In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: 217

THE CORPORATION OF HAMILTON

Applicant

-v-

THE ATTORNEY-GENERAL

Respondent

-and-

THE CENTRE FOR JUSTICE

Intervener

JUDGMENT

(In Court)

Date of hearing: October 22, 2014
Date of Judgment: November 5, 2014

Mr. Mark Diel, Marshall Diel & Myers Limited, for the Applicant

Mr. Gregory Howard, Attorney-General's Chambers, for the Respondent

Mr. Chen Foley, Sedgwick Chudleigh Ltd., for the Intervener-tendered written Submissions and attended without formally appearing

Background

1. By an Originating Summons dated June 2, 2014, the Applicant ("the Corporation") sought the determination of the following question:

> *"Whether the Corporation of Hamilton is empowered to regulate and control parking on its property (whether on the streets of Hamilton or in car parks) and, in particular, by controlling the times when, the places where and the manner in which such parking is to be permitted, by imposing charges for such parking, and by imposing sanctions for breach of such regulation or control, including, in particular, affixing wheel clamps or other immobilisation devices to vehicles parked in breach, towing away vehicles parked in breach, and imposing fines for the removal of (and for any damage to) such clamps and the return of such vehicles."*

2. The question was not whether the Corporation had the statutory power to regulate and control parking in the ways set out in the pleaded question. Rather, the question was whether certain rules the Corporation had already adopted to deal with such matters were validly made and legally enforceable.

3. The genesis of the present proceedings was the Corporation's implementation of a wheel clamping policy in 2007 which the Centre for Justice ("CfJ") had publically contended in or about late 2013 was unlawful. In May 2014, the Senior Magistrate (in the course of dismissing a charge of criminal damage brought against a motorist who removed a clamp fitted to his vehicle by the Bermuda Hospitals Board), observed that the Corporation was unlawfully clamping vehicles too. The legal doubts which had been publically raised about the Corporation's clamping powers seriously compromised its ability to enforce its parking rules with this invasive but effective method. Very sensibly, the Corporation decided to seek a clarification of its legal rights from this Court.

4. A contributing cause of the dispute between the Corporation and the Attorney-General as to how the Corporation's undoubted power to regulate parking on its property and on its streets may lawfully be exercised appears to be tensions between successive administrations of the Corporation and Government about the latter's right to vet the former's law-making powers. But those tensions, which could be viewed as part of a wider "turf war" only serve to mask the important public law issues the CfJ originally sought to illuminate. What are the limits on the powers of the Corporation to impose penal sanctions on motorists parking in what is essentially public space, sanctions which interfere with the citizen's property (and mobility) rights? What constraints does the rule of law impose on the Corporation's legitimate right to regulate activities taking place on its own property?

5. These broad legal policy issues inform the analysis of the following specific issues which were in controversy:

    (1) the validity of the Municipalities (Hamilton Pay & Display Parking Vehicle Wheel Clamping) Ordinance 2007 ("the 2007 Ordinance") either:

        (a) when purportedly made; and/or

        (b) in light of the enactment of section 17(2) of the Municipalities Amendment Act 2013 with effect from October 15, 2013;

    (2) ancillary to (1), whether the Hamilton Pay and Display Voucher Parking Amendment Ordinance 2010 ("the 2010 Ordinance") was validly made;

    (3) whether the Corporation could in the alternative validly create the same or similar rules without an ordinance at all, deploying its general and/or incidental powers under the Municipalities Act 1923 ("the Act");

    (4) ancillary to (3), whether the Resolution of the Corporation of Hamilton Concerning the Extension of Pay Parking Streets, purportedly adopted by the Corporation on June 4, 2014 pursuant to section 20 of the Act was validly made.

6. The case was argued orally with considerable economy within only one day. In digesting these streamlined oral submissions, I have been greatly assisted by the comprehensive written submissions and authorities tendered by Messrs. Diel and Myers for the Corporation, Mr. Howard for the Attorney-General and Mr. Foley for CfJ.

Legislative overview

7. Before analysing the narrow issues which call for determination, it is helpful to step back, and look at the scheme of the Act in broader terms. Since its original enactment in 1923, over 90 years ago, it has been amended approximately 40 times. The Act deals with the following main topics of relevance to present concerns, and:

    (a) it creates and geographically describes the municipal area of the City of Hamilton (sections 3, 5 and 6);

    (b) it constitutes the Corporation as a body corporate (sections 7-8);

    (c) it confers ample general powers on the Corporation in relation to dealing with personal and real property (section 20) together with

specific powers to "*provide off-street parking*" and to "*authorize the use as a parking place any part of a street in the municipal area*" (section 20(2)(b)-(c));

(d) it vests "*seisin*"[1] in all land in the municipality which has not been sold to private owners, in the Corporation (section 21);

(e) it confers powers of compulsory acquisition of land and the power to levy rates (sections 22-23) and confers supplementary assessment and collection powers (sections 24-29);

(f) it limits the size of the rate, with an ultimate cap being imposed by the separate legislation under which the rate is approved (section 30);

(g) it confers the power to make ordinances (section 38), which ordinances have since 2013 been subject to amendment by the Minister (subsection (4)) but which before 2007 were required to be laid before Parliament (subject to the affirmative resolution procedure) if they fall within section 38(3)(d) ;

(h) it specifies the particular matters with which ordinances may deal, including "*the regulation and control of off-street and on-street parking*" (section 38(2) (bb)-inserted in 1995), and levying charges for parking (section 38(2) (n)).

(i) it provides for the trial and punishment of offences under the Act or ordinances made under the Act (section 46).

Legal findings: the validity of the 2007 Ordinance when made

The 2007 Ordinance

8. The Ordinance is headed "*BERMUDA STATUTORY INSTRUMENT*" but on its face was not published in the customary official fashion with an assigned number. By its terms, it is clearly intended to supplement earlier ordinances, in particular the earlier Municipalities (Hamilton Pay and Display Parking) Ordinance 1986, which is defined in the 2007 Ordinance as "*the 1986 Ordinance*". The most significant aspects of the 2007 Ordinance are the following provisions:

[1] Which I take to mean the" [p]*ossession of land by freehold*: http://www.oxforddictionaries.com/definition/english/seisin.

(a) a "*clamper*" is defined in paragraph 1 as a person authorised by the Corporation to fit clamps to vehicles in "*fee car parks*" regulated under the 1986 Ordinance;

(b) a clamper may fit a clamp to a vehicle in a fee car park which has not purchased or validly displayed a ticket, or which has stayed on after a ticket has expired (paragraphs 3-5);

(c) save with the Corporation's authority, only a clamper can remove a vehicle wheel clamp. A clamp "*may only be removed from a vehicle by the clamper following payment of a monetary sum payable to the clamper*" (paragraph 6(4)). The driver is entitled to receive a receipt upon payment by cash or card (paragraph 7);

(d) notification of the 2007 Ordinance must be posted at every fee car park entrance and on every ticket machine (paragraph 8);

(e) the amount payable to clampers from time to time and any changes in clamper details must be advertised by the Corporation in the Gazette (paragraph 9);

(f) it is expressly provided that the Ordinance "*is to complement any other Ordinances in respect of fee car parks*" (paragraph 10);

(g) it is an offence to interfere with or obstruct a clamper (paragraph 11).

