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Judgment
37, 1964

IN THE PRIVY COUNCIL. No. 25 of 1964

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND



Between

HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND on the relation of ROBERT RICHARD LEWIS and ERIC BERNARD ELLIOTT, Apellant

and

THE MAYOR, COUNCILLORS AND AND CITIZENS of THE CITY of LOWER HUTT Respondent

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- CASE FOR RESPONDENT -

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LOWER HUTT.

IN THE PRIVY COUNCIL No. 25 of 1964

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR NEW ZEALAND ON THE RELATION OF ROBERT RICHARD LEWIS AND ERIC BERNARD ELLIOTT

Appellant

- AND -

THE MAYOR COUNCILLORS AND CITIZENS OF THE CITY OF LOWER HUTT

Respondent

CASE FOR RESPONDENT

RECORD

1. This is an appeal from a Judgment of the Court of Appeal of New Zealand (North P.Turner and McCarthy JJ .) given on 13th December 1963 dismissing with costs an appeal by the present Appellant against a Judgment of the Supreme Court of New Zealand (McGregor J. ) given on 20th September 1963 refusing the Appellant an order restraining the Respondent from adding sodium silico-fluoride or any similar substance to the domestic water supplied by it. p.71 p.44

2. The origin of the proceedings was an action commenced in the Supreme Court at Wellington. The Appellant, as Plaintiff, filed a Statement of Claim in which, so far as is relevant to this appeal, it was alleged that the relators were residents and ratepayers of the City of Lower Hutt and that they drew their supply of domestic water from the Respondent (therein named the Defendant). It was further alleged that the Respondent had acquired and installed equipment for the purpose of p.2

RECORD

adding sodium silico-fluoride to the water supplied to the residents of the said City. Further, that the Respondent had maintained operated and used such equipment and had added sodium silico-fluoride to the domestic water supplied as aforesaid, It was further alleged that the addition by the Respondent of sodium silico fluoride as aforesaid was for the purpose of medication only and not of purifying the water, and that such addition of sodium silico fluoride was not within the powers conferred upon or vested in the Respondent.

3. The Respondent filed a Statement of Defence in which it admitted the above allegations save that it denied that the addition of sodium silico-fluoride was for the purpose of medication only and it denied also that the maintenance operation and use of the fluoridation equipment, and the addition of the sodium silico fluoride, was not within its powers. p.5

4. McGregor J., giving the judgment of the Supreme Court, found certain facts relating to the actual process of fluoridation of the Respondent's water supply, and its desirability. He found, inter alia, that in nature water free from impurities is never found. Absolutely pure water can be supplied only by means of a complicated distillation process, and would not be palatable or acceptable to the ordinary user. All natural waters contain something in the nature of impurities. The Lower Hutt City water supply, which is an artesian one, contains 40 parts per million of calcium, 3.8 parts per million of magnesium, 15.4 parts per million of sodium and .3 parts per million of potassium. The fluoride content is so low that it cannot be demonstrated and the natural water is slightly acid in action. For a double purpose the Respondent installed a treatment plant adding both lime and fluoride to the water. In result the water supplied pp.32 ff
p.32, l.28
p.32, ll.28-31
p.32, l.31
p.32, ll.34-36
p.32, ll.37-38
p.32, l.38

RECORD

contains 138 parts per million of calcium, rendering it slightly alkaline, and .96 parts per million of fluoride. The alkalinity obviates the acid reaction on the pipes through which the water is supplied, thus achieving a desirable result. The fluoridation was, McGregor J. found, highly beneficial to the population in general by reducing the incidence of dental caries and to children in particular, and that it was in the highest degree desirable that fluoridation of water should be developed.

p.33, ll.1-4

(p.33, ll.36-37
(p.40, ll.18-19

p.32, ll.26-27

5. McGregor J. said that whether the Respondent was within its powers in maintaining its fluoridation scheme depended upon the powers conferred on it as a local authority by the legislature. These powers are contained in the Municipal Corporations Act 1954. That it is accepted that the Respondent in the exercise of its operations is limited to the authorities conferred or reasonably implied by or from the provisions of the enabling legislation. Attorney-General v. Great Eastern Railway Co. (1879) 5 A.C. 473, 478; and Trustees of the Harbour of Dundee v. D. and J. Nicol, (1915) A.C. 550, 570. Further that the Municipal Corporations Act 1954 should receive a fair large and liberal construction in accordance with its objects. The Court should be liberal in deciding what matters are fairly incidental to or consequential upon the express authority conferred; and general powers given to effect specified purposes will ordinarily be construed to cover any proper method of effecting those purposes, although the method may not have been known nor been in existence at the time the powers were originally granted. Halsbury 3rd Edn Vol. 30 at 689; Attorney-General v. Cambridge Consumers Gas Co. (1868) L.R. 6 Eq. 282.

