Hilary Term
[2019] UKPC 2
Privy Council Appeal No 0075 of 2017

JUDGMENT

Mexico Infrastructure Finance LLC (Appellant) *v* The Corporation of Hamilton (Respondent)

From the Court of Appeal for Bermuda

before

Lord Reed
Lord Sumption
Lord Lloyd-Jones
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

21 January 2019

Heard on 16 October 2018

Appellant
Lord Pannick QC
Ben Adamson
(Instructed by Squire
Patton Boggs (UK) LLP)

Respondent
Michael J Beloff QC
Ronald H Myers
(Instructed by Charles
Russell Speechlys LLP
and Marshall Diel &
Myers Limited)

LADY ARDEN: (with whom Lord Reed and Lord Briggs agree)

1. The principal issue on this appeal is whether the grant by the Corporation of Hamilton ("the Corporation") of a guarantee ("the guarantee") to support a borrowing by a private developer was *ultra vires* and unenforceable as it was not for a "municipal purpose" within section 23(1)(f) of the Municipalities Act 1923 of Bermuda ("the 1923 Act"). The loan was a bridging loan made by Mexico Infrastructure Finance LLC, the appellant, to the developer in connection with the development of an existing single-level car park ("the Car Park") in Hamilton owned by the Corporation as a hotel with a new multi-level car park. The public would be able to use two underground levels of the car park. The Court of Appeal for Bermuda concluded that the grant was *ultra vires*, upholding the order of Hellman J. The bridging loan has become repayable but the developer has not repaid it. In consequence, the appellant seeks to obtain repayment from the Corporation under the guarantee.

Factual background

2. On 11 April 2012, the Corporation entered a development agreement and agreement for lease ("the development agreement") with Par La Ville Hotel and Residences Limited ("PLV") to build a hotel complex ("the development") on the Car Park and thereafter run the hotel as a five-star hotel. The estimated cost of the development was $350m. It would involve the Corporation granting the developer a ground lease over the Car Park, which could be terminated if the developer failed to secure the funding that it needed to complete the development within a specified period or if it failed to complete the hotel within the agreed time. The developer had to obtain planning permission and complete the development within a particular timescale. The hotel was expected to open on 31 August 2016. The Corporation would receive the rent reserved by the ground lease, and also the use of two levels of a new underground car park, from which it could obtain further revenues. The Corporation did not undertake any obligation to provide finance for the development and the development agreement contained a declaration that the Corporation and the developer were not acting in partnership in relation to the development.

3. In a letter dated 3 June 2013 to Terra Law Limited, attorneys, the then Mayor of Bermuda, Mr Graeme Outerbridge, described the benefits of the development as follows. The development would provide luxury hotel accommodation to meet the strong demand by affluent business travellers. It would also provide conferencing and business concierge services, and luxury apartments. The development would add to the vibrancy of Hamilton and "enhance revenues within other city service providers, and thereby [create] opportunities for enhanced City of Hamilton rate-based revenue streams". The site was an underperforming asset, and the development would enable

the Corporation to obtain higher revenues from it, and the rates and the rent from the site would also be greater. The developer would also reimburse the Corporation for loss of the car parking revenues during construction.

4. In August 2012, after the development agreement was executed, PLV requested the Corporation initially to provide an amount against which it could raise a bridging loan which it needed to raise in order to secure the full funding required to construct the hotel. PLV had failed to obtain this facility elsewhere. It therefore required this bridging loan to enable it to proceed with the development. Lengthy negotiations ensued, and the Corporation ultimately agreed to provide a guarantee for $18m, secured as a first charge on the car park site, to secure a loan by the appellant to PLV, which was due to be repaid on 30 December 2014. This loan was to enable PLV to pay a sum into an escrow account which appears to have been required so that it could raise the finance it needed to construct the hotel. It is not clear whether PLV was under any obligation to the Corporation to apply the funds raised by or as a result of the guarantee in constructing the hotel and it is an agreed fact that the bridging loan funds were not used for their intended purpose. It is also an agreed fact that PLV failed to repay the loan on its due date of 30 December 2014.