9. Mr. Howard helpfully provided copies of other Ordinances made by the Corporation in relation to parking, including the 1986 Ordinance. It appears that they were all published in the usual official manner, although the statutory instrument number does not appear in each case on the version produced. They were certainly all published as part of the Revised Laws of Bermuda:

(a) Hamilton Fee-Parking Ordinance 1981, Title 4: Item 1 (c);

(b) Municipalities (Hamilton Pay and Display Parking) Ordinance 1986, BR 4/1986,Title 4: Item 1(p);

(c) Hamilton Traffic and Sidewalks Ordinance 1988, Title 4: Item 1(m);

(d) Hamilton Pay and Display Voucher Parking Ordinance 1995, BR 31/1995, Title 4: Item 1(pa).

10. This merely illustrates what was essentially common ground. The 2007 Ordinance was made without following the customary publication protocols. The full text of the Ordinance was not published in the Official Gazette, though publication did take place in the Bermuda Sun and the Royal Gazette of a Notice advising the public that the Ordinance had been made and that wheel clamping would soon commence.

11. It is now necessary to turn to precisely what was actually prescribed by law in terms of procedural requirements for making an ordinance.

Procedural requirements for making an ordinance

12. Section 38 in its 2007 form prescribed the following requirements for making an ordinance:

> *"(3) 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 Alderman and shall be assented to by the Mayor;*
>
> *(c) Ordinances shall, before coming into force, be published in the Gazette;*
>
> (d) *The affirmative resolution procedure shall apply to any Ordinance levying port dues on ships or wharfage on goods, shed tax, tax, assessment, charge or toll."*

13. The 2007 Ordinance on its face purports to be a statutory instrument, but in any event clearly falls within the wide definition found in section 1 of the Statutory Instruments Act 1977. The following additional procedural requirements, expressed in mandatory terms, under the 1977 Act accordingly applied to the 2007 Ordinance:

> *(a)* "2 *(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.*";
>
> (b) "*5(1)... every statutory instrument shall be published in the Gazette within one month of its filing, unless publication by deposit for public inspection is authorized by the enabling Act...*
>
> *(4) A statutory instrument shall not have effect until published.*"

14. Two elements of non-compliance were, to my mind, seriously in issue. Firstly, failure to publish as required by the Act as read with the Statutory Instruments Act. Secondly, issue was joined on whether or not the 2007 Ordinance was caught by section 38(3) (d) and ought to have been laid before Parliament as well.

Consequences of failure to strictly comply with the publication requirements

15. The CfJ intervened in the present case because it considered the 2007 Regulation was *ultra vires* and its effect was "*to deprive a person of their property, or hinder their ability to move about freely, and consequently amounts to a violation of ...constitutionally protected rights and freedoms*": Written Submissions, paragraph 4. Mr. Foley submitted that the failure to publish as required by the Act and the 1977 Act was fatal because the latter Act expressly provided that a statutory instrument was not operative until published. The local statutory context was distinguishable from that in the United Kingdom, which meant that no need to consider the consequences of non-compliance arose.

16. Mr. Howard also submitted that failure to publish the entire Ordinance following the Statutory Instruments Act procedure meant that the 2007 Ordinance had clearly never entered into force. He also rightly submitted that publication of the entire instrument was clearly required by the terms of section 5(1). The enabling Act in this case did not authorize deposit for inspection instead of publication. Mr. Diel for the Corporation submitted that there was no authority for the proposition that publication of the entire ordinance was required must accordingly be rejected.

17. There was local authority for the proposition that failure to comply with the publication requirements of the Statutory Instruments Act 1977 would not invalidate the instrument in question, Mr. Diel further argued. This was the decision of Meerabux J in *Barber-v-Minister of the Environment* [1994] Bda LR 5. In that case, expressly rejecting the argument advanced by Mr. Foley, Meerabux J held (at page 25, after citing *R-v-Sheer Metalcraft Ltd. and Another* [1954] 1 All 542 at 545):

> "*Section 5 of the 1977 Act is not cast in the same words as section 3(2) of the United Kingdom Act but nonetheless it deals with the same matters of publishing and making known to members of the public the statutory instrument and the coming into force of an instrument.*
>
> *Hence, adopting the principles set out in the Metalcraft case above, I am of the view that non-compliance [with] sections 2 and 3 of the 1977 Act...does not affect the validity of the Bermuda Plan 1992. In my view it is valid by virtue of its being prepared by the Minister and approved by resolution of either House of the Legislature.*"

18. This is at first blush weak authority for the proposition the Corporation relies on, because Meerabux J went on to note: "*I must mention that it is common ground that the Bermuda Plan 1992 is in force and operative*". Moreover, earlier in his judgment he noted that section 13A of the Development and Planning Act expressly exempted the Plan from the publication requirements of the 1977 Act. So this reasoning was not central to the operative parts of his decision.

19. More fundamentally still, the legislative provisions under consideration in *R-v-Sheer Metalcraft Ltd. and Another* [1954] 1 All 542 were materially different. The validity of the instrument in that case was raised in the context of a criminal trial. Section 3(1)(2) of the Statutory Instruments Act 1946 (UK) provided in relevant part as follows:

> "*(2) In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by Her Majesty's Stationary Office ...unless it is proved that reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or the person charged.*"

20. Notwithstanding the substantial differences between the statutory wording under consideration in *Metalcraft* and the provisions of the 1977 Bermudian Act, I would always be slow to differ from the opinion of Meerabux J, a former Parliamentary draftsman, on a point of statutory interpretation. His compressed *obiter dicta* in *Barber*, distilled to its essentials, is this. When considering whether or not a statutory instrument has been validly made, the courts should only make a finding of invalidity when as a matter of substance the essential requirements for validity have not been met. The failure to strictly comply with the formalities of publication will not necessarily mean that the essential requirements for making the statutory instrument have not been met. And what constitutes substantial compliance with publication requirements may often be a somewhat fluid consideration, depending on the applicable facts.

21. I accept Mr. Diel's submission that the present factual and legal context gives rise to the need to analyse whether Parliament intended failure to strictly comply with the requirements of the 1977 Act as regards publication of a statutory instrument to render the instrument ultra vires and void. I agree with Meerabux J in *Barber* , that despite the statutory differences between the legislation under consideration in *Metalcraft* and our own 1977 Act, failure to comply strictly with 1977 Act's publication requirements is not without more fatal to the validity of the instrument in question. It is possible to conceive of limitless scenarios in which it would lead to absurd results if strict adherence to the publication and related requirements were to be invariably required. For instance:

(a) a draft statutory instrument, otherwise validly made, is forwarded by the lawyer for the maker of the instrument to the Attorney-General's Chambers rather than the Cabinet Secretary. The instrument is duly formatted, numbered and published. It would be absurd if the instrument had to be declared invalid simply because the Cabinet Secretary was not actively involved;

(b) a draft statutory instrument, otherwise validly made, is forwarded to the Cabinet Secretary, duly formatted and published, but due to a printing error, which no one notices until years later, only partially published. It would be absurd if the instrument had to be declared invalid simply because the entire text was not published;

(c) a statutory instrument, otherwise validly made, is duly formatted and published as part of the Bermuda Laws online but, due to a clerical oversight which is never discovered until years later, never gazetted at all. It would be absurd if the instrument had to be declared invalid simply because publication took an unauthorised form.

22. In my judgment, substantial compliance with the publication and related Statutory Instruments Act and section 38(3) (c) of the Municipalities Act requirements, as opposed to strict compliance, is all that is required. The section 38(3)(c) requirement is nevertheless one that cannot be ignored altogether because, unlike the legislation under consideration in *R-v-Sheer Metalcraft Ltd. and Another* [1954] 1 All 542, publication in the Gazette is a condition of equal rank with the other more substantive conditions subject to which ordinances may be made. It is integral to the making of a valid ordinance.

