The Court of Appeal for Bermuda

CIVIL APPEAL No. 21 of 2014

Between:

THE CORPORATION OF HAMILTON

Appellant

-v-

THE ATTORNEY GENERAL

Respondent

and

THE CENTRE FOR JUSTICE

Intervener

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Mark Diel, Marshall Diel & Myers, for the Appellant
Gregory Howard, Attorney General's Chambers, for the 1st Respondent
Alex Potts, Sedgwick Chudleigh Ltd, for the 2nd Respondent

Date of Hearing: **10 March 2017**

Date of Judgment: **24 March 2017**

JUDGMENT

Baker, President

1. At the heart of this appeal lies the Municipalities (Hamilton Pay and Display Parking Vehicle Clamping) Ordinance 2007 ("The 2007 Ordinance"). This was made by the Corporation of Hamilton under section 38 of the Municipalities Act 1923: ("The 1923 Act"). The first question is whether its making complied with section 38 (3) of the 1923 Act.

2. At the material time section 38(3) provided:

   The conditions subject whereto Ordinances may be made are as follows:

   (a) Ordinances shall not be repugnant to any Act.

   (b) Ordinances shall be passed by a majority of the Common Council and by a majority of the Aldermen and shall be assented to by the Mayor.

   (c) Ordinances shall, before coming into force, be published in the Gazette.

   (d) The alternative resolution procedure shall apply to any Ordinance levying port dues on ships or wharfage on goods, shed tax, tax, assessment charge or toll.

3. The critical question is whether, as required by section 38(3)(c), the 2007 Ordinance was published in the Gazette. The Ordinance is a detailed document, eleven paragraphs in length and purports on its face to be a Bermuda Statutory Instrument. It plainly is a statutory instrument because it falls within the wide definition of statutory instrument in section 1(1) of the Statutory Instruments Act 1977 ("The 1977 Act").

   Section 2 of the 1977 Act requires that:

   "(1) Every statutory instrument shall be filed by the maker thereof with the Secretary.

   (2) The Secretary shall be responsible for the numbering and indexing of all statutory instruments filed in his office and for their publication."

Section 5 of the 1977 Act requires that:

> "(1) …every statutory instrument shall be published in the Gazette within one month of its filing unless publication by deposit for public inspection is authorised by the enabling Act.
>
> ……
>
> (4) A statutory instrument shall not have effect until published."

4. There was therefore a dual obligation to publish the Ordinance in the Gazette both under section 38(3)(c) of the 1923 Act and under section 5 of the 1977 Act. In each case it does not have effect until published. What in fact happened was that the following notice appeared in the Bermuda Sun.

> *"CORPORATION OF HAMILTON*
>
> *Public Notice*
>
> *Clamping of Illegally Parked Vehicles*
>
> *The Corporation of Hamilton wishes to advise the motoring public that Any vehicle parked in the Corporation of Hamilton's Car Parks will be clamped if they do not display a current parking permit or voucher.*
>
> *This procedure will come into effect [sic] on Monday 5th November 2007 and will be operated by Safeguard International Security Ltd. Vehicles will be unclamped upon payment of $100 to the operators.*
>
> *City Hall, Hamilton* — *By Order*
> *29 October 2007* — *Ian Hind*
> *City Engineer"*

5. Mr. Diel, who appeared for the Corporation of Hamilton, submits that this notice amounts to sufficient publication to meet the requirements of both Acts. The requirement of publication, he submits, should be considered in a broad sense. It was sufficient to bring to the public's attention that from 5 November 2007 vehicles parked in the Corporation's car parks that did not display a permit or voucher would be clamped and it would cost $100 to have the clamp removed. Mr Howard, for the Attorney-General, responded that the notice was

not publication of the 2007 Ordinance, of which it made no mention. Furthermore, it did not notify the public where the full text of the Ordinance could be seen. It appeared to be an administrative order made by the City Engineer, Ian Hind.

6. Mr Howard made the further point that although the Bermuda Sun in which the notice was published was "the Gazette" (see section 7(b) of the Interpretation Act 1951) within the meaning of both statutes, the notice was not placed among other Government notices. Be that as it may, in my judgment the underlying problem for the Corporation is that the Ordinance itself was never published either within the meaning of section 38(3)(e) of the 1923 Act or section 5(4) of the 1977 Act. Accordingly it never came into effect.