5. The Corporation did not seek to raise rates to enable it to execute the guarantee, but it sought ministerial approval to execute the guarantee under section 23(1)(f) of the 1923 Act, which is set out below and enables the Corporation to levy rates for municipal purposes of an extraordinary nature, but only with ministerial approval. The Minister declined to give approval because of concerns about the Corporation's powers, and so informed the Corporation on 10 July 2013.

6. In October 2013, the Legislature passed the Municipalities Amendment Act 2013 ("the 2013 Act"), which came into operation on 15 October 2013. It is common ground that the 2013 Act was intended to cure the concerns about the Corporation's powers. The relevant provisions are summarised below.

7. Following the passing of the 2013 Act, and pursuant to the statutory framework, a series of legislative approvals for the development agreement and the guarantee were obtained:

i) pursuant to section 14 of the 2013 Act (approval of Cabinet and Legislature required to validate certain agreements and dispositions), the Senate gave its approval on 16 December 2013;

ii) pursuant to section 37(1) of the 1923 Act (set out below), the House of Assembly passed a motion authorising the Corporation to issue a guarantee up

to a maximum amount of $18m for developing a hotel on the Car Park, and on 16 December 2013 the Senate passed an identical motion;

iii) the guarantee was presented in draft to the Legislature for approval and, pursuant to subsections (1A) and (1B) of section 20 (set out below) and section 37(1) of the 1923 Act, the House of Assembly approved and authorised the Corporation to issue the guarantee on 13 June 2014. The Senate gave its approval on 25 June 2014.

8. The Corporation executed the guarantee and mortgage on 9 July 2014. The bridging loan was made but has become repayable and remains unpaid. The appellant has demanded payment from the Corporation under the guarantee, but the Corporation has not made any payment. Under advice, the Corporation consented to judgment. Subsequently different advice was obtained. The Corporation then sought to set aside the judgment which had been given against it on the grounds that it had a viable defence. Hellman J acceded to that application and the Court of Appeal dismissed an appeal from his order.

9. There is no evidence before the Board from the councillors as to why they approved the grant by the Corporation of the guarantee and mortgage. The letter from Mr Outerbridge on which the appellant understandably relies makes no reference to these documents.

Statutory framework and history

10. The powers and functions of the Corporation must be ascertained from the statutes constituting it. They may be express or implied.

11. The St George's and Hamilton Act 1793 ("the 1793 Act") established the Corporation as a separate legal person. The 1793 Act also provided for the election of a Mayor, Aldermen and Common Council to constitute the Corporation.

12. The 1793 Act also gave the Corporation power to make rules, orders, by-laws, statutes and ordinances "respecting the appointment of markets, the regulation of weights and measures, the fixing the Assize of Bread, and all other matters and things for the ordering, ruling and good government of the said Corporation…" (section 11). Thus, it is clear that the Corporation was established in order to run the city of Hamilton on behalf of its inhabitants.

13. The 1923 Act repealed many of the provisions of the 1793 Act (including section 11). It extended the franchise for electing the Mayor and Aldermen and conferred new powers to levy rates and to make ordinances. These provisions of the 1923 Act remain in force today.

14. Regarding guarantees, there is no express power to issue guarantees so the power is said to be implied from other provisions, in particular the power to levy rates conferred by section 23(1) of the 1923 Act.

15. Section 23(1) enables the Corporation to levy rates on valuation units within the limits of Hamilton for the following specific purposes:

> "(a) the maintenance of any force of security guards, traffic wardens or watchmen for duty within the municipal area;
>
> (b) *[repealed]*
>
> (c) sanitation or health purposes of all kinds including sewerage disposal and garbage collection, whether within or outside the municipal area;
>
> (d) the construction, maintenance, upkeep and renewal of any municipal sewerage, drainage or water system;
>
> (e) the widening, improvement, lighting and maintenance of any street, alley, lane, wharf, landing place, park or other amenity within the municipal area;
>
> (ee) for the construction, maintenance, upkeep and renewal of off-street parking;
>
> (f) such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve;
>
> (g) any other purpose which is incidental to the general administration of the municipal area in accordance with this Act."