23. It remains to consider whether substantial compliance occurred on the facts of the present case.

Is the 2007 Ordinance invalid for non-compliance with the publication-related requirements of the Act and the Statutory Instruments Act?

24. It is common ground that the strict requirements of the applicable legislation were not met in the following respects:

(a) the 2007 Ordinance was not sent to the Cabinet Secretary for formatting, numbering and publishing;

(b) the full text of the 2007 Ordinance was never published in the Gazette.

25. It is common ground that publication did take place in the following form:

(a) the fact that a new clamping "procedure" had been adopted by the Corporation was published by Notice in the Gazette;

(b) the Notice provided for the procedure to take effect 7 days after its publication;

(c) the Notice did not expressly refer to the Ordinance at all but described the essence of its provisions, save that no reference at all was made to the purported creation of an offence).

26. There is no credible evidence that the Attorney-General represented that he accepted the 2007 Ordinance had been validly passed so as to create a legitimate expectation in the Corporation's favour that he would not now challenge the validity of the Ordinance. It is nevertheless surprising that, apart from the enactment of the Municipalities Amendment Act 2013, no remedial action was seemingly taken by the Attorney-General after the new clamping policy was announced to raise (in relation to the 2007 Ordinance) the points which have now belatedly been raised in proceedings initiated by the Corporation itself.

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 Corporation's response to 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. As far as the 2007 Ordinance is concerned, it was the CfJ which first seemingly raised the legality issue in 2013.

28. The Attorney-General's failure to formally challenge the highly publicised introduction of the clamping scheme in and after 2007 seemed somewhat inconsistent with the high importance of the procedural requirements which Mr. Howard contended for. In the submissions of the Attorney-General, it was argued:

> *"10...there was a requirement to assure that there is no repugnancy contrary to section 38(3) (a) of the 1923 Act. That responsibility falls to the Attorney-General, who has Constitutional authority as the principal legal advisor to the Government. The Cabinet Secretary consulted the Attorney General regarding the 2010 Ordinance and the carriage Ordinance of 2012, as shown in pages 1-35 of Mr. Benevides' Second Affidavit. There is no information about the 2007 Ordinance in that regard."*

29. As a practical matter, it is clear that the requirement of forwarding statutory instruments to the Cabinet Secretary creates an opportunity for the Attorney-General to consider the legality of a proposed instrument in terms of repugnancy with other Acts, but the involvement of the Attorney-General is not a statutory requirement (or was not in 2007 and 2010). It is also difficult to identify any legal basis for the Government's principal legal adviser advising the Cabinet Secretary not to publish an instrument which has been made, not by a Government Minister, but by some other independent public authority such as the Corporation. Whether a draft Ordinance made by the Corporation meets the requirements of section 38(3) would appear to be in the first instance, subject to an adjudication by the courts, a matter for the maker of the Ordinance, not the public official charged with the administrative tasks relating to publication. In the period leading up to the 2013 Amendment Act, the Corporation's attorneys justifiably questioned the Government's contention that the Attorney-General was required to determine whether or not ordinances were repugnant to other legislation contrary to section 38(3)(a).

30. Whether substantial compliance occurred in publication terms therefore turns, as Mr. Diel correctly submitted, on an analysis of the adequacy of the publication which actually took place in terms of bringing the contents of the 2007 Ordinance to the attention of the public. Even applying this most liberal and flexible test, however, I find it impossible to fairly conclude that the requirements of publication contained in section 38(3) (c) of the Act and section 5 of the Statutory Instruments Act were substantially met. The published Notices read as follows:

> "***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 effective* [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*"

31. The underlying rationale for the publication requirement is in my judgment the goal of ensuring that the contents of a statutory instrument made under the Act and

intended to have legislative effect is brought to the attention of members of the public as they move about the Corporation's land, which is manifestly held for the public benefit. The need for prior notice of a new law is obviously enhanced in the context of penal legislation. The published Notice:

(a) failed to publish the contents of the Ordinance;

(b) failed to notify the public where the full text of the Ordinance could be obtained; and

(c) failed to mention the 2007 Ordinance at all; and

(d) by its terms gave notice of the making of an administrative edict issued by the Chief Engineer, as opposed to the making of an Ordinance by the Corporation under section 38 of the Act.

32. It is impossible to see how it could properly be open to any reasonable tribunal properly directing itself to find that this Notice substantially met the requirements of publication prescribed by section 38(3)(c) of the Act and section 5 of the Statutory Instruments Act in relation to ordinances made by the Corporation under its governing Act. The Corporation's counsel referred the Court to Wade & Forsyth, '*Administrative Law*', 10th edition at pages 761-762 in support of the proposition which I have accepted that non-publication by itself does not automatically result in invalidity. The learned authors (at page 761 n. 249) also cite the Australian authority of *Watson-v-Lee* (1979) 26 ALR 461 (High Court of Australia). Barwick CJ commented in that case on the mischief of subsidiary legislation being purportedly made operative before the public could ascertain its contents as follows:

> "*4... To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny.*"

33. The 2007 Ordinance was accordingly invalidly made because it failed to substantially comply with the applicable publication requirements.

34. In these circumstances I see no need to make any formal findings on the subsidiary complaints that (a) there was no evidence of compliance with section 38(3) (b) (the requisite majority), and/or (b) that paragraph 11 purportedly creating an offence was invalid because the offence was not included in the appropriate traffic legislation (the Traffic Offences Procedure Act 1974).

Was the 2007 Ordinance invalid because the affirmative resolution procedure applied but was not followed?

35. The arguments on whether the affirmative resolution procedure applied were more evenly balanced. The controversy centred on the meaning to be assigned to section 38(3)(d), in light of the related provisions of section 38(2)(n). Mr. Diel argued that, applying the *eiusdem generis* rule, the list of charges in the former subsection should be read as exclusively port-related, because no express reference to the other type of charges listed in 38(2)(n) was repeated in 38(3)(d) . The provisions state:

> *"(2) The purposes for which Ordinances may provide are-*
>
> *(n) the levying for all or any of the purposes mentioned in this 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..*
>
> *(3)... (d) 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, charge or toll."*

36. Subsection (2)(n) empowers the Corporation to make ordinances levying the following types of charges:

(1) rates on valuation units (which are assessed under section 25); or

(2) "*any charge, tax or toll*" (a) for the use of any property, etc., (b) "*or for off-street or on-street parking* "; or

(3) "*any wharfage on any goods or port dues on ships*".

37. There are three categories of charge: (1) an assessment for rates (applicable to valuation units); (2) any charge, tax or toll (applicable to the use of real property or chattels and to off-street and on-street parking); and (3) wharfage and port dues (applicable to shipped goods and to ships). Section 38(3)(d) applies the affirmative resolution procedure to categories (1), (2) and (3). Reading that subsection (3)(d) with the earlier (2)(n) (and, as regards rates with section 25 as well), it is clear :

(a) what matters an "*assessment*" relates to: it relates to rates, because rates are "assessed" on valuation units pursuant to, *inter alia*, sections 23(3) and 25 ;

(b) It is also clear what matters the open-ended category "*any shed tax, tax... charge or toll*" applies to. It applies to charges in relation to the use of real property or chattels belonging to the Corporation, and to charges relating

to parking. There is accordingly no need to repeat in full the somewhat verbose language of subsection (2)(n) in its entirety; and

(c) "*wharfage on goods*" and "*port dues on ships*" warrant explicit mention, because they are distinctive terms of art for distinctive categories of charge which, like rate assessments (section 25) are dealt with in detail by other sections in the Act (sections 31 and 32, respectively).

