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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 38 of 1971

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding)
The Hon. Mr. Justice Grannum, J.A. (Ag.)
The Hon. Mr. Justice Swaby, J.A. (Ag.)

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BETWEEN - KINGSTON WHARVES LTD.

and

WESTERN TERMINALS LTD. - (APPELLANTS)

AND - THE PORT AUTHORITY - (RESPONDENT)

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R.A. Mahfood, Q.C. and Dr. L. Barnett for the appellants.

Dr. K. Rattray, Q.C. and Dr. A. Edwards for the respondent.

October 29, 30, 31 and November
1, 2, 5 - 9 , December 20, 1973.

LUCKHOO, J.A.:

On November 9, 1973, we dismissed the appellants' appeal against the decision of the Port Authority contained in that Authority's report to the Minister of Trade and Industry dated July 16, 1971 and promised to put our reasons therefor in writing. This we now do.

The appellants Kingston Wharves Ltd. and Western Terminals Ltd. are limited liability companies operating Class I public wharves in the Port of Kingston within the contemplation of the Wharfage Law Cap. 412 as amended by the Wharfage (Amendment) Act, 1966 (No.15). In the period September 15, 1970 to May 19, 1971 the Port Authority of its own motion held a public enquiry (under the provisions of r. 4

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of the Wharfage Rates Rules contained in Schedule A Part II to the Wharfage Law as substituted by the First Schedule to the amending Act) for the purpose of reviewing the tariff of rates fixed pursuant to the provisions of Schedule A in relation to goods landed on or delivered at or shipped from a wharf. The tariff rates which were the subject of review had been fixed by the Port Authority on August 10, 1967, after a public enquiry was held by the Authority in that regard. An appeal by the present appellants against that decision of the Port Authority was later abandoned. We have been informed by Mr. Mahfood that that appeal was abandoned because of practical considerations.

The present appeal raises two main questions for the Court's determination - (i) whether the tariff of rates as revised secured to persons investing in the public wharves of the Island generally a fair and reasonable return computed on the basis prescribed by r. 17 of the Wharfage Rates Rules contained in Schedule A to the Wharfage Law; (ii) whether the Port Authority was right in holding that there should be no apportionment of the contract price of land owned by the appellant companies between what is said to be attributable to the cost of the land and attributable to the cost of dredging.

<u>The first question - whether a fair and reasonable return on equity capital?</u>

Rule 17 of the Wharfage Rates Rules in so far as it affects this question is as follows -

R. 17 (1) The Tariff shall secure to persons investing in public wharves of the Island generally a fair and reasonable return computed on the following basis, that is to say -

(a) the Authority shall -

(i) treat the operations of all Class I wharves in the Island as being notionally the operations of a single wharf (for this purpose consolidating the accounts of all the wharves of that class accordingly);

(ii) compute a fair and reasonable return to persons notionally investing in such single wharf; and

(iii) fix the Tariff accordingly;

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(2) In pursuance of paragraph (1) the Authority shall -

(a) charge against revenue all charges which are properly to be made against revenue including in particular the following -

(i) operating and maintenance expenses;

(ii) taxes other than income tax and profits tax;

(iii) depreciation allowances in accordance with paragraph (3);

(iv) any other charges shown to the satisfaction of the Authority to be necessary and appropriate for the purpose of earning the revenue, including in the case of a public wharf operated by a limited liability company, interest charges, payments for the amortisation of expenses (including discounts after allowing for any premiums) on the issue or retirement of shares or debentures;

(b) apportion non-recurring items over such number of years as the Authority may think reasonable;

(c) in the case of a limited liability company which is either engaged solely in the operation of a public wharf or engaged in the operation of a public wharf and in such other operations as may be approved by the Minister as being ancillary operations, make provision for the payment of dividends on preference shares and for fair and reasonable earnings on the equity capital in respect of the operation of the public wharf, the preference shares and equity capital relating to the wharf being ascertained, where necessary, in accordance with sub-paragraph (d);

(d) where any person is engaged in a single enterprise which consists of more than one of the following operations namely -