p.35, ll.14-16

p.35, ll.34-35

p.35, ll.40-42

p.36, ll.21-25

p.36, ll.25-28

p.36, ll.30-34

6. McGregor J. pointed out that the Respondent relied

upon s. 240 and s. 288 of the Municipal Corporations Act 1954 for its powers to maintain its fluoridation scheme. Section 240 provides that the Council may construct waterworks for the supply of pure water for the use of the inhabitants of the district, and may keep the same in good repair and may from time to time do all things necessary thereto. The Appellant had argued that this provision conferred no authority to add fluoride to the natural water supply and questioned whether the fluoridation plant was a plant for the supply of pure water. The Judge accepted the meaning that pure water was equivalent to wholesome water. Further that the natural artesian water of the Respondent was pure water in the sense that it was wholesome or potable water and that, on the evidence, the fluoridated water was still pure water even although there was a slight percentage of chemicals added thereto. The Judge, however, held that the fluoridation plant was not necessary for collecting or conveying pure water to the district because the Respondent already had such pipes machinery and appliances as were necessary before it installed the fluoridation plant. The Judge referred on this point to the definition of "Waterworks" in s.239 of the Act and to The Village of Forest Hill v. The Municipality of Metropolitan Toronto (1956) O.R. 367 and to R. v. Fredericton (1956) 2 D.L.R. (2nd) 551. McGregor J. felt it would be straining the language of the Act to hold that by implication the legislature had empowered the Respondent to add fluoride to its water supply where the water it already supplied was pure. The Judge accepted that if a thing be within the discretion of the local authority the Court had no power to interfere with its mode of exercising that discretion provided it acted reasonably and bona fide

p.35, ll.36-39

p.36, ll.37-40

p.37, ll.7-8

p.37, ll.9-11

p.37, ll.16-17

p.37, l.32

p.37, ll.33-35

p.37, l.21

p.38, l.2.

p.38, l.4.

p.39, ll.11-15

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Westminster Corporation v. London and North Western Railway (1905) A.C. 427. But the Judge considered that the discretion was limited to what was necessary for the supply of pure water and accordingly did not give the Respondent power to fluoridate the water. p.39, ll.23-26 p.39, ll.29-30

7. McGregor J. then turned to s. 288 of the Municipal Corporations Act 1954 which reads as follows :

> "The Council may do all things necessary from time to time for the preservation of the public health and convenience, and for carrying into effect the provisions of the Health Act 1956 so far as they apply to the district." p.39, ll.35-40

The Judge then made certain specific findings of fact on the evidence in relation to fluoridation and public health and went on to consider the meaning of the words "preserve" "public health" and "from time to time" contained in the section and concluded that fluoridation of the water supply is necessary for the preservation of the public health. The Judge rejected an argument by the Appellant that such a construction of s. 288 would by virtue of s. 23 of the Health Act 1956 impose on all local authorities a duty to install fluoridation schemes. The order sought by the plaintiff was accordingly refused. p.40, ll.14-27 p.40, l.31. p.40, ll.40-41 p.41, ll.16-25 p.41,ll.7-8 p.41, ll.26-30 p.43, 1.4

8. The Appellant appealed from the Judgment of McGregor J. on the ground that the judgment was erroneous in fact and law. The appeal was heard on the 4th and 5th days of November 1963. Judgment was reserved and delivered on the 13th December 1963 dismissing the appeal with costs. p.45, 1.21 p.71