16. Unlike a commercial company, the Corporation has no objects clause setting out the purposes for which it was incorporated. Those purposes must be identified by interpreting the enactments which constitute the Corporation. The power to make ordinances provides important guidance on its functions, as it had in the 1793 Act, quoted above. The 1923 Act confers powers to make ordinances for specific purposes, such as running the port of Hamilton, maintaining highways, regulating markets, controlling the construction of buildings, maintaining the water supply and regulating places of public entertainment. Section 38 provides as follows:

> "**Corporation Ordinances**
>
> 38(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.
>
> (2) The purposes for which Ordinances may provide are -
>
> (a) the regulation of the use of such wharves, piers and landing-places, within municipal areas as are not bona fide the property of the Government or of the Government of the United Kingdom, or private property;
>
> (b) the regulation of the use of any shed or building erected upon any such wharf, pier or landing-place within municipal areas;
>
> (bb) the regulation and control of off-street and on-street parking;
>
> (c) the control, maintenance, repair and lighting of all streets and highways within municipal areas, and the control of vehicular and pedestrian traffic thereon;
>
> (d) *[repealed]*
>
> (e) the general control of markets, fairs, pedlars, hawkers and vendors in public, of goods within municipal areas;

(f) the regulation of all aspects of building and building operations and the condemnation, demolition and removal of dangerous, sub-standard or unsightly structures;

(g) the maintenance and use of a sufficient water supply;

(h) the establishment and maintenance of plant and machinery for supplying any artificial light supplied by such Corporation;

(i) the control and supervision of theatres, dance halls, concerts, public exhibitions, entertainments and performances, and of the erection of any building intended to be used therefor;

(j) the regulation or prohibition of dangerous or unhealthy trades or practices and the regulation or prohibition of the shipment, handling, use, storage, transfer and landing within municipal limits of any dangerous commodity or any commodity which constitutes or is likely to constitute a nuisance;

(k) *[repealed]*

(l) *[repealed]*

(m) the regulation of the use of any of the following whether within or without the municipal area, if owned or controlled by the Corporation making such Ordinances, that is to say, parks, gardens, buildings, lands, wharves and landing-places;

(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;

(o) the levying and recovery of any shed tax on all agricultural produce of Bermuda shipped from the respective Ports of Hamilton and St. George's;

(p) subject to the Advertisement Regulation Act 1911, the control of all forms of advertising which can be heard or seen by any person in a public place."

17. Ordinances are binding on those affected by them and may even create civil rights of action or criminal offences. The purposes for which ordinances may be made are more extensive than the purposes for which rates may be raised.

18. As to borrowings, section 37(1) of the 1923 Act set out limits on the Corporation's borrowing powers. The 2013 Act inserted a reference to guarantees, so that they are subjected to the same limit: section 16. The Municipalities Amendment and Validation Act 1995 also inserted a new subsection (1A) for the issue of bonds with ministerial approval: section 5. Section 37 of the 1923 Act as amended by that Act provides:

"**Limit on powers of Corporations to borrow money**

37(1) The Corporation… of Hamilton … shall not borrow, receive or hold upon loan any sums exclusive of any sums which the Legislature has authorized or shall authorize [the Corporation] to borrow or guarantee for specific purposes, in the whole exceeding at one time…

(1A) Notwithstanding subsections (2) to (4), but subject to (1) subsection where the Minister of Finance considers it appropriate, the [Corporation] may raise money by the issue of bonds -

(a) secured in such manner and to such extent as the Minister of Finance may, prior to such issue, authorize; and

(b) subject to such conditions as the Minister of Finance may specify, including a condition requiring the establishment of a Sinking Fund, other than the Sinking Fund referred to in subsection (2), for the purpose of such issue…."

19. It is clear from section 37(1), as amended, that the Corporation has an implied power to borrow money and execute guarantees, but the purposes for which it may do so are not set out in section 37(1). This is a significant omission. The objects clause of a commercial company will usually confer power to issue guarantees as a separate and independent object, so that it does not have to be shown that the guarantee is issued for one of the purposes of the company, but there is no similar provision in the case of the Corporation.