7. The Corporation faces other problems under the legislation. By section 38(3)(d) the affirmative resolution procedure applies to any Ordinance levying port dues on ships or wharfage on goods, shed tax, tax, assessment, charge or toll. Mr Howard submits that the 1977 Ordinance is subject to the affirmative resolution procedure because by paragraph 6.4 the clamp may only be removed on payment of a monetary sum by the driver and this is the levying of a charge in relation to off-street parking. Accordingly, the Ordinance ought to have been laid before Parliament and it was not. Mr Diel, on the other hand, submits that on its true construction section 38(3)(d) is concerned only with what can broadly be described as maritime charges and that if the position were otherwise the subsection would have been structured differently.

8. In analysing the true meaning of section 38(3)(d) assistance can be found in section 38(2) which precedes it. Section 38(2) sets out the various purposes for which Ordinances may provide. Those that involve the levying of sums of money are to be found in section 38(2)(n) and (o).

Section 38(2)(n) provides:

> "the levying for all or any of the purposes mentioned in the Act of any rate on valuation units, within municipal areas, or any charge, tax or toll for the use by the public of any real property, fixture or chattel vested in or subjected to the control of either Corporation or for off-street or on-street parking or any wharfage on any goods or port dues on ships."

Section 38(2)(o) provides:

> "the levying and recovery of any shed tax on all agricultural produce of Bermuda shipped from the respective ports of Hamilton and St. George's."

9. Section 38(3) provides for the various conditions subject to which Ordinances may be made, section 38(3)(d) being the application of the affirmative resolution procedure to the various categories of levying money set out in section 38(2)(n) and (o). It will be noted, for example, that levying a rate on a valuation unit involves an assessment. Whilst there is some initial attraction in Mr Diel's argument that the latter categories in section 38(3)(d) are qualified by the former, which all relate to ports, this cannot I think be so when one takes into account the wording in section 38(2). It is also logical that the affirmative resolution procedure should apply to all types of activity that involve the raising of money rather than those in some way related to the ports of Hamilton and St. George's.

10. Mr Diel also prays in aid the subsequent amendment to section 38(3)(d) by Section 17 of the Municipalities Amendment Act 2013 ("the 2013 Act") which provides.

> "the affirmative resolution procedure shall apply to any Ordinance levying *any* port dues on ships or wharfage on goods, or *any* shed tax, tax assessment, *fee* charge or toll."

The italicised words were added, according to Mr Diel, to make Ordinances covering payment for off-street parking subject to the affirmative resolution

procedure where they had not been before, and that their addition supports his construction of the prior wording. I do not accept this submission because on a careful analysis it is plain they were already subject to the affirmative resolution procedure. In my judgment section 17 did no more than clarify what was already the position.

11. It appears that the 2007 Ordinance was never filed with the Secretary to the Cabinet as required by section 2 of the 1977 Act. Nor was it numbered and indexed. Nor was a draft laid before both Houses of the Legislature as required by section 7 of that Act. Indeed, absent an express provision to the contrary, every statutory instrument requires Parliamentary scrutiny (see section 6 of the 1977 Act). So, if the affirmative resolution procedure did not apply, the negative procedure did and section 38 of the 1923 Act would have applied. This point is emphasised by the introduction of section 38(3)(e) into the 1923 Act by section 17 of the 2013 Act.

12. One of the issues raised before the Chief Justice was the consequence of failure to comply strictly with the publication requirement of the 1923 Act and the various requirements of the 1977 Act. The Chief Justice considered *Barber v Minister of the Environment* [1994] Bda LR 5 and *R v Sheer Metalcraft Ltd and another* [1954] I All ER 542, the latter case concerning the UK Statutory Instruments Act 1946. We were referred to the dictum of *Lord Hailsham of St Marylebone L.C. in London and Clydeside Estates Ltd v Aberdeen District Council and another* [1979] 3 All ER 876 at p. 883:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so

> outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences on himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for a declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act."

13. I agree with the Chief Justice's conclusion that strict compliance with the 1977 Act's publication requirements is not without more fatal to the validity of the instrument in question and that substantial, as opposed to strict, compliance would ordinarily be sufficient. What amounts to substantial compliance, which I regard as a practical test, will depend on the particular circumstances and the instrument in question. This issue is, however, in my judgment of no materiality in the present appeal because the 2007 Ordinance was plainly invalid for two fundamental reasons. The Ordinance itself was quite simply not published at all and therefore never had effect. Secondly it was never submitted for Parliamentary scrutiny. The bottom line is that if the Ordinance was not published, which in my judgment clearly it was not, it did not come into force per section 38(3)(c) of the 1923 Act and it was of no effect per section 5 (4) of the 1977 Act.