9. North P. said counsel were agreed that the necessary statutory authority, if it exists, must be found in one or other of three provisions, namely,

s. 240 of the Municipal Corporations Act 1954 or s. 288 of that Act, or s. 23 of the Health Act 1956. p.47,ll.3-13 He then went on to consider the ambit of s. 240 and in particular to consider what meaning should be given to the word "pure". He referred to Milnes v. p.47, l.23 Mayor of Huddersfield (1888) 11 App. Cas. 522 and arrived p.47, l.35 at the conclusion that he was prepared to accept the view of both counsel for the Appellant and the Respondent that the word "pure" was used in a very general sense as meaning something like "wholesome" or "potable" water. The Judge found no difficulty p.48, ll.9-12 in reaching the view that "waterworks" as defined in s. 239 would include a plant installed for the purpose of improving the quality of the natural water available p.49, ll.9-11 either by extracting some element there to excess or p.49, ll.12-13 adding some useful element that was lacking. If the p.49, ll.16-17 necessary authority was not found in the express words it might be fairly regarded as being incidental to or consequential upon those things the legislature has authorised. Attorney-General v. Great Eastern Railway Co. (1880) 5 App. Cas. 473. On the other hand if a local p.49, ll.21-26 body in the interests of the health of the inhabitants. sought to introduce foreign substances into the water supply then s.240 would not justify the course because it would be adulterating the water supply and rendering it impure. p.49, ll.26-31

10. North P. then considered the case of The Village of Forest Hill v. Metropolitan Toronto (1955) O.R. 889, p.49, l.35 (1956) O.R. 367, (1957) 9 D.L.R. (2nd Ser.) 113 and after canvassing the opposing points of view expressed by the Judges preferred the minority view of the Chief Justice of Canada and Locke J. as the more convincing. p.52, ll.40-43 The Judge went on to say he saw no reason why a local authority, so long as it acted in good faith, should not be entitled to take any reasonable step it thought

proper to improve the quality of its available water supply as water. It must not attempt to introduce a substance foreign to the nature of water but short of that it was entitled to change the concentration of the various elements in the water available to it if it was advised that that course was desirable. Local authorities are public bodies entrusted with powers and duties for public purposes. Thus the power contained in s. 240 should not be narrowly construed: Attorney-General v. The Crayford Urban District Council (1962) 1 Ch. 575. New Zealand soils are deficient in fluoride; fluoride is a natural constituent of most waters used for drinking and domestic purposes; and the water supply available to the respondent is particularly low in fluoride content. Acting upon expert advice the Respondent was rectifying a deficiency in the water available to it and was lawfully entitled so to do.

p.53, ll.23-26
p.53, ll.29-32
p.53, l.33.
p.53, l.36
p.53, ll.42-43
p.53, ll.44-45
p.54, ll.1-2
p.54, ll.7-8

The Judge went on to say he had not found it useful to place reliance on s. 288 of the Municipal Corporations Act 1954 or s. 23 of the Health Act 1956. He considered that the general provisions contained in these two sections would not enlarge the specific power contained in s. 240.

p.54, ll.20-22
p.54, ll.30-32

11. Turner J. first considered s.240 and concluded that McGregor J. had taken too narrow a view in his interpretation of the word "waterworks". He considered "waterworks" included not only plant strictly necessary for the collection and conveyance of water but also all plant reasonably ancillary thereto. Thus if fluoridated water could be described as pure water the fluoridation plant was part of a waterworks; if not the plant was not one reasonable ancillary to the supply of pure water. The question was whether fluoridated water

p.55, l.10
p.55, ll.20-22
p.55, ll.27-29

was "pure water" . The Judge considered p.55, l.33
the sources of water in New Zealand and concluded
that the term "pure water" referred not to pure
$H_2O$ but to ground waters which have been subjected
to a reasonable degree of purification. He p.56, ll.14-17
considered that once resort is to be made to ground
waters certain processes of purification become
inevitable. He saw no reason why, for instance, the p.56, ll.29-31
addition of chlorine to eliminate bacterial contam-
ination, or lime to neutralise acid constituents,
should not be permissible, for the residue which
remained in solution after the operation is only
incidental upon the removal of deleterious matter,
previously contaminating the water. However he did p.56, ll.32-37
not expressly so decide because the addition of these
substances was not a matter of formal argument. But p.56, ll.38-40
it was quite another thing to attempt to justify the
addition (as here) of more of some substance already
present in the natural water on the ground that such
addition will be beneficial to the diet of the
consumer. p.56, ll.40-43

12. The question was "Is the process of fluoridation
employed by the Lower Hutt City Council one which can
reasonably be said to be part of the supply of "pure
water"? If it was not then no considerations of p.57, ll.12-14
community benefit could bring the Judge, by straining
the construction of s. 240, to decide the case "on the
merits". In Turner J's opinion the section authorised p.57, ll.15-17
the collection of ground water reasonably suitable for
drinking purposes and its purification by removing
deleterious and contaminating substances which it
naturally contains. Water could not be purified by p.57, ll.23-26
adding to it a substance not there before for the
purpose of compulsorily improving the diet of the