20. As to land, the Corporation has power to buy land and to use it in various ways for profit (section 20(1) of the 1923 Act). Provisions for the approval of the Legislature and the Cabinet of sales and similar transactions were inserted by the 2013 Act. The Corporation also has power to construct any building on any land it owns "where such works are calculated to facilitate or is conducive or incidental to the discharge of any function of the Corporation." (section 20(2)). There is a further express power to provide off-street parking.

21. Section 20 provides as follows:

> "20. …sub-section (1) (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 21 years or for terms renewable exceeding in the aggregate 21 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 [Corporation is] 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."

22. The Board considers that the powers in section 20 are clearly to enable the Corporation to carry out its functions and that they are not conferred for the purposes of some separate and independent business of investing or trading in land.

The judgments below

23. In his judgment dated 18 November 2016, Hellman J held that the provision of the guarantee was *ultra vires* because it was not a service provided by the Corporation to its ratepayers, although it may have been of benefit to them. Nor was it ancillary to or consequential on any such service.

24. The appellant appealed to the Court of Appeal which on 12 May 2017 dismissed the appeal.

25. Giving the first judgment, Bell JA agreed with the judge that the guarantee was not given for a municipal purpose. The fact that the hotel might enhance the city and raise revenue would not mean that the provision of the guarantee was for "municipal purposes". Bell JA held that the development of a casino in Hamilton would be *ultra vires* if it was of benefit to the whole of the Island because it did not relate to the functions of the local government of the city of Hamilton. Bell JA did not address the question whether the provision of the hotel was a municipal purpose from which the power to guarantee could be implied as a means by which the purpose might be fulfilled. Clarke JA agreed and gave a concurring judgment on a separate issue. Baker P agreed with both judgments.

Submissions: different approaches to "municipal purposes" and other matters

26. The amendment to section 37 made by the 2013 Act now makes clear that the Corporation has an implied power to issue guarantees within the limits imposed by section 37 (1) of the 1923 Act, as amended. However, as explained, those guarantees cannot be an activity in themselves and must therefore be issued for an authorised purpose found elsewhere in the 1923 Act.

27. The appellant's case is that the purpose is found in section 23(1)(f) as part of the power to levy rates. It is common ground that if the purpose of the guarantee is within that paragraph, it is an authorised act of the Corporation since, if it had to levy a rate to meet its liability and could do so under that provision, the guarantee must necessarily be authorised. It is also common ground that, if the guarantee falls within section 23(1)(f), the necessary ministerial approval has been given.

28. Consideration of these issues must commence with a detailed examination of the wording of section 23(1)(f). Lord Pannick QC, for the appellant, submits that the words "such municipal purposes, being purposes of an extraordinary nature" show that section 23(1)(f) was intended to have considerable width. It envisaged activities out of the ordinary run and the fact that the legislature had imposed ministerial control on the power in section 23(1)(f) underlined its width. Section 23(1)(f) was also intended to operate independently of the other purposes for which rates might be levied. The word "such" did not limit the purposes authorised by section 23(1)(f) to those similar in kind to those already listed in section 23(1). It did not mean "such other purposes…"

29. Lord Pannick accepts that the guarantee must be issued for a "municipal purpose" as stated in the opening words of section 23(1)(f) but he submits that the word "municipal" reflects two matters: a geographical component in the Corporation's

powers, which he contends are the city limits of Hamilton, and a local-interests component, consisting of the need for the purpose to be in the interests of the locality and its inhabitants. Lord Pannick submits that the two-part meaning which he attributes to "municipal" is consistent with the various definitions in section 1 of the 1923 Act which utilise the word "municipal". Most obviously, section 1 defines the "municipal area" as the "municipal area for the time being of the City of Hamilton…". The two-part meaning is also consistent with certain dictionary definitions of "municipal" which Lord Pannick relies on and which define the word by reference to the connection between a matter and the inhabitants of a place. The luxury hotel is not intended to be enjoyed by the inhabitants of Hamilton. However, it is also seen by the Corporation as a great attraction to tourists and thus as having the potential to benefit the city and its inhabitants by creating new needs for other services which the city can offer for reward, thus increasing revenues both for the inhabitants of Hamilton and for the Corporation: see the explanation given by the then Mayor of Hamilton, set out in paragraph 3 above.

