partnership of site owners and a developer; a subsidiary of Argent Group PLC, and managed by another subsidiary, Argent (King's Cross) ("Argent"). Except for the water supply to three un-demolished buildings and the surface water drainage to part of the development site, all water and sewerage connections to the buildings and all other parts of the development site had been disconnected.

Argent had embarked upon the comprehensive redevelopment of the site with a view to building 4.9 million square feet of office space in 25 new buildings, 500,000 square feet of retail space, 2500 new dwellings and the University of Arts London. Argent appointed companies within the corporate group of which IWNL is a part to be the utility companies for substantially the whole of the development site. It supported IWNL in its applications to Ofwat to be appointed the water and sewerage undertaker for the site as defined in its applications.

THE STATUTORY TESTS AND THE DECISIONS

The statutory tests

The Act provides, as relevant, two grounds on which a company may apply to replace the incumbent statutory supplier in respect of part of that supplier's area. These are:

- (1) under section 7(4)(b), where the appointment or variation relates to parts of the area served by the incumbent "*none of the premises in which [part(s)] is served by*" the incumbent; ("the unserved site criterion")
- (2) under section 7(4)(bb) and section 7(5), where the appointment or variation relates only to parts of the area served by the incumbent and in relation to "*each of the premises*" the conditions in subsection (5) are met, which are (as relevant):
 - that "*the premises are or are likely to be supplied with not less than the 50 megalitres of water in any period of 12 months*"; and
 - that "*the person who is the customer in relation to the premises consents in writing to the appointment or variation.*" ("the large user criterion")

Ofwat required IWNL to obtain an independent report to demonstrate that the conditions

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of appointment were satisfied. As a result of the findings in the three reports submitted by IWNL, and for the purpose of the application, the boundaries of the development site were redrawn to exclude certain buildings, some or all of which continued to be supplied with water and sewerage services by TWUL.

IWNL applied under the unserved site criterion in July 2009 under the large user criterion in November 2009.

The decisions

In April 2010, Ofwat decided to allow both the application under the unserved site criterion in respect of water services and the application under the large user criterion in respect of water and sewerage services. It found that the statutory tests were fulfilled, and exercised its discretion in favour of IWNL.

THE JUDGMENT

Mr Justice Mitting identified as the first issue the true meaning of the word “premises” in section 7 of the Act. Ofwat had taken the whole of the site subject to the application to be a single premises; TUWL contended that this was a mistake of law, not least because the Act refers to the requirements being met in respect of “each of the premises” subject to the application.

The meaning of “premises”

The Judge started from the OED meaning of the word: “*a house or building within its grounds and other appurtenances*”.

He considered, however, that the usages and definitions of the “*premises*” in sections 55 and 98 made clear that the term was intended in the Act as whole to include land other than (and/or not containing) buildings, relying on the principle of statutory interpretation that a word is to be given the same meaning throughout a piece of legislation unless the fact of its having different meanings in different contexts is made clear:

The Judge accepted, therefore, that Ofwat was right to adopt the approach in its published documents that “[d]epending on the context “*premises*” may mean buildings, land or both.” This was accepted by TUWL in its submissions, and was consistent with the observations of May LJ in *Thames Water Utilities Limited v Hampstead Homes (London) Limited* [2003] 1 WLR 198 (at [36]).

The meaning of “unserved”

It was common ground that the unserved site criterion could be met in respect of greenfield sites and other sites that had never been supplied by the statutory water and sewerage undertaker: TUWL argued that the Act ought to read so as to provide protection to incumbent suppliers, and that the unserved site criterion could, therefore, be met only where the site had never been supplied.

The Judge held that there was no such requirement in the Act, and that the draftsman could easily have added the words “or have ever been supplied”, had that been the Parliamentary intention. Accordingly, the test could be met in respect of brownfield sites such as that in issue. On an application of that type:

“...Ofwat would be entitled to take into account whether and for how long water and sewerage services have not been supplied to the premises and, if so, why. The demolition of buildings originally supplied and the permanent disconnection of private infrastructure via which they were supplied will be highly relevant factors pointing to the existence of the necessary state of affairs.” (Judgment, para. 24)

Was the development site “unserved”?

Mr Justice Mitting observed that Ofwat had not set out specifically its reasons for concluding that the site was unserved, but held that “the circumstances in which it made its decision, and the reasons for it” were clear. In particular:

“It had always been intended by Argent that save for external structures (the walls of gutted buildings) the application site should be cleared for comprehensive rebuilding and redevelopment. This is what is being done. In those circumstances Ofwat were entitled to conclude that a state of affairs existed on this brownfield site under which no part of it was supplied with water by TWUL. Its decision on that application is unimpeachable.” (Judgment, para. 27).

The large user criterion

The requirements of the large user criterion must be met in respect of “each of [the] premises” (section 7(4)(bb)). This was relied upon by TUWL in arguing that:

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- i. the “premises” in respect of which the volume of water must be likely to be supplied meant the buildings and land which would be occupied by customers when they were built and in receipt of a water supply; and
- ii. the “customer” (who must consent) referred to in section 7(5)(b) was therefore the occupier of such a building and land, not Argent.

The Judge rejected these arguments, relying first on the definition of “customer” in section 219 as showing that the term must mean the customer of the incumbent supplier (here, Argent as TUWL’s customer; rather than the future owners of the buildings to be developed). Ofwat was right, it was held, to argue that it must decide whether or not to make an appointment by reference to circumstances which exist at the date of the appointment, except when section 7(5) provides otherwise; accordingly, the only person of whom consent could have been required was Argent, and that consent had been given.

As to the requirement as to the volume of water to be supplied to the premises (i.e. the site as defined in the applications), the Judge held that Ofwat was entitled to conclude that the site would receive the minimum supply.

Permission to appeal

Mr Justice Mitting granted permission to appeal on both issues, reasoning that it would be “pointless” to refuse permission to appeal on the first issue in light of his decision that TUWL had on the second issue, which he had found more difficult, a realistic prospect of success.

COMMENTS

There were before the Court detailed submissions as to the approach to adopt to regulatory decisions of this nature, and on the importance to the interpretation of the statutory words (if any) of Ofwat’s duty to promote competition. The Judge was able to decide the issues without any reference to these submissions

In light of the fact that neither party argued on the second issue that the literal meaning of the statutory words was to be applied, there must be scope for the Court of Appeal to base its reasoning upon that which it identifies as the purpose of “inset appointments” in the statutory scheme. The Court of Appeal may, for instance, identify in the Act and rely upon an underlying policy objective with regard to competition in the supply the water and

sewerage services; alternatively, it may regard the Judge's approach as creating wrongly a broad discretion to introduce new suppliers where the statutory words create only narrow exceptions to the normal position of supply by the statutory undertaker.

Kassie Smith appeared for Thames Water Utilities Limited
Ben Rayment appeared for Independent Water Networks Limited