The Chief Justice said at paragraph 27:

> "The publically announced introduction of the new "procedure" in 2007 begged the question as to what legal tools were being used to supplement the Corporation's existing parking regulatory structure which was embodied in statutory instruments. Cabinet Office queried another Ordinance published by the Corporation in 2010, and the Attorney-General's Chambers challenged its validity. The 2010 Ordinance and the Attorney-General's Chambers' challenge, appears to have prompted the

> 2013 amendments to the Act which made the need for Parliamentary scrutiny unambiguously clear…"

14. The 2010 Ordinance referred to by the Chief Justice was the Hamilton Pay and Display Voucher Parking Amendment Order 2010 which purported to be an instrument amending the Hamilton Pay and Display Voucher Parking Ordinance 1995. It was concerned with loading zones. The details are immaterial but it suffered from the same defects as the 2007 Ordinance. By 2013 the Centre for Justice who have appeared in these proceedings as an interested party, were actively involved in challenging the approach of the Corporation.

15. The 2013 Act by section 17 amended the 1923 Act by substituting a new section 38. The material provision for present purposes is section 17(2) which provides:

> "Any Ordinance made or purported to be made by a Municipality at any time before this section comes into operation that has not been duly made, filed and numbered in the office of the Secretary to the Cabinet and published in accordance with the provisions of the Statutory Instrument Act 1977 shall be null and void."

16. It seems clear to me that, in light of the ongoing issue between the Corporation on the one hand and the Centre for Justice and the Government of Bermuda on the other as to the validity in particular of the 2007 and 2010 Ordinances, the purpose of this provision in the 2013 Act was to put the position beyond doubt. As the Chief Justice put it at paragraph 48 of his judgment:

> "This provision was clearly intended to invalidate retrospectively any Ordinances purportedly made by the Corporation by passing the requirements of the 1977 Act, notably the 2010 Ordinance of which the Government was clearly aware."

17. Mr Diel's response is that the 2007 Ordinance, and I think it follows the 2010 Ordinance, were duly made because the relevant provisions of the 1977 Act were not mandatory and indeed the Ordinance had been duly published within

the meaning of the legislation. Accordingly, they were not affected by section 17 (2) of the 2013 Act. His argument is that if the Ordinances were already of no effect section 17(2) would have served no purpose and that accordingly they were valid when made and that non-compliance with the 1973 Act did not render them invalid. He also relies on the inclusion of the word 'duly' and submits that had this word been omitted section 17(2) would have had the effect contended for but, as it was not, it did not affect the validity of the Ordinances. I cannot accept this submission and have no difficulty in accepting the conclusion of the Chief Justice above. The evidence shows that there was an ongoing issue between the Corporation and the Attorney-General's Chambers as to the validity of the Ordinances and section 17(2) of the 2013 Act was intended to put matters beyond doubt.

18. The next question is whether the Corporation has power to regulate parking otherwise then through Ordinances under section 38 of the 1923 Act. It is necessary first to look at the relevant provisions of the Act.

19. The Corporation is a public body whose powers derive from the 1923 Act, as amended. As Laws J, as he then was, said in *R v Somerset County Council, ex parte Fewings et al* [1995] 1 All ER 513 at 524:

> "Public bodies and private persons are both subject to the rule of law: nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything that the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose.…It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which defines its purpose and justifies its existence. Under our law, this is true of every public body.

> The rule is necessary in order to protect the people from arbitrary interference by those set in power over them"

I gratefully accept this as a correct statement of the law.

20. It is therefore necessary to look at what the statute permits. Sections 20 et seq are headed HOLDINGS, ETC, OF REAL AND PERSONAL PROPERTY. Section 20 itself provides for the "Powers of Corporations with respect to real and personal property etc. Section 20(2) is in the following terms:

> "(2) The Corporations of Hamilton and St. George's, respectively, are hereby empowered, subject to the provisions of this Act and to any other enactment passed before or after the coming into operation of this Act-
>
> (a) to build, construct, erect or cause to be built, constructed or erected, any building, or to carry out any works upon any land owned by, or under the control of, the Corporation, where such works are calculated to facilitate or is conducive or incidental to the discharge of any function of the Corporation;
>
> (b) to provide off-street parking –
>
> (i) whether within the municipal area or otherwise; and
>
> (ii) whether or not consisting of or including buildings,
>
> together with means of entrance and egress from such off-street parking; and
>
> (c) to authorize the use as a parking place of any part of a street within the municipal area

21. This gives the Corporation power to provide both off-street and on-street parking, but subject to other provisions in the Act and any other Act. One turns then to section 38 which deals with the making etc of Ordinances. Section 38(2) opens with the words: "The purposes for which Ordinances may provide are:" There then follows a list of those purposes which includes section 38(2)(a) (see above) and this includes the levying of a charge for off-street and on-street parking.