30. Mr Michael Beloff QC, for the Corporation, submits that the purpose of the guarantee was to put the developer ("PLV") in a position to meet construction costs and that that is not a municipal purpose at all. He submits in effect that the appellant's argument attributes insufficient weight to the word "municipal" in section 23(1)(f). In the context of the Corporation having to have a "municipal" purpose, there would have to be the provision of services for the benefit of the inhabitants of the city of Hamilton. Moreover, the word "such" on his submission links back to the other circumstances in section 23(1). This underscores the need for meaning to be given to the word "municipal".

31. Purposes are, submits Mr Beloff, municipal if they constitute a governmental function of an entity within a larger state. They could include the provision of theatres for the benefit of inhabitants even if the theatres were also used by visitors. Governmental functions largely involved the provision of necessaries, not luxuries such as the hotel in this case, which was in any event primarily for visitors. The provision of a sports stadium or theatre was the kind of service that one could expect from local government, as was also the case with a tourist information office, even though that, like a hotel, was directly intended to benefit visitors but it would, unlike a hotel, provide a service which visitors would expect to have provided for them by central or local government. A tourist information office would also benefit local inhabitants because it would relieve them of any burden of providing the same information themselves if asked to do so or bring business to them.

32. Mr Beloff submits that the local-interests component is not sufficient under the 1923 Act. For a purpose to be a lawful purpose of a local authority, it was not enough that the proposed action is convenient or desirable or profitable. see *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, 31. Furthermore, in 2015 the Legislature had amended the 1923 Act by inserting a new section 7AA. This created a new power to give ministerial directions to the Corporation, subject to

consultation with the Corporation. Section 7AA provides that any act by the Corporation under such directions would be deemed to be for municipal purposes, which meant, submits Mr Beloff, that the Legislature did not consider that there had previously been such a provision.

33. Overall, Mr Beloff submits that the hotel project in this case was designed to satisfy the needs of affluent travellers, and that it was clearly not a municipal purpose. Moreover, he submits that the Corporation could not carry out such a project itself. Property development may be profitable, but it is not a function of local authority.

34. Lord Pannick disagrees with the submission that "municipal purposes" mean actions involving the provision of services to local residents. He cites the examples given in the courts below of the construction by the Corporation of a sports stadium or local theatre. It is an agreed fact that the Corporation of Hamilton owns a theatre, and that this provides performances not just for the inhabitants of Hamilton but for visitors to Hamilton.

35. If the appellant is right that the issue of the guarantee falls within section 23(1)(f), then it would also follow on its argument that the Corporation could itself build a luxury hotel within the city limits. Lord Pannick argues that the Corporation could itself build a hotel to advance the interests of Hamilton as a tourist destination and raise a rate under section 23(1)(f). In the same way, if there were a need for a water system, the Corporation could either provide one which it owned or use a private contractor to provide one.

36. Lord Pannick contends that by contrast, if the Corporation could issue the guarantee under section 37, which does not use the word "municipal", then it was not necessary, although unlikely in practice, for the hotel to be within the city limits or even to be in Bermuda, provided that it was in the interests of the inhabitants of the city of Hamilton.

37. Lord Pannick submits that the Corporation could have some functions which were funded by rates and some which were not. He draws attention to section 111 of the Local Government Act 1972 applying in England and Wales, which recognises a division like that. The Board, however, notes that that section prohibited such division. Insofar as the 1923 Act specifically envisaged some activities, such as regulating markets and wharves, for which no power to levy rates was given, it must have been envisaged that the expenditure would have been insignificant or such as could be funded by, for example, wharfage dues. Given the size of potential liabilities under guarantees, for which there is no obvious source of payment other than rates or other revenues, the division of function which Lord Pannick postulates does not assist in establishing that the guarantee is *intra vires*.

38. Lord Pannick further argues that if the Corporation's powers to issue the guarantee in this case are ambiguous, the Board should nonetheless uphold the validity of the guarantee as the Legislature had clearly understood it to be a valid guarantee under the 1923 Act as amended when it gave its approval to the issue of the guarantee. Lord Pannick submits that when enacting legislation the Legislature intends to change the law: see *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8] per Lord Bingham of Cornhill:

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

39. Lord Pannick submits there is no constitutional objection to the court having regard to how the Legislature itself understood the legislation. When interpreting amending legislation, the court can take into account that the Legislature was mistaken as to the meaning of a section that it amended and its amendment would fix the section with that mistaken meaning (see *Comr of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306, 323-4 and *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 2 KB 403, 414). In other words, that the court can look at legislative intent where the language is ambiguous.