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consumer. It made no difference if the additive was shown, as here, to be wholesome or beneficial in the proportions used. If one substance could be added, so could another. p.57, ll.32-36 p.57, ll.37-40'

13. Turner J. rejected an argument that the addition of fluoride might be justified as a step in purification on the ground that fluoride is found in all ground waters in nature, but in only minute proportion in the Lower Hutt artesian supply, and that the addition practised at Lower Hutt does no more than "correct a deficiency". Such an argument involved the postulation of some "normal" drinking water and there was no such standard perceptible in this case. p.58, ll.1-5 p.58, ll.7-11

14. Turner J. went on to consider the English and Canadian cases cited and pointed out that they were decided on provisions containing the words "pure and wholesome", and reached the conclusion that the additional word "wholesome" prevented them being of assistance in construing the New Zealand section. p.59, ll.1-2 p.59, ll.6-8

15. Turner J. next considered s. 288. He considered the words "necessary from time to time" were applicable only to ad hoc action. Further that the evidence did not establish that fluoridation was necessary for the preservation of public health, though it was shown to be desirable for the improvement of the health of the inhabitants. Further the words of the section were too general to be of use to the Respondent. If they were to be used to authorise fluoridation he was not able to see where the use of the section could stop. He therefore concluded the section did not give the Respondent the necessary authority to fluoridate the water. He further held that ss. 240 and 288 were not intended to be read p.60, ll.15-16 p.60, l.19 p.60, ll.20-21 p.60, ll.22-24 p.60, l.26 p.60, ll.28-30

together so as to extend the meaning of the other and give the authority sought. For reasons similar to those given by him in relation to s. 288 he found it impossible to read s. 23 of the Health Act 1956 as giving the Respondent the necessary authority. p.60, ll.40-41 p.61, ll.9-12

16. McCarthy J. commenced his judgment by referring to the powers that a municipal corporation has, and pointed out that the Courts will consider a corporation as having not only the powers expressly stated, but also whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised. Attorney-General v. Great Eastern Railway Co. (1880) 5 App. Cas. 473; Dundee Harbour v. D. and J. Nicol (1915) A.C. 550. Further a liberal view would be taken of the power under consideration. Attorney-General v. Crayford Urban District Council (1962) 1 Ch. 575. Finally, if the act done is a discretionary power of the corporation the Courts will not interfere if the discretion has been exercised reasonably and bona fide. Westminster Corporation v. London and North Western Railway (1905) A.C. 426. He considered these principles important because the conclusion one reached in this case depended largely on the spirit in which one approached the interpretation of the statutory provisions on which the Respondent relied. p.62, ll.16-18 p.62, ll.20-22 p.62, ll 28-30 p.62, ll.30-34 p.62, l.35 to p.63, l.1.

17. The Judge then turned to consider these statutory provisions and dealt first with s.240. He held that by implication it clearly conferred a power to undertake the supply of water, but that it must be the supply of "pure water". He then considered the meaning of "pure water" and expressed the view that if a literal interpretation is rejected the question becomes more open and more subject to the influences p.63, ll.23-24 p.63, ll.27-28

of one's approach. He canvassed various approaches p.63, l.44
to the meaning of the word "pure" and concluded that
by inserting the word "pure" in the section the
legislature meant no more than to ensure that it
was the supply of water alone, not water and some-
thing more, which was being authorised. On this p.64, ll.31-33
view two questions arose; (1) whether the addition
of fluoride resulted, in fact, in a supply of water
plus something else for if it did that was the end
of the matter, and, (2) even if it did not, whether p.64, ll.34-36
the act of fluoridation could reasonably be regarded
as incidental to the supply of water by a local body
to its residents. The Judge then went on, before p.64, ll.36-38
answering these two questions, to consider the facts
as to what it was the Respondent actually did in the
course of fluoridating its water supply and why that was done.

