

EASTERN CARIBBEAN SUPREME COURT

ANGUILLA

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: AXAHCV2022/0037

BETWEEN:

Anguilla Electricity Company Limited

-and-

The Attorney General

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mrs. Tana'ania Small-Davis KC and with her Mrs. Jacinth Jeffers of counsel for the claimant
Dr. Francis Alexis KC and with him Mr. Sasha Courtney and Mr. Theon Tross for the defendant

2023: October 27

2024: March 28

Judgment

[1] **Moise, J.:** This is a claim for restitution. The claimant seeks an order for the return of EC\$28,349,774.00 it claims to have paid over to the Government of Anguilla in duties on the importation of diesel fuel. In summary, the claimant asserts that by virtue of section 32 of the **Electricity Act**¹ and the **ANGLEC Exemption Regulations (1991) (the Exemption Regulations)**², it was exempt from the payment of import duties on diesel fuel brought into Anguilla. However, it is claimed that between January 2011 and 30th June, 2022, the claimant had imported over 56,699,548 imperial gallons of diesel fuel, on which duties had inadvertently been paid. Attempts to recover this sum from the Government had failed, as a result of which this action was commenced. The defendant on the other hand argues that section 32 of the **Electricity Act** and the **Exemption Regulations**

¹ R.S.A cE35

² R.R.AE35-1

(1991) were impliedly repealed by the **Financial Administration and Audit Act**³ which was promulgated in November, 2003. As such, **Anguilla Electricity Company Limited** ("ANGLEC") was not entitled to the exemption which it claims and therefore duly paid the import duties it was obliged to pay. ANGLEC is also put to strict proof regarding the actual payment of the duties claimed in its pleadings.

- 2] Having heard the evidence in this case, and having considered the submissions, I have determined that the provisions of section 32 of the **Electricity Act** and those of the **Exemption Regulations** have not been impliedly repealed as claimed by the defendant. I have found that ANGLEC would be entitled to restitution of the sums actually paid in customs duties for the supply of diesel fuel during the relevant period. However, insofar as it relates to the amount of duties paid, I have ordered that an additional affidavit be filed, with a view to gaining assistance from counsel in reconciling the evidence presented against the amount claimed in the pleadings. These are the reasons for my decision.

The Facts

- 3] ANGLEC is the exclusive public supplier of electricity in Anguilla. By virtue of section 32 of **The Electricity Act**, a discretion is granted to the Governor to exempt a public supplier from certain tax liabilities. The section provides as follows:

(1) The Governor may exempt, by regulation, a public supplier from liability to pay any taxation, duties, imposts, levies and rates, including income tax, withholding taxes, corporation tax, tax on profits, advance corporation tax, accumulation tax, capital gains tax, capital transfer tax, gift tax, inheritance tax, value added tax, customs duty, capital duty, excise duties, import duties, development land tax, stamp duty, stamp duty reserve tax and generally any tax, duty, impost, levy or rate or other amount and any interest, penalty or fine in connection therewith which would otherwise be payable in respect of the operations, activities,

³ R.S.A c F27

investments and profits of the supplier arising pursuant to the supplier's holding of a public supplier's licence.

(2) *An exemption under subsection (1) shall last for such period, not exceeding the period of validity of the supplier's licence, as shall be specified in the regulations...*

[4] It is not in dispute that, in keeping with these provisions, The Governor of Anguilla passed the **the Exemption Regulations** in 1991. The relevant provisions of those regulations are as follows:

"1. The Anguilla Electricity Company Limited (hereinafter referred to as "Anglec") is exempted for the duration of the validity of its public supplier's licence—

...

(f) from liability to pay any of the taxes, levies, or duties enumerated in section 32 of the Electricity Act, whether imposed under any present or future written law."

[5] ANGLEC asserts in its pleadings that it requires diesel fuel in order to fulfill its obligations as a public supplier of electricity. As such, between March 2010 and July, 2013, it obtained diesel fuel from a third-party supplier, Sol Saint Lucia Limited. Between July 2013 and June 2022 ANGLEC obtained fuel through another supplier, Delta Petroleum (Anguilla) Ltd. These third-party suppliers would import fuel into Anguilla and present invoices to ANGLEC upon delivery. ANGLEC, in turn, was obliged to honour its commitment to pay the sums claimed on the invoices.

[6] ANGLEC asserts that in June 2022 an audit of its records revealed that it was paying customs duties on the importation of diesel fuel from as far back as January 2011. It is asserted that each of the fuel suppliers paid \$0.50 in customs duties upon the importation of fuel. These payments to the customs collectors were then passed on to ANGLEC in the suppliers' invoices. ANGLEC therefore claims that a total of 56,699,548 imperial gallons of fuel was supplied to it during this period and therefore infers that a total of EC\$28,349,774.00 was paid in duties which were charged on the suppliers' invoices.