40. Mr Beloff does not accept the proposition that, to the extent there is any ambiguity as to "municipal purposes" in section 23(1)(f), the Board should resolve this in favour of the Legislature's interpretation, since on his submission a rate-raising power should be interpreted as strictly as a taxing provision would. Mr Beloff submits that ministerial approval is necessary but not a sufficient condition.

The Board's view: the guarantee was ultra vires because it was not for a municipal purpose

41. To succeed on this appeal, the appellant must show that the execution of the guarantee was reasonably incidental to the development agreement or alternatively that the execution of the guarantee was itself a "municipal purpose… being [a purpose] of an extraordinary nature…" within section 23(1)(f) of the 1923 Act.

42. It is well established that there must be implied into a statutory provision constituting a public body the power to do that which is reasonably incidental to any

express power (see the well-known case of *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653). In asking whether a power is reasonably incidental to the exercise of an express power, it is necessary to examine the express power that was exercised. Here the Corporation had power to dispose of an interest in its land and was thus able to enter into the development agreement. It cannot be said that the guarantee was incidental to the execution of that agreement. The development agreement deliberately distanced the Corporation from the development. If the developer did not demonstrate within a stipulated period that it had obtained the finance needed to complete the hotel, the Corporation could terminate the development agreement and the developer would never be able to complete the development. The terms of the agreement specifically provided that the Corporation and the developer were not partners for the purpose of the hotel development.

43. That leaves the alternative argument that the guarantee fell within section 23(1)(f) of the 1923 Act. This question falls into two parts: (i) the meaning of section 23(1)(f) and (ii) the application of that paragraph to the facts.

(i) Meaning of section 23(1)(f)

44. The key word in section 23(1)(f) is "municipal" in relation to the purpose for which rates may be raised. The appellant puts forward a two-part test of "municipal". However, in the opinion of the Board, neither element of this test is satisfactory. The Board takes the components in turn.

45. As to the first component, the statement that the purpose has to be exercisable within the geographical limits within which the Corporation can act throws little or no light on whether the purpose of the act is authorised or not. The city limits may also not coincide with the areas within which a power may be exercised (see section 20(2)(b) of the 1923 Act).

46. As to the second, and in this case more important, component put forward by Lord Pannick (the local-interest component), in the view of the Board, the basic point is that the word "municipal" must be given an appropriate meaning. The word "municipal" is clearly a word of limitation. To find out the content of this limitation, in broad terms, the Board agrees with the approach of the judge, and also of the Sheriff-Substitute in the Scottish case of *Arnot v WM McEwan & Co Ltd* (1893) 1 SLT 500, that the term "municipal" must, in the case of a body with rate-levying powers, be interpreted by reference to its context. The relevant statutory provisions must be considered in their context and with regard to their relationship to one another.

47. The starting point is the 1793 Act. As explained, it is clear from the 1793 Act that the Corporation was established to benefit the inhabitants within the limits of

Hamilton. Although the relevant clauses were repealed by the 1923 Act and so are no longer in force, the Corporation was not reconstituted with some wholly different functions or powers but continued with updated and more specific powers than previously.

48. As to what purposes are municipal, guidance can be obtained from the Corporation's power to make ordinances. As can be seen from section 38 of the 1923 Act, the purposes for which the Corporation may make ordinances concern the provision of services or facilities for inhabitants of Hamilton. One obvious example is the maintenance and use of a sufficient water supply. What the purposes in section 38 have in common is the fact that they are activities of a kind which would benefit the whole or part of the inhabitants of Hamilton by the provision of some facility or service, such as a water system and highways.