22. Mr Diel's argument is that the Corporation's power to hold and enjoy land which it undoubtedly has, (see section 20(1)(b)) is sufficient in itself to confer power to regulate parking on its land. He submits this puts the Corporation in a similar position to a private landowner. A landowner's power to hold and enjoy land includes a power to charge for parking on the land and to clamp and tow away vehicles parked without paying the relevant charge. See *Arthur v Anker* [1997] QB 564 and *Vine v Waltham Forest London Borough Council* [2000] 4 All ER 169, 175. The Chief Justice was not attracted to this submission and nor am I. In short, neither case concerned the construction of the statutory power of a public authority and it is to those powers that one must look in the present case. The question is whether on its true construction the 1923 Act provides such a power independently of that under section 38.

23. As the Chief Justice observed, the high point of Mr Diel's case on general property owners' powers was *Akumah v Hackney London Borough Council* [2005] 2 All ER 148. That was a case in which the council introduced a parking scheme for an estate by resolution and not by bylaws. It was held that the regulation and control of parking of cars on its housing estate was inherent in the function which it was the duty of a housing authority to perform under section 21(1) of the Housing Act 1985 and was therefore lawful. Lord Carswell said at paragraph 25:

> "…I consider that the functions of a local housing authority can properly be said to include the activities of regulating and controlling the parking of vehicles on housing estates, in order to safeguard and improve the amenity of life for its tenants and to facilitate their access to and enjoyment of their houses and flats. I do not think it is necessary to resort to section 12 of the 1985 Act (the byelaw provision) to find power to operate a parking control scheme. I would only observe that if the appellant's argument were correct, the provision of any and every feature or amenity in a housing estate apart from the houses themselves would require the consent of the Secretary of State. I find it difficult to suppose that Parliament intended such a result."

24. As the Chief Justice pointed out, implicit in the reasoning in *Akumah* was the assumption that a public authority managing residential property under

legislation regulating housing must have flexible property management powers. The general power relied on in the present case is not a property management power; it is a power to hold and enjoy property and the regulation of parking is not inherently integral to it. Nor is the present case comparable to *Westminister Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 where the local authority might have proceeded under two different Acts. In my judgment the question in the present case is one of statutory construction and whether section 20 provides a different route to achieving parking control that does not necessitate proceeding by Ordinance under section 38. Mr Howard submits there is no tension between the two sections; they lead to the same position.

25. Mr Diel seeks to draw comfort from what he submits is the discretionary meaning of the opening words of section 38(2) of the 1923 Act; "The purposes for which Ordinances *may* provide are:" He draws a distinction with section 23. Section 23(1) provides that the Corporations may levy and collect rates and section 23(2) says that rates shall be levied by means of a rating Ordinance. The distinction, he submits, is significant. If section 38 was intended to have been mandatory it would have said so. Mr Howard submits that the meaning of section 38 is clear. The Corporation *may* make an Ordinance but if it does so it *must* follow the prescribed procedure. The Chief Justice pointed out that is standard drafting practice to prescribe various matters that *may* be dealt with by subsidiary legislation and that this usually means that they *must* be dealt with if at all by subsidiary legislation. He cited section 13 of the Road Traffic Act 1947 as an example where it would be impossible to construe that section as empowering the Corporation to make Ordinances with respect to parking on city roads while reserving the Corporation's right to make overlapping parking rules under its general property holding powers. Such a construction would produce absurd results. Section 13(2) confers the sort of powers relating to signs which would not be necessary if section 20 of the 1923 Act was still in play as regards regulating parking. Further, section 2 of the 1947 Act expressly

constrains the Ordinance making of Municipalities (under Section 38 of the Act) without any reservation of section 20 rights.

26. I cannot accept Mr Diel's submission that the conditions in section 38(3) are discretionary thus opening the door to a less rigorous procedure under section 20. The question nevertheless arises why section 20(2)(b) and (c) exist at all. In my judgment the answer is clear. Section 20 is providing power for the provision of off-street parking and the authorisation of on-street parking places. Like the other powers given to the Corporation under section 20, it is a power that can be exercised without the creation of a statutory instrument (see the definition in section 1(1) of the 1977 Act). This is in contradistinction to what must happen if the Corporation wishes to levy a charge for parking. In those circumstances the Corporation is required to proceed by Ordinance and the section 38(3) conditions apply. Section 38(2)(bb) gives the Corporation power to make Ordinances for the regulation and control of on-street and off-street parking and section 38(2)(n) for the levying of charges in respect thereof. Because the Corporation wished to levy a charge they had to proceed in 2007 by Ordinance rather than resolution and the mandatory conditions of section 38(3) had to be followed.