18. McCarthy J. then surveyed the facts relating to
these topics and referred to the role of fluorine in p.65, l.7 ff.
nature, and in the human body, and particularly in
teeth structure. He pointed out that small amounts
of it occur in most natural waters in the form of
soluble fluoride ions but that New Zealand ground p.65, l.9
waters, generally speaking, have a particularly low
fluoride content when compared with very many overseas
waters, and especially when compared with what experts
consider to be an optimum fluoride level. The object p.65, l.28
of fluoridation, as carried out by the Respondent, was
to bring the level of the fluoride content up to a
figure which the experts consider to be desirable p.65, l.31
He concluded that it was established that a higher concen-
tration of fluoride in the Respondent's water supply
would be highly desirable. The Judge then considered p.66, l.16
the Appellant's submissions to the effect that the
adding of the fluoride was not a step in obtaining a

RECORD

supply of pure water but was a mass medication. p.66, ll.31-32
McCarthy J. said that terms like "mass medication" obscured the issue and in particular it veiled the distinction between the extent of a power on the one hand, and the motives behind its use on the other. Nowhere had it been suggested that there p.66, ll.37-39
was an improper exercise of an existing power in this case; p.66, l.41
it was the existence of a sufficiently wide power at all which was challenged. p.66, ll.41-42

10 19. While some people saw fluoridation simply as a medication the Judge thought it better not to do so; p.67, ll.5-6
but rather it should be borne in mind that fluoride is normally present in New Zealand waters and that all that is done in Lower Hutt is to increase the quantity. This distinction is basic when one is p.67, ll.7-9
concerned with the extent of the power. Fluoridation p.67, ll.9-10
does not add a substance that is foreign to the nature or essence of natural water but brings about a change in the concentration of the fluoride. The water is p.67, ll.11-13
20 still "pure water" in the sense in which that expression should p.67, l.18
be interpreted. It is not water plus some foreign substance in material quantity. Further that though fluoridation may not be p.67, ll.20-21
literally authorised by the words of the section yet because it results in a water which brings to the inhabitants of the district a required element which is normally and best conveyed to humans through a water supply, it can be seen as an act reasonably and properly performed in the prosecution of the main purpose. p.67, ll.34-40

30 20. The Judge then considered and rejected an argument of the Appellants that there is a distinction between the addition of chlorine and lime, which makes their addition permissible as acts of purification, and the addition of fluoride which is not an act of purifica- p.68, ll.2-5

tion but a step in making the water less pure. He pointed that in his interpretation of "pure water" purification was not the test. His test was whether the action of the Council promoted the supply of water suitable for the purposes for which water is normally supplied in like communities. The Judge also considered and rejected an argument that if the Respondent was permitted to add fluoride, it could then add any other substance which it honestly considered beneficial. He pointed out that fluoride was normally found in water and that increasing the concentration did not amount to adding something foreign. Whether some other substance could be added would have to be determined separately in each case. The judge referred to Attorney-General v. Crayford Urban District Council (1962) 1 Ch. 575.

p.68, l.6

p.68, ll.13-15

p.69, ll. 2 ff.

p.69, ll.3-5

p.69, ll.5-6

p.69, ll.6 ff.

21. McCarthy J. concluded his judgment by referring shortly to the Municipality of Metropolitan Toronto v. Forest Hill (1957) 9 D.L.R. (2d) 113 and added that as, in his view, the proper interpretation to put upon s.240 impliedly authorised the fluoridation of the water supply he had no need to enquire whether s.288 or s.23 of the Health Act would also avail the Respondent.

p.69, l.31

p.70, ll.20-23

22. The Respondent humbly submits that the decision of the Court of Appeal and of the Supreme Court were right and should be affirmed, and that this Appeal should be dismissed with costs for the following among other

REASONS

1. The power of the Respondent to carry on its fluori-

dation scheme depends upon the construction to be placed on the powers conferred upon it by statute.

2. Such statutory powers should be construed in accordance with the following principles:

(a) Being powers of a public nature to be exercised by a public body they should be construed liberally;

(b) The powers include not only those expressly stated but also whatever may be fairly regarded as incidental to, or consequential upon, them;

(c) Acts done within discretionary powers will not be interfered with by the Court if the discretion has been exercised reasonably and bona fide.

(d) The Powers should be given such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent meaning and spirit. (Section 5 (j) of the Acts Interpretation Act 1924.)

3. That upon a proper interpretation of s.240 of the Municipal Corporations Act 1954 the Respondent has power to carry on its fluoridation scheme

4. And, or alternatively, upon a proper interpretation of s.288 of the Municipal Corporations Act 1954 the Respondent has power to carry on its fluoridation scheme

5. And, or alternatively, upon a proper interpretation of s.23 of the Health Act 1956 the Respondent has power to carry on its fluoridation scheme

6. And for the reasons given in the Judgments of McGregor J. in the Supreme Court and of North P. and McCarthy J. in the Court of Appeal.

R. C. SAVAGE.

IN THE PRIVY COUNCIL.

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