49. In argument, counsel referred to the theatre which the Corporation owns and the possibility that it might provide a stadium and theatre. These are examples of facilities which are or might be provided by the Corporation from which inhabitants get a direct benefit if they choose to use those facilities. The Board sees no reason in principle why in an appropriate case the provision of services should not be indirect, rather than direct, as where a tourist office which the inhabitants must in practice provide for visitors is only used by them. But, if the theatre or stadium is only open to visitors, and inhabitants do not qualify to use it, the facility would not be one provided for inhabitants. The Corporation was not given power, as commercial companies often are, to carry out any function that might advantageously be carried out.

50. A further point is that section 23(1)(f) does not permit rates to be levied for such purposes as the councillors consider to be municipal. The test is objective. The purpose must actually be municipal. That is an important safeguard for ratepayers. Express wording would be needed if the question whether an activity was for a municipal purpose was simply to depend on the opinion of the councillors who approve it.

51. Next, because section 23(1)(f) is a rate-levying provision, it must not be strained to cover purposes which are not fairly within it. That is an established approach to the statutory interpretation of penal and revenue statutes (see, for example, *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1, 10 per Hoffmann J). It cannot be avoided by pointing to the need for the Corporation to obtain ministerial consent. Obviously that is an additional safeguard but the inhabitants elect the councillors and accordingly they are entitled to hold the councillors to account for proper use of the rate-raising power.

52. Taking all these factors together, in the opinion of the Board, it is clear from the context provided by the statutes constituting the Corporation that the Corporation has

not been set up to do an act simply because it may promote the prosperity of Hamilton. Such an interpretation would deprive the word "municipal" of any relevant meaning: the word might just as well have been omitted since councillors are bound to act in the interests of inhabitants. It is worth observing that the Legislature used the word "municipalities" in the title to the 1923, 2013 and 2018 Acts to refer to the self-governing town of St George's and city of Hamilton. Municipal purposes are clearly the purposes of a municipality as established by the statutes constituting it.

53. In the context of implied powers Mr Beloff QC referred to the well-known holding of Lord Templeman in *Hazell* [1992] 2 AC 1, 31 that:

> "The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable."

54. Lest there be some confusion on this point, the Board records that Mr Beloff did not suggest that the ratio of *Hazell* applied here. In that case, the House of Lords held that the local authority had acted outside its powers when it entered into swap agreements (agreements to exchange cash flows for a certain period) to avoid adverse interest rate fluctuations on borrowings that it had power to raise. But there is an analogy between *Hazell* and this case in that if the appellants were correct they would have power as a self-standing function to enter into any transaction which was in the interests of the inhabitants. Lord Pannick's submission that as a logical consequence of his argument the Corporation could itself set up a luxury hotel within the city limits if such a hotel brought economic benefits to Hamilton is a startling one because there is then no real control on the extent to which the councillors can undertake projects and impose rates under section 23(1)(f). The Legislature must surely be presumed to impose a manageable standard of accountability for a public body such as the Corporation.

55. The Board's interpretation takes due account of the words "of an extraordinary nature" in section 23(1)(f). In the opinion of the Board, those words simply mean that the purpose is one which is outside the normal run of the Corporation's purposes and activities. In order for a purpose to qualify as a purpose of an extraordinary nature, a purpose must first overcome the hurdle of being a "municipal purpose".

56. In argument, Mr Beloff distinguished the hosting by Bermuda of the America's Cup races in June 2017. This example illustrates the proposition that in determining a "municipal purpose", all the facts must be considered. The hosting of the America's Cup would have involved the provision of accommodation for visitors. The Board has been given little information about this and expresses no view on the legal analysis of Mr Beloff's example. But the benefits for inhabitants are likely to have been far greater than those they might derive from a luxury hotel for visitors to Hamilton. Given the history of the port of Hamilton, sailing is probably a popular activity and there will no

doubt be races for its inhabitants to watch, and also local events and celebrations open to all. The example is useful because the words "of an extraordinary nature" in section 23(1)(f) can more readily be seen to be applicable to exceptional events of this nature. There is no issue before the Board in relation to this event. It suffices to say that it may be distinguishable.

57. For these reasons, the Board rejects Lord Pannick's submission as to the meaning of "municipal purpose" in section 23(1)(f) of the 1923 Act. The Board prefers the meaning put forward by Mr Beloff, that is, to be "municipal", a purpose must be aimed at the provision by the Corporation of a service for the benefit of inhabitants of Hamilton. The Board reads "services" in this context as including the provision of facilities.