[7] ANGLEC goes on to claim that it made numerous requests to the government for repayment of the duties paid. The government, however, refused to do so. In his witness statement, Mr. Sutcliff Hodge, the current Chief Executive Officer (CEO) of ANGLEC, states that he has attended a number of

meetings with members of the Government, during which time the issue of a refund of the duties paid had been raised. He states, however, that no proposal had ever been made as to how this would be resolved. Mr. Hodge goes on to state that invoices had been presented to the Permanent Secretary in the Ministry of Finance, upon her request. Despite this, there was still no effort made on the part of the Government to resolve the issue. In fact, by way of a letter dated 20th October, 2022, attorneys acting on behalf of ANGLEC were informed that the Government's position on the matter was that there was no legal obligation to reimburse ANGLEC for the duties paid. It is also noted that, as of June 2022, the Government was no longer collecting duties on diesel fuel imported on ANGLEC's behalf by third-party suppliers.

8] Mr. Peter Lamontagne, the Chief Financial Officer (CFO) of ANGLEC, also noted in his evidence that in April 2022, when reviewing ANGLEC's outstanding debts and the amount owed to its fuel suppliers, it was then discovered that the invoices included duties paid on the importation of fuel for ANGLEC's use. He states that the law was then reviewed, and it was discovered that ANGLEC was in fact exempt from the payment of import duties. A review of the records was then undertaken, and the amounts claimed in these proceedings were discovered. Mr. Lamontagne thereafter largely repeats what was pleaded in the statement of claim as I have already outlined. The same can be said for the evidence led by Mr. Patrick Mardenborough, who was the chairman of the Board of ANGLEC when the issue was discovered.

9] ANGLEC also led evidence from Mr. David Hodge, who is the assistant accountant at SOL Saint Lucia Ltd. Mr. Hodge states in his witness statement that Sol became the supplier of diesel fuel to ANGLEC on 17th March, 2023. He states that a similar arrangement was in place from March 2010 to July 2013. Mr. Hodge states that, in practice, ANGLEC orders fuel from Sol. Sol imports the fuel and bills ANGLEC on an invoice sent to it. The bill would be based on the cost price to which was added the customs duties, insurance and freight, as well as the company's mark-up. Mr. Hodge asserts, in his evidence, that fuel imported for ANGLEC's use is separated from Sol's other imports and is dealt with specifically by the customs department. He states that, as of the date of his witness statement, ANGLEC had fully paid all of its invoices to Sol.

[10] I pause here to note two important facts especially coming out of the cross-examination of the claimant's witnesses. ANGLEC has not necessarily been able to supply actual invoices and payment receipts for all which has been claimed. I find that, on balance, the invoices presented contained duplicates, and some of what had been highlighted were payments of duties on gasoline, which, it is accepted, does not fall within the exemptions claimed by ANGLEC. In addition to that, reference was made to various audited statements which did not form part of the bundle of documents disclosed or presented in this case. In essence, it was stated in Mr. Lamontagne's oral evidence in court that the invoices are samples and that for a full indication of the amount paid in duties over the relevant period, a reconciliation of the diesel fuel consumed by ANGLEC, when balanced against the rate of \$.50 per gallon was what was used. This reconciliation was presented into evidence.

[11] It seems to me, therefore, that the court is asked to infer, from the limited nature of the invoices presented and the imperial gallons allegedly imported, that this amount of duties must have been paid over the relevant period. There is also no evidence to suggest here that ANGLEC had made any efforts, at the point of importation of the fuel, to claim these exemptions through the normal process. It appears that the failure to claim these exemptions at the time was mere inadvertence. In fact, at various points in the evidence, ANGLEC asserted that the duties were paid as a result of a mistake. It was not that the government was denying an exemption at the point of importation. They were allegedly paid by the third-party supplier who in turn invoiced ANGLEC as part of the cost of importing diesel fuel on ANGLEC's behalf.

[12] In light of this, I note that the defendant led evidence from only one witness. That was Mrs. Kathleen Rogers, who is the Permanent Secretary in the Ministry of Finance. Mrs. Rogers expressed no opinion on the question of whether ANGLEC was in fact exempt from customs duties during the relevant period claimed. Based on the pleadings, Mrs. Rogers was of the view that this was a matter of law, and she could not opine on it. The main thrust of the defence put forward on behalf of the Government was that the **Exemption Regulations** relied on by ANGLEC in those proceedings have been impliedly repealed by the **Financial Administration and Audit Act (FAA)**. This is a matter to which I will return in my assessment of the law.

[13] Mrs. Rogers also goes on to state that, although she had sight of invoices presented by ANGLEC, she could not state the exact periods which the invoices covered. She was unable to ascertain, from the invoices presented, whether ANGLEC had in fact paid the sums claimed in customs duties during the relevant period. The defence has, for the most part, put ANGLEC to strict proof of the payment of customs duties in the amount claimed in the statement of claim.