(i) the operation of a Class I wharf;

(ii) the operation of a Class II wharf;

(iii) some other operation approved by the Minister under sub-paragraph (c),

apportion the capital, charges and expenses of such enterprise between such respective operations in such manner as it thinks fit;

(4) In paragraph (2) of this rule -

(a) "limited liability company" means any company limited by shares and incorporated under any statute for the time being in force in the Island regulating the incorporation of trading companies;

(b) "equity capital" in relation to a limited liability company means the sum of -

(i) its issued share capital excluding preference shares and also excluding any part of the issued share capital arising from a revaluation of assets and the capitalization of a capital surplus arising therefrom; and

(ii) its reserves.....

(ii) its reserves of whatever kind excluding any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing for any known liability (which shall be deemed to include all liabilites in respect of expenditure contracted for and all disputed or contingent liabilities);

(c) "earnings on equity capital" includes -

(i) dividends on issued share capital referred to in sub-paragraph (b) (i) of this paragraph; and

(ii) such reserves as in the opinion of the Authority are usual or proper to be made by undertakings of a like character;

(d) in determining the reasonable earnings on the equity capital of limited liability companies operating public wharves regard shall be had to the earnings of companies which in the opinion of the Authority are comparable investor owned companies, whether incorporated in Jamaica or elsewhere, and with which such first-mentioned companies must compete for capital.

The appellants say that the Tariff has not secured to persons investing in public wharves in the Island a fair and reasonable return by reason of the Port Authority's failure to comply with the terms of r. 17 (2) (c) which requires that provision should be made not only for payment of dividends on preference shares but also for fair and reasonable earnings on equity capital. This failure the appellants urge is due to the fact that the Port Authority made provision for earnings on only a portion of equity capital. In order to ascertain whether this complaint is justified it is necessary to examine the basis upon which the Port Authority proceeded in arriving at what they considered to be fair and reasonable earnings on equity capital.

The Port Authority computed the Class I issued share capital of the appellants to be $2,323,139 after certain adjustments were made. The reserves they computed to be $3,819,422 also after certain adjustments were made. The total of these amounts $6,142,561 they regarded as forming the equity capital of the appellants. At the public enquiry the appellants had contended that the equity capital of the appellants was $7,782,583 but this contention was not pursued before us and the Port Authority's finding in this regard was not made a ground of appeal. The Port Authority computed what

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in their opinion was a fair and reasonable return on equity capital in the following way. They determined (a) what dividends ought to be paid on the issued share capital as defined by Law applicable to Class I wharves; (b) what were the reserves which in their opinion were usual or proper to be made by undertakings of a like character and (c) what provision for additional earnings by the appellants should be made having regard to any special circumstances or needs of the appellants which may be shown to exist. In respect of (a) they considered that the amount to be made available to pay dividends on issued share capital should be 12½% per annum requiring provision of $290,392. In respect of (b) as to what sums should be added to the existing reserves, they had regard to (i) the present state of the reserves; (ii) the purpose for which the reserves were required; (iii) the adequacy or otherwise of the reserves for those purposes. Having ascertained that the existing reserves applicable to Class I wharves were $3,819,422 they decided after examination of the operations of the appellant companies, the submissions made and the evidence adduced at the public enquiry that those companies required reserves for the following purposes -

> "(a) to meet the proposed capital expansion;
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> (b) to amortise their debentures;
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> (c) to pay companies' profits tax; and
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> (d) to provide funds against the likelihood that the companies will issue as equity share capital that part of the sums now held as part of the reserves which they may be entitled to issue as equity share capital."

As Mr. Mahfood conceded the above forms a comprehensive list of the purposes for which the appellant companies required reserves.