38. It is ultimately clear, admittedly after somewhat more analysis than Mr. Howard felt was required, that the Act envisages that ordinances levying any form of charge should be subject to Parliamentary scrutiny. It makes no sense that such scrutiny was intended to be afforded only to charges levied on the docks and withheld in relation to a host of other charges.

39. I am fortified in this conclusion by the fact that other legislation typically requires Parliamentary scrutiny of fee-charging subsidiary legislation. Section 63 of the Supreme Court Act 1905, for example, provides as follows:

> "*(2) The affirmative resolution procedure shall apply to every rule of court which may involve an increase of expenditure out of public funds or which is relative to fees payable in causes or matters.*" [emphasis added]

40. Similar provision is made in relation to regulations authorising other public authorities to impose charges on the public e.g. under the Government Fees Act (section 2(3)), the Companies Act 1981 (section 121(7)). Exceptions to what appear to be the general rule obviously exist. The Bermuda Hospitals Board Act, creating a quasi-private framework for hospitals, expressly dispenses altogether with Parliamentary scrutiny for professional charges (section 13A(9)), while regulations creating hospital charges are subject to the light-touch negative resolution procedure (section 13(2)).

41. The 2007 Ordinance purportedly levied a charge for obtaining the release of clamped vehicles. Paragraph 6 provides:

> "*(4) A vehicle wheel clamp may only be removed from a vehicle by the clamper following payment of a monetary sum payable to the clamper by the driver of the vehicle to which a vehicle wheel clamp has been fitted.*"

42. Although section 38(3)(d) was later amended to add the word "*fee*", I find little difficulty in construing the words "*any... charge, tax, or toll*" as including the "*monetary sum*" provided for by paragraph 11(4) of the 2007 Ordinance. It follows that the 2007 Ordinance was also invalid because it failed to comply with the Parliamentary scrutiny requirements of section 38(3)(d) of the Act.

Summary: validity of 2007 Ordinance when purportedly made

43. I find that the 2007 Ordinance was not validly made because of an actual and substantial failure to comply with the publication and Parliamentary scrutiny conditions imposed by section 38(3)(c)-(d) of the Corporation's governing statute.

44. The same analysis would seem to apply to the 2010 Ordinance. Although it was not clear to me precisely what form the advertisement by the Corporation took in that case, the Attorney-General's Chambers rightly argued in correspondence at the time that the effect of the Ordinance (which extended the pay and display rules to loading zones) was to levy a charge or fee, so the affirmative resolution procedure was required.

Findings: was the 2007 Ordinance retrospectively rendered null and void by section 17(2) of the Municipalities Amendment Act 2013?

45. In light of my findings that the 2007 Ordinance was in any event invalid, the impact of section 17(2) of the 2013 Amendment Act is only necessary to consider in case those primary conclusions are found to be wrong.

46. The 2013 Amendment Act amended section 38(3) as follows:

> *"(3)The conditions subject to which Ordinances may be made are as follows—*
>
> *(a) Ordinances shall not be repugnant to any Act;*
>
> *(b) Ordinances shall be submitted in draft to the Minister and the Attorney-General for their review;*
>
> *(c) Ordinances shall be passed by a majority of the Members, and the Mayor or Secretary of a Corporation shall signify that it has been so passed;*
>
> *(d) 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;*
>
> *(e) all other Ordinances shall be subject to the negative resolution procedure."* [emphasis added]

47. The effect of these amendments introduced by section 17(1) was to (a) create a positive requirement for ordinances to be reviewed by Government (the Minister and the Attorney-General[2]), (b) clarify that any type of financial charge including a "fee" in an ordinance engaged the affirmative resolution procedure, and (c) provide that all

[2] The current version of section 38(3)(b) does not in terms authorise the Attorney-General to determine whether or not an ordinance made by the Corporation conflicts with subsection 3(a) or any other relevant provision of the Act.

other ordinances had to be laid before Parliament. Section 17(2) of the 2013 Act must be read in this context:

> *"(2)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 Instruments Act 1977 shall be null and void."*

48. This provision was clearly intended to invalidate retrospectively any ordinances purportedly made by the Corporation bypassing the requirements of the 1977 Act, notably the 2010 Ordinance of which the Government was clearly aware. It is only fair to point out that in the Second Benevides Affidavit the reason for the Corporation bypassing the Cabinet Secretary in 2010 was explained as follows:

> *"5... The AG Chambers continued to insist that only they could determine whether an Ordinance was within the ambit of the Corporation's authority. However, the requirement that Ordinances be first vetted by them as a condition precedent as being accepted for filing, numbering etc by the Cabinet Secretary was clearly not supported by the legislation.*
>
> *6. It should be noted that the overall context of these exchanges was a situation which had arisen where the Secretary to the Cabinet was refusing to accept Corporation Ordinances for filing and refusing to publish them, as required by the Statutory Instruments Act 1977, until they had received the approval of the Attorney-General's Chambers. This effectively blocked all attempts from either Corporation to have the Cabinet Secretary number and publish any Ordinance for some 5 years, and significantly hindered the Corporation in in carrying on its function of governing the City of Hamilton."*

49. The same Affidavit exhibited a January 9, 2009 letter from Mr. Benevides to the Attorney-General's Chambers seeking guidance as to whether clamping was permitted, noting that verbal advice had previously been received from Chambers that clamping was permitted. Mr. Howard, coincidentally, responded that the Corporation should seek its own legal advice. This evidence is important in demonstrating that the Corporation believed in early 2007 that it was entitled to carry on clamping, in part as a result of oral advice from the Attorney-General's Chambers. It also believed that the Cabinet Secretary through improper stonewalling was forcing the Corporation to bypass the 1977 Act procedures.

50. The Corporation did eventually seek legal advice and Messrs Marshall Diel & Myers by letter dated July 31, 2012 advised the Cabinet Secretary on the Corporation's behalf that he had no lawful authority to decline to publish an ordinance based on the Attorney-General's advice that it was repugnant to other legislation. The Corporation's position on whether or not the Statutory Instruments Act applied at all was reserved.

51. Objectively viewed, and without making any final determinations on these matters, the true position appears to me to have been as follows:

(a) the Cabinet Secretary must have been entitled by necessary implication to assign the clerical function of formatting and numbering to the Attorney-General's Chambers;

(b) the Cabinet Secretary must have been entitled by necessary implication to request the Corporation to send draft Ordinances to the principal legal adviser to the Government on his behalf rather than directly to himself; however

(c) the right of the Secretary of the Cabinet under the 1977 Act to refuse to publish an ordinance based solely upon the Attorney-General's advice that it was unlawful for breach of section 38(3)(a) must be doubted, having regard to the fact that the Corporation (not a Government Minister) was the maker of such instruments.

52. It was against this background that the 2013 Amendment Act was passed and provided, *inter alia*, that any ordinances which had not been made in conformity with the Statutory Instruments Act would be null and void. Despite the clear and unambiguous language of section 17(2) of the 2013 Amendment Act, Mr. Diel sought to persuade the Court to, as I observed in the course of the hearing, turn cartwheels to achieve a different interpretation. Two convoluted submissions were made:

(1) it was correctly submitted that legislation purporting to retrospectively impose criminal liability was not permitted by section 6(4) of the Constitution. However I found the related argument that the effect of section 17(2) was to retrospectively create liability for the offence disobeying an Act contrary to section 149 of the Criminal Code to be unintelligible. It is impossible to imagine how section 17(2) of the 2013 Amendment Act could conceivably be construed as designed to create retrospective criminal liability under section 149 of the Criminal Code;

(2) it was submitted that the words "*not been duly made*" in section 17(2) only invalidated previous ordinances if there was a mandatory obligation to follow the procedure of the 1977 Act. If the procedure was not mandatory, the non-complying ordinances were not caught by section 17(2). This construction involves a gross distortion of the natural and ordinary meaning of the words of the provision in their context. The words "*not been duly made*" can only sensibly mean what they actually say. The notion that Parliament intended that previous ordinances would be "duly made" if they failed to comply with express procedural requirements which were <u>not</u> mandatory and only "not duly made" if the requirements which were not met <u>were</u> mandatory seems wholly fanciful. It flies in the face of the natural and ordinary meaning of the words of the enactment and the obvious mischief it was designed to cure.