27. It also seems to me to be of some significance that whereas section 20 covers only the provision and authorisation of parking places, section 38(2)(bb) is rather wider and covers their regulation and control. The qualification in section 20 that the powers there given are subject to the provisions of that Act and any other Act are in my view important. Section 38(2) lists a variety of different circumstances in which regulation maintenance or control is required, including in some instances the levying of charges. I would therefore read section 20(2) as meaning that once the Corporation wishes to go down the route of regulating or controlling by payment the parking they have provided or authorised they must do so by Ordinance and comply with Section 38(3). The Corporation has no choice.

28. The 2010 Ordinance purported to be made under section 38(2)(bb) of the 1923 Act and to amend the 1995 Ordinance. It was concerned with regulation and control rather than the imposition of any charge. It fell clearly within section 38 and was a statutory instrument. I agree with the Chief Justice that there was no power to amend the 1995 Ordinance other than under Section 38.

The 2014 Resolution

29. On 4 June 2014 the Corporation passed a Resolution concerning the Extension of Pay Parking Streets. It purports to be made under section 20 of the 1923 Act and was to take effect from 18 August 2014. As the Chief Justice observed it purports to amend the 1995 Ordinance in two respects: (1) by expanding the geographical sphere of its operation and (2) by modifying the fees prescribed in that Ordinance. The Resolution was obviously most carefully drafted with a view to avoiding the procedural requirements of section 38 necessary for Ordinances. Resolutions are made by a different procedure. It states in the preamble that the Corporation's powers include the power to charge for parking on land that it owns and that this is in addition to the Corporation's powers under section 20.

30. The purpose of the Corporation in proceeding by Resolution under section 20 was to avoid the more stringent requirements of section 38 and the procedure for validating statutory instruments. Thus it did not have to be published in the Gazette before coming into force, nor did it have to be filed, numbered, indexed and laid before Parliament. Whilst it appears that the Corporation was driven to do this as a result of an impasse in clearing Ordinances through the statutory instrument process, the question is whether it has legal validity and in my view it does not. The power in section 20 goes no further than the provision of off-street parking and authorisation of any part of a street as on-street parking. That power is in any event subject to other provisions of the Act

and any other enactment. The regulation and control of parking can only be achieved by Ordinances under section 38 and the conditions under which the Ordnances may be made are clearly set out in section 38(3). Further, Ordinances are by definition statutory instruments and must comply with the requirement of the 1977 Act. The amendment of an Ordinance which is what the 2014 Resolution was purporting to do is one of the matters empowered by Section 38(1) of the 1923 Act. In my judgment the Corporation had no power to amend it by Resolution.

31. It may be wondered why this appeal has not been heard until well over two years after the decision of the Chief Justice. The parties on several occasions asked for and were granted adjournments in order to make the appeal unnecessary. Presumably this was in order for the Government to pass legislation along the lines of section 7 of the Municipalities Amendment and Validation Act 1995 as mentioned by the Chief Justice in the penultimate paragraph of his judgment. In the event, for whatever reason, no such steps have been taken.

32. There was some reference during the hearing of the appeal to the consequences of the Corporation losing the appeal in particular where vehicles have been clamped without lawful authority. We were referred to *Mossell (Jamaica) Limited (T/A Digicel) v Office of Utilities Regulations etc* [2010] UKPC1 in which Lord Phillips said at paragraph 44:

> "What it all comes to is this. Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found *ultra vires*, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called "third actors") during the period before their invalidity is recognised by the court – see, for example, *Percy v Hall* [1997] QB 924. All these issues were left open by

the House in *Boddington*. It is, however, no more necessary that they be resolved here than there."

33. It is neither relevant nor necessary in the present appeal for us to consider those consequences which, as the Chief Justice said, are not an answer to the Corporation's claim.

Conclusion

34. The 1923 Act by section 38 provides for the Corporation a clear procedure for the making and amendment of Ordinances for the regulation and control of off-street and on-street parking. Ordinances are statutory instruments within the meaning of the 1977 Act and accordingly the procedure for making statutory instruments applies. Where the Ordinance involves the levying of a charge, the affirmative resolution procedures applies. The 2007 Ordinance never came into force because it was never published and was never laid before Parliament. The same is true of the 2010 Ordinance. The position was put beyond doubt by the 2013 Act but in truth neither Ordinance was ever effective. It was not open to the Corporation to proceed by Resolution as the Corporation has no statutory power to regulate or control parking by section 20 of the 1923 Act or otherwise apart from by the Ordinance procedure under section 38.

35. I would dismiss the Corporation's appeal.

Signed

Baker, P

Signed

Bell, JA

Signed

Clarke, JA