The Port Authority considered that the existing reserves of $3,819,422 could quite easily accommodate the future expansion programme requiring the expenditure of $1,305,000, leaving a balance of $2,514,422 in the reserves. For amortisation of debentures $776,753 and payment of companies' profit tax $150,000 the Port Authority considered that the reserves should be increased by those amounts. In addition the Port Authority considered that the

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reserves should be increased by a further sum of $152,233 to be utilised, if necessary, for the payment of an annual dividend of 12½%" upon that part of the reserves which the shareholders are entitled to issue as shares ..... if and when in fact issued." It is this last mentioned provision which, the appellants contend, shows that the Port Authority failed to provide for earnings on the appellants' entire equity capital applicable to Class I wharves. The appellants contend that in regarding only the sum of $1,217,863 from the reserves as available for distribution to shareholders and not the entire amount of the reserves $3,819,422 which form part of the equity capital the Port Authority failed to provide earnings in respect of the remainder of the reserves and specifically in respect of the sum of $1,296,559. This contention proceeds on a mistaken view of the approach taken by the Port Authority in determining what was a fair and reasonable return on equity capital. The Port Authority was not seeking to isolate component parts of equity capital and to determine what was a fair and reasonable return on each component part, as the appellants seemed to think, but rather to make provision for a fair and reasonable return on equity capital as a whole and in so doing to ensure that earnings on equity capital should include dividends on issued share capital. The Port Authority as their Report clearly indicates made provision for the further sum of $152,233 because they considered that the amount of $1,217,863 part of the reserves was properly available for issue as bonus shares to shareholders and it was considered that "it would be unfair to the shareholders if the appellants were to decide within a reasonable time to make a bonus issue and adequate provisions for payment of dividends thereon were not made." The appellants' contention also ignores the fact that provisions for increasing the existing reserves by the sums of $776,753 (to amortise debentures) and $150,000 (to pay companies' profit tax) also form part of earnings on equity capital. Certainly these two amounts cannot be regarded as earnings attributable to specific components portions of equity capital. They are, and so are the amounts of $290,392 and $152,233, attributable to and form part of the earnings on equity capital

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as a whole. The fact that $290,392 and $152,233 were determined as the amounts which might be paid out as dividends by the appellants was only an earmarking of those amounts from earnings for those particular purposes. There is therefore no room for the view that the Port Authority failed to make provision for earnings on a part of the equity capital viz. on $1,296,559 being part of the reserves. In our view the Port Authority proceeded in accordance with the principles set out in Part III of Schedule A to the Wharfage Law in their exercise in fixing the Wharfage rates. Further the tariff as revised was calculated to secure to the appellants a return of $1,369,378 on equity capital of $6,142,561 i.e. a return of 22.29%. It has not been shown that a return of this amount is too low for this type of investment. It follows, therefore that the appellants have no ground for complaint on the first question.

Before proceeding to deal with the second question raised by the appeal we should perhaps refer to a complaint made by Mr.Mahfood that certain passages in the Port Authority's Report indicate that the Authority did not regard the entire amount of the reserves as belonging to the appellant companies but rather that a certain portion of the reserves were held by the appellant companies in trust for the "ratepayers". As we indicated during the course of the hearing we do not think that the Port Authority intended to convey that they were of the view that the entire reserves do not belong to the appellant companies.

<u>The second question - whether there should have been apportionment in relation to the parcel of land sold by the appellant Western Terminals Ltd.?</u>

That question arose in the following way. Under an agreement of sale and purchase dated September 3, 1965 the appellants Western Terminals Ltd. purchased from Foreshore Development Co. Ltd. a parcel of land for the price of £279,000 expressed in the agreement as a lump sum. This parcel of land described in the