53. Accordingly I find that if the 2007 (and 2010) Ordinance was not invalid when made, it was retrospectively rendered invalid by section 17(2) of the 2013 Amendment Act.

54. The amendments to section 38 of the Act introduced by section 17(1) of the 2013 Act introduced for the first time (a) the requirement for the Corporation to submit draft ordinances to both the Attorney-General and the Minister (section 38(3)(a)), and (b) a new power for the Minister to amend any ordinance made by the Corporation. This does not in terms empower the Attorney-General to determine whether or not a proposed ordinance is repugnant to other legislation. It is still arguable that in pure and abstract legal terms, such a role would be inconsistent with the independent status of the Corporation. As a practical matter, however, it is difficult to see why the Corporation today would not wish to seek input from the Attorney-General before draft ordinances are printed, with a view to avoiding a situation where:

    (a) the Attorney-General impedes the smooth progress of ordinances at the Parliamentary scrutiny stage; or

    (b) an ordinance which could have been perfected before being initially implemented is subsequently modified by the Minister under section 38(4).

Findings: does the Corporation possess the statutory power to regulate parking by, inter alia, clamping otherwise than through ordinances under section 38?

The issue in outline

55. The question of whether or not the Corporation can regulate parking matters otherwise than through ordinances under section 38 is also a question of statutory interpretation. The Corporation's considered position is that, following English case law which it contends this Court ought to follow, a public authority's property-ownership powers are analogous to those of a private property owner. And a private property owner can without legislation regulate parking on his property, by clamping procedures or otherwise. Moreover, the powers to make ordinances are conferred by the Act are expressed in permissive rather than mandatory terms suggesting that the Corporation may choose which route to follow.

56. The Attorney-General contends that the judicial precedents the Corporation relies upon were decided in a different statutory context, and ought not to be followed. It is only through subsidiary legislation that the Corporation can regulate and control parking on its land.

57. The starting point for the analysis must be the relevant statutory provisions themselves.

Relevant provisions of the Act

58. Section 20 of the Municipalities Act 1923 (as amended in 2013 with the insertion of subsections (1A) to 1C) reads as follows:

> "***Powers of Corporations with respect to real and personal property, etc.***
> *(1)Subject to subsections (1A) to (1C), the Corporations of Hamilton and St. George's, respectively, are hereby empowered—*

(a) to purchase, take, hold, mortgage, pledge, deal with and dispose of, at their own will and pleasure, all manner of goods, chattels and other personal property; and

(b) to purchase, take, hold, receive and enjoy, and to give, grant, release, demise, assign, sell, mortgage or otherwise dispose of and convey by deed under the seal of the Corporation, any land in Bermuda, in fee simple or for a term of life or lives or years or in any other manner.

(1A)Any agreement for—

(a) the sale of land which is the property of the Corporation; or

(b) a lease, conveyance or other disposition of any interest in land which is the property of the Corporation, being a lease, disposition or conveyance expressed to be for a term exceeding twenty-one years or for terms renewable exceeding in the aggregate twenty-one years,

and any related agreement, must be submitted in draft to the Minister for approval by the Cabinet, and be approved by the Legislature.

(1B)The approval of the Legislature referred to in subsection (1A) shall be expressed by way of resolution passed by both Houses of the Legislature approving the agreement, and communicated to the Governor by message.

(1C)If a Corporation purports to enter into an agreement referred to in subsection (1A), but the agreement was—

(a) not submitted in advance to the Minister and approved by the Cabinet; and

(b) not approved by the Legislature,

the agreement, any related agreement, and any sale, lease, conveyance or other disposition in pursuance of the agreement, shall be void ab initio.

(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."[emphasis added]

59. Mr. Diel relied upon the combined effect of the broad powers to deal with real property conferred by subsection (1)(b) and the specific powers in relation to parking conferred by subsection (2) (b)-(c). Reference was also made to the following passage from paragraph 457 of '*Halsbury's Laws of England*', Volume 24 (2010), 5th edition:

> "*A statutory corporation has only such powers of alienation as are granted or authorised or are properly required for carrying into effect the purposes of its incorporation or may fairly regarded as incidental to or consequential on those things which the statute has authorised.*"

60. Mr. Howard submitted that this principle justified giving the Corporation's powers a narrower rather than a broader construction. I agree. However, looking at section 20(1)(b) and 20(2)(b)-(c) in isolation from the rest of the Act, the provisions clearly:

(a) empower the Corporation to provide off-street and on-street parking on its land; and

(b) by necessary implication the incidental power to regulate such parking as well.

61. The position is complicated because section 38 explicitly provides that the regulation of off-street and on-street parking (as opposed to using land for providing parking) may be the subject of ordinances. Section 38 firstly provides as follows:

> "*(1)The making, amendment from time to time, and revocation, of Ordinances by either Corporation for all or any of the purposes, and subject to the conditions, mentioned in this section, are hereby authorized.*"

62. This subsection does not explicitly state that ordinances must be used for the purposes stated in the section. Section 38 next provides in salient part as follows:

> "*(2)The purposes for which Ordinances may provide are...*"

63. Mr. Diel relied heavily on the permissive language used, and contrasted it with the mandatory prescription made in relation to rates by section 23(2) of the Act: "*Rates shall be levied by means of a rating Ordinance.*" Amongst the purposes which

ordinances "*may*" provide for are the following, introduced by the same legislation[3] that created section 20(2)(b)-(c):

> "*(bb) the regulation and control of off-street and on-street parking;...*
>
> *(n) the levying for all or any of the purposes mentioned in this 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...*"[emphasis added]

64. Ignoring for present purposes whether or not parking may only validly be regulated under section 38, it seems clear as a preliminary matter that as the "*regulation and control*" of parking is expressly dealt with under section 38(2)(bb), it is difficult if not impossible to justify construing section 20(2)(b)(c) as dealing with the same regulatory power by implication. This is why the Corporation nailed its colours to the general property-owner's powers mast, with reference to the powers conferred by section 20(1)(b).

65. This argument was countered very fully in the Attorney's submissions on the logical basis that if the only relevant regulatory power was found within section 38, no question of whether or not the Act envisaged a right of election between two powers arose for determination. However, the two issue:s (a) whether the Corporation's powers under section 20 include the same powers of a landowner, and (b) whether section 38 provides the exclusive statutory route for lawful regulation of parking, are closely intertwined questions of statutory interpretation.

Prior practice in terms of regulating parking in the City of Hamilton

66. How parking has previously been regulated is not strictly relevant to a correct construction of the Corporation's regulatory powers. It is most pertinent to the question of whether the Corporation's general property-holding powers, assuming they do extend to parking regulation, can validly be deployed to modify existing legislative rules. Mr. Howard helpfully placed various previous Ordinances before the Court.