(ii) Applying the meaning of "municipal purpose" to the facts

58. On the evidence before the Board, it is clear that the purpose of the Corporation in giving the guarantee was to help the developer obtain funding for the development. As to this, it is no part of the Corporation's functions to act as banker to a developer.

59. The primary purpose of the guarantee was to enable the developer to obtain credit. It may be that, although the funds were not in fact applied for the purposes of obtaining funding for the development, the credit raised by the guarantee was limited to funding for developing the hotel complex. However, for the reasons given, that would not in the opinion of the Board change the legal position. The hotel complex did not provide any service or facility for inhabitants, except possibly for the conferencing facilities, but it has not been suggested that the conferencing facilities alone (doubtless a relatively small part of the total complex) could make the purpose municipal, as the Board has interpreted that term. As explained above, the guarantee was not capable of being brought within the Corporation's powers by reference to a wider motivation and desire on the Corporation's part generally to promote Hamilton's economic development.

Remaining submissions

60. The appellant has invoked also section 23(1)(g) of the 1923 Act but this only authorises acts which are incidental to the general administration of the area. The development of the new car park is not a matter of "general administration" of the city of Hamilton and so this sub-paragraph cannot assist.

61. In these circumstances it is unnecessary to deal with the other submissions that were made. However, the Board will briefly address the submission that weight should

be given to the fact of legislative approval where the language is ambiguous. The Board considers that this would not be the correct approach. That would amount to applying a law in terms of what the Legislature thought it had enacted rather than what it actually enacted. The appellant's case is not assisted by the *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 2 KB 403, because in that case the legislative approval was in fact subsequent legislation. In a similar vein the Corporation sought to rely in these proceedings on the 2018 legislation of Bermuda, but the Board does not consider that it would be appropriate to take account of that later legislation in interpreting the earlier legislation.

Conclusion

62. In conclusion, the Board humbly advises Her Majesty that this appeal should be dismissed. The parties have 21 days in which to make submissions on costs, failing which the Board will order that they be borne by the appellant.

LORD SUMPTION: (dissenting) (with whom Lord Lloyd-Jones agrees)

63. In my opinion the Corporation had power to guarantee the bridging loan to the developer. That power was to be implied from the power under section 23(1)(f) to levy rates for "such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve." There are two reasons for this which, since they have not found favour with the majority of the Board, I shall state with becoming brevity.

64. First, "municipal purposes" are purposes calculated to benefit the current and future residents, permanent or temporary, of Hamilton in their capacity as such. That is the relevant limitation. I can see no justification either in principle or in the language of the provision for distinguishing between benefits consisting in the direct provision of services or facilities to residents, and expenditure on the promotion of the city's economic development which benefits the residents less directly. For example, expenditure on the provision of facilities for sport or entertainment in the city may be largely used by residents of other places. Expenditure on the promotion of foreign tourism or the staffing of tourist offices is likely directly to benefit only non-residents. But it would be artificial to say that these purposes, which indirectly serve the economic interests of the city and its inhabitants, are not municipal purposes. These examples, and one could give many others, illustrate the technical, functionally irrelevant and barely workable distinctions which it is necessary to make if the test favoured by the majority be correct.

65. Secondly, sub-section (1)(f) refers not just to municipal purposes, but to municipal purposes "of an extraordinary nature". The natural meaning of this phrase is that the expenditure in question is expenditure of a kind which is incurred outside the ordinary course of a municipality's functions. This does not give them unlimited discretion, for it is limited by the need to obtain the minister's consent to levy the rate necessary to cover it. That in itself suggests that expenditure under this head was not expected to be confined to the ordinary provision of services directly to residents.

66. None of this means that the Corporation has power to engage in free-standing business activity for the purpose of earning profits with which to meet its expenditure, which was the perceived vice of the swap transactions held to be ultra vires in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1. But the issue of a guarantee to assist a development thought to be in the broader economic interest of the city does not appear to have been a free-standing business activity, let alone an independent source of earnings.