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agreement as lot 410B, Newport West, Kingston had been reclaimed from the sea by the vendors and abutted onto a channel which had been dredged by the vendors. By an agreement of sale and purchase dated January 1, 1966, the appellants Western Terminals Ltd. sold to Western Storage Ltd. 240,000 sq. ft. of land being a part of lot 410B for the sum of £120,000. At the enquiry before the Port Authority evidence was elicited that in determining the lump sum price asked for lot 410B the vendors took account of the cost of dredging in addition to the cost of reclaiming land from the sea. According to the evidence of Matalon (one of the vendors), the vendors fixed the sale price of lot 410B on the basis that the cost of reclamation of the land from the sea was at the rate of 7s. per sq. ft. and the cost of dredging spread over the area of lot 410B was at the rate of 8s. per sg. ft. The sale price of lot 410B thus worked out was at the rate of at 15s. per sq. ft. The sale price of 240,000 sq. ft. under the agreement of sale and purchase dated January 1, 1966 worked out at 10s. per sq. ft. The appellants contended at the enquiry that the base cost of the land sold under the agreement of January 1, 1966 should be taken as 7s. per sq. ft. The appellants urged that the practical importance of this is that if as the appellants contend, the cost of the portion of land sold was 7s. per sq. ft. rather than 15s. per sq. ft. then the capital profit on the sale would be much greater with a consequential increase of the capital reserves of the appellants which form part of the equity capital on which they are entitled to receive fair and reasonable earnings. The portion of land sold by the appellants Western Terminals Ltd. is not immediately contiguous to the sea. It was urged by Mr. Mahfood that this sale did not deprive those appellants of the benefit of the cost of dredging and consequently the cost of dredging should not be included in the base cost of the land sold for the purpose of computing the appellants' capital profit on the sale. The Port Authority after considering the evidence of the expert witnesses rejected the arguments adduced by Mr. Mahfood on this question and held that the true cost of the

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land to appellants Western Terminals Ltd. was at the rate of 15s. ($1.50) per sq. ft. thus re-affirming the decision at which they had arrived when this same question was raised at the earlier enquiry held in 1967.

On appeal before us Mr. Mahfood advanced similar arguments on this question to those advanced at the enquiry under review and contended that the Port Authority arrived at their decision on this point upon a fundamental misconception of the arguments advanced. We think that the arguments advanced by the appellants have been completely answered by the submissions of Dr. Rattray which are set out hereunder -

1. In determining whether apportionment is appropriate regard must be had to the terms of the contract and its conditions and nothing in the terms of the contract shows the cost of the channel as a divisible element or as an element attaching only to a portion of the land. The contract simply provided for a contract of £279,000. In contradistinction the contract expressly dealt with the construction of bulkhead as an element of cost separately. If dredging was intended to be dealt with separately because as an element of cost it could only refer to the land abutting the channel it should have been separated and dealt with in the contract.

2. The evidence of Matalon (of the vendors) cannot affect the overall cost to the purchaser as reflected in the contract. That evidence merely indicates that in determining the price he, as vendor, would ask for the land he would calculate the dredging cost and apply a surcharge of 8s. per sq. ft. so as to arrive at 15s. per sq. ft.

3. In any event on the basis of Matalon's evidence the 8s. per sq. ft. surcharge would have to be applied over the entire lot 410B otherwise the calculation of 15s. per sq. ft. would be mathematically impossible and incorrect. In other words if the figure of 15s.

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per sq. ft. was only applied to the waterfront and to no part of the 240,000 sq. ft. sold the price of £279,000 could not be arrived at mathematically.

4. It is unrealistic to separate the channel from the lands around it including the area of 240,000 sq. ft. which was subsequently sold. The existence of the channel gives a situational value to all lands in reasonable proximity and any cost incurred cannot be meaningfully restricted to a narrow strip. In fact the Port Authority found as a fact that the contiguous lands extending a suitable distance from the waterfront and including the area which was sold should be zoned for development of wharf facilities.

5. The dredging was no more than a development cost to the vendors in much the same way as the roadways and therefore could not be isolated for treatment by the purchasers.

6. The dredging had the effect of enhancing the value of the entire lot 410B as a capital asset with all the benefits attaching to such capital assets, such assets not being severable or divisible. Since the land so created became an indivisible whole apportionment was inappropriate.

We agree with Dr. Rattray's contention that there was abundant evidence on the basis of which the Port Authority was entitled to reject the apportionment.

In the result the appellants are unable to succeed in this appeal.

For these reasons we dismissed the appellants' appeal, affirming the decision of the Port Authority with costs of the appeal to the respondents to be agreed or taxed.