67. The power to impose charges in relation to parking was considered to have existed before the 1995 amendments to the Act, although any doubts were resolved by the validating portions of the 1995 Act. The Hamilton Fee-Parking Ordinance 1981 was made under section 38(2)(n) of the Act, and authorised the Corporation to charge fees for parking in "*fee car parks*" and created offences. Similar objects were achieved by the Municipalities (Hamilton Pay and Display Parking) Ordinance 1986, also made under section 38 of the Act. A wider range of traffic regulation including parking was regulated by another Ordinance made under section 38, the Hamilton Traffic and Sidewalks Ordinance 1988. Pay parking streets and parking charges were prescribed and related offences created by the Hamilton Pay and Display Voucher Parking Ordinance 1995.

[3] The Municipalities Amendment and Validation Act 1995.

68. Mr. Howard submitted that traffic offences could only effectively be charged if the relevant Ordinances were listed in Part 1 of the Schedule to the Traffic Offences Procedure Act 1974. The Schedule lists offences under section 13(7) of the Road Traffic Act 1947 (which includes ordinances made by a Municipality creating parking offences) as well as the 1988 and 1995 Ordinances.

69. In summary, off-street and on-street parking has historically (prior to 2007) been dealt with exclusively by Ordinances made under section 38 of the Act.

Do the general property-related powers of the Corporation under section 20 of the Act incorporate by necessary implication the powers of an ordinary property owner?

70. Mr. Howard firstly sought to challenge the entire idea of a public authority such as the Corporation having the same powers as a private landowner, citing the dictum of Lord Templeman in *Hazell-v-Hammersmith and Fulham Council* [1992] 2 A.C. 1 at 41:

> *"A London metropolitan borough council being created by statute could only exercise the powers conferred by statute. Neither the council nor the borough, so far as it existed apart from the council, had the powers of a natural person."*

71. He also relied upon an earlier passage in the same judgment (at page 31) which seems to me to articulate a broader and more fundamental principle:

> *"The authorities deal with widely different statutory functions but establish the general proposition that when a power is claimed to be incidental, the provisions of the statute must be construed...having regard to the provisions and limitations of the Act...regulating that function."*

72. Mr. Diel correctly submitted that there was no general principle that a public authority could never have the general powers of a natural person. I agree that, if section 20 is looked at in isolation from section 38, the property-related powers conferred by subsection (1) would by necessary implication include many of the powers which an ordinary landowner would have. The main difficulty with applying this tentative conclusion to the area of parking regulation is that section 38 of the Act explicitly deals with "*regulation and control*" of parking as one of the statutory purposes ordinances may prescribe. It seems internally inconsistent to find that Parliament intended to deal with the same topic by implication in one section when it has dealt with it expressly in another. It is an elementary rule of statutory construction that the relevant language must be construed in its wider statutory context. Or as Lord Templeman put it in *Hazell*, the "*provisions of the statute* [said to incorporate an incidental power] *must be construed...having regard to the provisions and limitations of the Act...regulating <u>that function</u>*" [emphasis added].

73. Further, while it may be theoretically possible for Parliament to confer on a statutory corporation or other public authority corresponding powers, to be exercised at the

authority's election, in my judgment clear words would be required to support finding such an exceptional legislative intent. One example is provided by a planning case cited by Mr. Diel and rightly distinguished by Mr. Howard, *Cusack-v-Harrow London Borough Council* [2013] UKSC 40. Another example in the local planning context is the option given to the Minister to hear appeals from the Development applications Board himself on the papers or affording the parties an opportunity to be heard by "*a person appointed by the Minister for the purpose.*"

74. It is standard drafting style to prescribe the various matters which "may" be dealt with by subsidiary legislation; this usually means that they must be dealt with, if at all, by subsidiary legislation. Mr. Howard referred the Court to the following provisions of the Road Traffic Act 1947:

> "***Control of parking of vehicles***
> *13(1)Subject as hereinafter provided, the parking on roads of vehicles or of any specified class of vehicle may be prohibited, restricted, or regulated by the following authorities—*
>
> *(a) in relation to highways outside municipal areas or in relation to estate roads by the Minister responsible for works and engineering;*
>
> *(b) in relation to highways within municipal areas, by the Municipality concerned;*
>
> *(c) in relation to a naval or military road, by the appropriate authority.*
>
> *(2)The Minister responsible for works and engineering, a Municipality or the appropriate authority, as the case may be, shall, in relation to the erection, placing or marking of notices on or near roads prohibiting, restricting or regulating the parking of vehicles, have the like powers as are conferred upon him by section 8, 9, 10 or 11 in relation to the erection, placing or marking of traffic signs.*
>
> *(3)A Municipality, as respects its municipal area, may, without prejudice to its powers under subsection (2), make orders prohibiting or regulating the parking of vehicles.*" [emphasis added]

75. The term "order" is not defined, but in my judgment it clearly signifies some form of statutory instrument because section 13(9) provides:

> "*(9) The negative resolution procedure shall apply to an order made under subsection (3).*"

76. It is not possible to sensibly construe section 13 of the Road Traffic Act 1947 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. This would produce absurd results. Section 13(2) of the 1947 Act confers the sort of powers relating to signs which would not be necessary if section 20 of the Act was still in play as regards regulating parking. In addition, section 2 of the Road Traffic Act expressly constrains the ordinance-making jurisdiction of Municipalities (under section 38 of the Act) without any reservation of section 20 rights:

> "2 (1)*Except as hereinafter in this Act provided, this Act shall have effect throughout Bermuda and no ordinance made under the Municipalities Act 1923, whether made before or after 23 April 1947, shall have any effect in so far as the ordinance is at variance with this Act.*
>
> *(2)Nothing in this Act shall absolve any person from any liability that he may incur by virtue of any other Act or at common law.*"

77. Obviously, the powers constrained relate solely to on-street parking and do not apply to off-street parking. But this makes the dual jurisdiction construction contended for by the Corporation even more improbable. To avoid repugnancy with the Road Traffic Act, the 1995 amendments conferring express powers to deal with on-street and off-street parking under sections 20 and 38 would have to be read in the following way to accommodate the Corporation's interpretation argument . Parliament must be deemed to have intended to require subsidiary legislation for on-street parking leaving the Corporation free to deal with off-street parking, at its election, either by ordinances or by administrative edicts based on general property-holding powers. This reading only has to be stated to be rejected.

78. Unless statutory provisions admit no straightforward meaning which is consistent with the language used and the apparent object and purpose of the statute, Courts should resist the invitation to reach unlikely statutory meanings which can only be justified by undergoing a rigorous course of mental gymnastics on a mind-numbing scale. While the 'turf war' which seems to have broken out between successive administrations of Municipal and central Government has clearly impeded the smooth workings of the Corporation's delegated law-making functions, this cannot excuse 'jumping' the governing legislative tracks clearly laid down by Parliament in its governing statute altogether. As was asserted by Mr. Foley in the 'Written Submissions of the Centre for Justice' based a variety of general and persuasive judicial pronouncements on implied powers: "*A power should only be implied to exist where it is so integral to* [a] *company's statutory mandate as to be obvious.*"

79. It remains to explain why I accept the submissions advanced on behalf of the Attorney-General that the case law relied upon by the Corporation ought not be followed in the present legislative context. *Arthur-v-Anker* [1997] QB 564 was Court of Appeal decision which upheld the right of the leasehold owners of a private car park who gave reasonable notice to trespassers that illegal parkers would be clamped. *Vine-v-Waltham Forest London Borough Council* [2000] 4 All ER 169 involved clamping on private property carried out by the Council as agents for the property owner. Neither case concerned the construction of the statutory powers of a public authority.

80. The high point of Mr. Diel's case on general property-owner's powers was *Akumah-v-Hackney London Borough Council* [2005] 2 All ER 148 (HL). On one reading of this authority it provides cogent support for the Corporation's contention that its governing statute provided two routes for parking regulation as well. If the Corporation was seeking an arguable jurisdictional basis for regulating parking without pursuing the section 38 route which was in the absence of effective diplomacy blocked, the *Akumah* case provides plausible and eminent judicial support for such a position. However, analysing this authority objectively through a lens unclouded by partisan motivations, the authoritative aura the Corporation sought to attach to this case eventually fades away.

81. This case involved a public authority and a parking regulatory scheme involving clamping for unauthorised parking, applied to the Council's housing estate for the convenience of its tenants. The claimant was a tenant who did not have a residential parking permit and argued the Council had no power to clamp his car without making bye-laws for that purpose. The House of Lords held that the Council had power to do so, not because of a general property-holding power under the governing legislation being equated with common law property rights, but as an incident of a very broad statutory property management power conferred in relation to residential property. Section 21 of the Housing Act 1985 provided:

> *"(1) The general management, regulation and control of a local housing authority's houses is vested in and shall be exercised by the authority and the houses shall at all times be open to inspection by the authority."*

82. At first instance, in the Court of Appeal and before the House of Lords, the argument that subsidiary legislation was the only means by which parking could be regulated was implemented was rejected. However, the argument that the bye-law route was the requisite statutory option was expressly rejected. Lord Carswell in his judgment dealt with the argument and its rejection in the Court below as follows:

> *"16. Moses J went on to discuss the relevance of section 23(1) of the Housing Act 1985 and section 7(1) of the Greater London Council (General Powers) Act 1975, which in Mr Kadri's submission pointed to a narrower meaning of section 21(1), and the need to resort to the power to pass byelaws in order to operate a valid parking control scheme. Section 23(1) provides:*
>
> > *'A local housing authority may make byelaws for the management, use and regulation of their houses.'*
>
> *That power was extended by section 7(1) of the 1975 Act, which was a private Act. It reads, as amended:*
>
> > *'The powers of the Council, a borough council and the Common Council of the City of London under section*

23(1) of the Housing Act 1985 to make byelaws for the management, use and regulation of houses provided by them shall extend so as to enable them to make byelaws prohibiting or regulating the parking or use of vehicles on any land held by them for the purposes of Part II of that Act, not being a highway.'

Moses J dealt with the arguments based on the wording of these provisions which were presented by counsel for Mr Akumah in paras 30 and 31 of his judgment:

> *'30. Mr Kadri QC argued that the function under section 21(1) does not include the regulation of parking, nor is regulation of parking incidental or conducive to the function in section 21(1): it is a wholly separate and distinct function. If, he submits, regulating parking was inherent or subsidiary to that housing function under section 21(1), so too it would have been subsidiary or inherent in the management, use and regulation of councils' homes under section 23(1). In that event there was no need for Parliament to extend the power to make byelaws by means of section 7 of the Greater London Council (General Powers) Act 1975.*

I do not agree. Section 23 of the Housing Act 1985 and section 7 of the 1975 Act are concerned with the power of the local authority to make byelaws which carry with them the right to prosecute and impose criminal sanctions. Particular care is therefore required to identify the source of such powers. Moreover, section 7 widens the power to make byelaws beyond the management, regulation and use of houses to any land, not being a highway, held for the purposes of housing and provides the power to acquire information where there is reasonable cause to believe an offence contrary to the byelaws has been committed."

17.Buxton LJ, in a short concurring judgment, expressed the same conclusion at para 38, speaking of the relationship between section 7(1) of the 1975 Act and section 23(1) of the 1985 Act:

> *'Mr Kadri argued that the contrast between those two sections demonstrated that the powers under section 23(1) were limited as he said them to be. It is however clear, in my judgment, as my Lord has already said, that section 7(1) extends the powers of a housing authority beyond those in section 23(1), or at least avoids any unclarity in the important area of making byelaws. In particular, section 7(1) of the 1975 Act extends to the regulation of parking on any land held*

for the purposes of Part II of the Housing Act 1985. It is clear from that Part, and not least from section 17(4) of it, that there may be circumstances where a housing authority holds land for the purposes of Part II of the 1985 Act, but where there is no housing yet in place. That is quite clear from the terms of the statute. The making of or power to make byelaws in respect of land that is not currently being used for housing purposes, and which may indeed be well away from the area of the local authority, does seem to me to be an extension of the power in section 23(1), and one that therefore shows that those who drafted the Act of 1975 cannot be assumed to have taken the view of the reach of section 23(1) that Mr Kadri urges."

83. Lord Carswell then concluded:

> *"26.There remains for consideration only the third contention advanced by Mr Kadri, based on the pointer to the interpretation of section 21(1) of the Housing Act 1985 which he submits can be found in the relationship between section 23(1) of that Act and section 7(1) of the Greater London Council (General Powers) Act 1975. On this issue I agree with the opinion expressed by both Moses J and Buxton LJ in the Court of Appeal concerning the extension by section 7(1) of the 1975 Act of the powers conferred upon a local housing authority by section 23(1) of the Housing Act 1985. The conclusion which Mr Kadri seeks to draw from the enactment of section 7(1) of the 1975 Act is not valid, and it does not throw any light upon the construction of section 21(1) of the Housing Act 1985."*

84. This case does illustrate a legislative example of clamping being implemented under a general statutory power when a more specific power to make delegated legislation for the same purpose of parking regulation exists in the same statute. However, as Buxton LJ in the Court of Appeal expressly found, one reason for the bye-law parking regulation provision being enacted was to extend councils' powers under the Housing Act to land on which houses had yet to be built. So the two powers were not completely overlapping powers. Moses J at first instance held that the bye-law parking regulation power carried an additional competence to impose criminal sanctions which did not exist under the general management power. But the most important distinguishing factor in *Akumah* is that parking regulation was held to be an integral part of the general statutory management (not a bare property holding) power. As Lord Carswell crucially held:

> *"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 that it is necessary to resort to section 12 of the Housing Act 1985 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. I do not propose, however, to attempt on the present occasion to define the limits of the powers conferred by section 12."

85. Mr. Diel was fundamentally correct to argue that *Akumah-v-Hackney London Borough Council* [2005] 2 All ER 148 supports a potential finding that a public authority's general powers, by analogy with those of a private landowner at common law, may be construed as including the right to regulate parking generally and to clamp offending vehicles in particular. However this assumes that the asserted particular regulatory power is truly incidental to the general power in the relevant statutory context. Implicit in the reasoning in this case is the assumption that a public authority managing residential property under legislation regulating housing must have flexible property management powers. The context of the Bermudian Municipalities Act 1923 is materially different in that:

(a) the general power relied upon in the present case is not a general property managing power at all. The regulation of parking is not inherently integral to the power under section 20(1)(b) conferred on the Corporation:

> *"to purchase, take, hold, receive and enjoy, and to give, grant, release, demise, assign, sell, mortgage or otherwise dispose of and convey by deed under the seal of the Corporation, any land in Bermuda, in fee simple or for a term of life or lives or years or in any other manner"*;

(b) the Municipal area under the Corporation's control includes both residential property and property (including roads) to which the general public have access;

(c) the specific powers conferred by sections 20 and 38 to regulate off-street and on-street parking appear in their statutory context designed to constitute the sole basis for parking regulation, there being no apparent other collateral purpose;

(d) parking regulation in the Municipal areas impacts substantially on the general public as opposed to a limited class of the public whose access to the regulated areas is based on residential property rights and, historically, has invariably entailed some criminal liability. Criminal liability can only be created by primary or delegated legislation;

(e) prior to comparatively recent attempts by the Corporation to avoid the need to make ordinances due to unusual political circumstances, historically parking regulation has been effected through statutory instruments made under section 38 of the Act. It is accordingly difficult to create new parking rules which do not have the effect of altering existing delegated legislation. It is impossible to seriously contend that the general property-owning powers of the Corporation are capable of validly amending delegated legislation.

Validity of the 2007 and 2010 Ordinances and the 2014 Resolution

86. The 2007 Ordinance was purportedly made under section 38 of the Act. According to paragraph 10, its purpose is "*complement any other Ordinances in respect of fee car parks*". It purportedly achieves this by authorising the clamping of vehicles which do not comply with the Municipalities (Hamilton Pay and Display Parking) ordinance 1986. It is not concerned with private residential parking but parking facilities made available to the public. It charges fees as well as purportedly creates an offence. In substance it amends the 1986 Ordinance by conferring additional enforcement powers on the Corporation in relation to the scheme prescribed in 1986.

87. I find that the Corporation had no general power independently of section 38 of the Act create the machinery for clamping contained in the 2007 Ordinance.

88. The Hamilton Pay and Display Voucher Parking Amendment Ordinance 2010 was purportedly made under section 38(2)(bb) of the Act. Its operative paragraph reads as follows:

> "*2. Bermuda Statutory Instrument BR 31/1995 Hamilton Pay and Display Voucher Parking Ordinance 1995 is amended by deleting the words '(b) loading zones;' and the words: '(c)fifteen-minute parking zones;' from the exceptions in the definition of 'pay parking street' in article 2 of the said Ordinance.*"

89. I find that the Corporation had no general power independently of section 38 of the Act to make the amendment to the 1995 Ordinance purportedly made by the 2010 Ordinance.

90. The only instrument which was explicitly based on the general power contended for was Resolution No. 1406001, a 'Resolution of the Corporation of Hamilton Concerning the Extension of Pay Parking Streets' adopted by the Corporation on June 4, 2014 with an operative date of August 18, 2014 ("the Resolution"). The Resolution has clearly been drafted with considerable legal care. The recitals assert, *inter alia*, that under section 20 of the Act, the Corporation:

> (1) "*has all the powers of a landowner in respect of the property it owns*";

(2) "*power to provide off-street parking and to provide for means of entrance to and egress from off-street parking*";

(3) "*(by implication of law)...has all such powers as may be calculated to facilitate, or incidental or conducive to the exercise of such powers*".

91. The express purpose of the Resolution, as stated in the final resolution is to meet the revenue requirements of the City's infrastructure and replacement plans "*by extending the area of the City of Hamilton where fees are charged for parking and by reorganizing the fee structure*". Paragraph 2 of the Resolution expressly affirms the primacy of all Acts of Parliament, including specified traffic legislation. Paragraph 1 of the Resolution provides as follows:

> "*(1) Subject to sub-paragraph (2), articles 3 to 12 (inclusive)(and so much of article 2 as may be applicable) of the Hamilton Pay and Display Voucher Parking Ordinance 1995, in addition to the pay parking streets referred to in Schedule 1 to that Ordinance, shall apply also to every other street or part of a street within the municipal area of the City of Hamilton as described by section 6(1) of and Schedule A1 to the Municipalities Act 1923, but subject to the exceptions referred to in that Ordinance; and the provisions of that Ordinance referred to are deemed, in relation to parking on such streets, to be a part of this resolution.*
>
> *(2) Notwithstanding the provisions of Article 3(2) of, or Schedule 2 to the Hamilton Pay and Display Voucher Parking Ordinance 1995 relating to fees, the fees payable in respect of parking on either the pay parking streets referred to in Schedule 1 to that Ordinance or on the additional streets referred to in sub-paragraph (1) shall be as set out in the Schedule to this resolution.*"

92. The Resolution in my judgment clearly purports to amend the 1995 Ordinance in two respects: (1) by extending the geographical sphere of its operation and (2) by modifying the fees prescribed by that Ordinance. Section 38(1) authorizes the making and "*amendment from time to time*" of ordinances for the purposes set out in that section. Since 2013:

(a) all ordinances must be submitted in draft to the Minister and the Attorney-General for review;

(b) ordinances relating to fees are subject to the affirmative resolution procedure;

(c) the Minister is given the power to amend or repeal any ordinance made by the Corporation (subject to the affirmative resolution procedure as well as Cabinet approval).

93. In my judgment it is impossible to construe the Act as conferring on the Corporation the power to choose between the executive decision making and delegated legislation making options for traffic regulation at its whim. It is also as a matter of more fundamental principle impossible to construe the Act as empowering the Corporation by executive fiat to amend delegated legislation. It follows that the Resolution is also invalid. As Laws J observed in *R-v-Somerset County Council, ex parte Fewings et al*[1995] 1 All 513 at 524 in a passage upon which Mr. Howard aptly relied:

> *"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."*

Conclusion

94. In the present case, in particular as regards the Resolution, the Corporation has acted in a far from arbitrary manner. However, as a matter of statutory interpretation, its attempts to resolve the unfortunate and ultimately futile impasse between itself and the central Government over the procedure for making ordinances have stretched its proper statutory authority beyond their permissible limits. Both sides were partly right and partly wrong in the technical legal points they jousted over. But their respective representatives were also wholly wrong to the extent that they appear to have lost sight of the practical need for civility and cooperation between the municipal and central branches of Government in the wider interests of the public which they jointly serve.

95. Historically, parking regulation through schemes which involve the creation of traffic offences and the levying of charges on the public at large has always been done through statutory instruments, a form of delegated or subsidiary legislation. This was based on what might be called an uncomplicated view of the scheme of the Corporation's governing Act which was entirely consistent with local legislative practice generally.

96. The Municipalities Act 1923 requires the regulation and operation of off-street and on-street parking through ordinances which must now be subjected to Parliamentary scrutiny. This is the only available statutory mechanism for dealing with such matters. The affirmative resolution procedure applies where fees or charges are

involved; otherwise the negative resolution procedure applies. The Corporation itself very properly sought declaratory relief from the Court because of concerns about its ability to implement the 2007 Ordinance which purportedly instituted a new wheel clamping scheme.

97. The 2007 and 2010 Ordinances were not validly made because they failed to comply with the lighter touch procedural requirements then in force. Alternatively, they were rendered invalid by section 17(2) of the Municipalities Amendment Act 2013, which Act subjected the Corporation's law-making powers to more rigorous central Government scrutiny. The concerns informally expressed by then Senior Magistrate Archibald Warner and formally raised by the CfJ about the legality of the clamping scheme were fully justified. The 2014 Resolution, purportedly made under the Corporation's general property-owning powers, was also invalidly made.

98. In the course of the hearing I expressed concerns about the consequences which might flow from acceding to the arguments of the Attorney-General and the Centre for Justice and finding in favour of invalidity of the instruments in question. Those concerns may well have been exaggerated or misplaced. Those concerns in any event potentially could be met were the Government to see fit to enact validating legislation along the lines of section 7 of the Municipalities Amendment and Validation Act 1995. Be that as it may, inconvenient consequences afford no answer to a valid complaint that a statutory authority has exceeded its powers in a fundamental respect.

99. I will hear counsel as to the terms of the final Order required to give effect to the present Judgment and as to costs.

Dated this 5th day of November 2014

IAN RC KAWALEY CJ