The Issues

[14] There are two main issues for consideration in this case. The first is whether ANGLEC was in fact entitled in law to the exemptions claimed. This is predicated on the question of whether the **Exemption Regulations**, as promulgated by the Governor in 1991, had been impliedly repealed by the **Financial Administration and Audit Act** and/or whether they are unconstitutional. The second question for consideration is whether ANGLEC has in fact proven that the monies claimed to have been paid in duties have in fact been paid. I will therefore consider the issues in turn.

Implied Repeal

[15] Before addressing the legal authorities referred to by the parties, it is important to highlight the provisions of section 18 of the **FAA** which was referred to by counsel for the defendant. The section states as follows:

- (1) When the Governor in Council is satisfied that it is in the public interest to do so or that hardship or injustice has resulted or is likely to result, the Governor in Council may, by regulation applicable to a class or classes of persons or by certificate in a specific case and subject to subsection (4), remit all or part of any tax, fee or other amount (other than the amount of a penalty or forfeiture due to a conviction within the meaning of section 76(d) of the Constitution of Anguilla) that is imposed, or authorised to be imposed, under this or any other Act.*
- (2) The remission of money may be conditional or unconditional, and may be granted—
(a) before, after or during the course of, any proceeding for the recovery of the money;
(b) before or after the payment has been made or enforced by process or execution;
or (c) in the case of a tax, fee or other amount, before the liability arises.*
- (3) When a condition of a remission is not performed, the authorisation of the remission has no effect, and all proceedings may be taken as if it had not been made.*

- (4) *A remission of a tax, fee or other amount referred to in subsection (1) shall not exceed \$1,000 or such greater amount as may be prescribed by regulation by the Governor in Council with the approval of the House of Assembly.*
- (5) *Money that has been paid and is subsequently remitted under this section or under section 76(d) of the Constitution of Anguilla shall be refunded from the Consolidated Fund.*

[16] In light of the distinction between these provisions and those of the **Electricity Act** and the **ANGLEC Exemption Regulations**, counsel for the defendant has argued that where there is a conflict between earlier and later statutory provisions on the same subject matter, the canons of construction dictate that (a) a statute or other form of legislation may be repealed either expressly or by implication; (b) that an intention to repeal earlier legislation may be inferred from the nature of the subsequent enactment; and (c) there exists a presumption against implied repeal, but this yields according to the context of the various enactments.

[17] For that proposition counsel refers firstly to the case of *Westham Church Wardens and Overseers v. Fourth City Mutual Building Society*⁴ where it was stated that *“the test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent or repugnant with the provisions of an earlier Act that the two cannot stand together?”* Reference was also made to the case of Ferdinand *James v. Planviron (Caribbean Practice) Limited et al*⁵ where Perreira CJ gave consideration to the question of whether the procedure outlined in the **Land Registration Act** in Saint Lucia for a claim for prescriptive title had impliedly repealed the previous provisions as outlined in the **Civil Code** of Saint Lucia. At paragraph 24 the Honourable Chief Justice phrased the question in the following manner:

“The question which falls to be determined therefore is whether the procedure under part 9 of the LRA is so inconsistent or repugnant with the provisions of the earlier article 2103A and the accompanying Prescription Rules, that they cannot stand together. Stated differently, the task at hand is to determine whether it is reasonably possible to construe the provisions in a manner which is capable of giving effect to both sets of procedure.”

⁴ (1892) QB 654 at page 658

⁵ SLUHCVP2017/0050

[18] I note at this stage that Pereira CJ in that case made reference to an earlier decision of Floissac CJ in the case of **Attorney General of Antigua and Barbuda and another v Lewis (Arland)**⁶, where he accepted the following principles on implied repeal as outlined in **Halsbury's Laws of England**⁷:

“966. Repeal by implication is not favoured by the courts, for it is to be presumed that Parliament would not intend to effect so important a matter as the repeal of a law without expressing its intention to do so. However, if provisions are enacted which cannot be reconciled with those of an existing statute, the only inference possible is that, unless it failed to address its mind to the question, Parliament intended that the provisions of the existing statute should cease to have effect, and an intention so evinced is as effective as one expressed in terms. ... The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. If it is reasonably possible so to construe the provisions as to give effect to both, that must be done, and their reconciliation must in particular be attempted if the later statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the later statute are so detailed that failure to include the earlier provision among them must be regarded as such an indication.”

[19] It is therefore important to note that the courts are not too quick to determine that a prior enactment has been repealed by a later statute unless the statute expressly says so. Notwithstanding this however, counsel for the defendants argue that the doctrine of implied repeal is designed to underscore the importance of parliamentary sovereignty. It recognizes the fact that under this system, no current parliament can bind a future parliament. Counsel referred to the case of **Ellen Street Estates Limited v. Minister of Health**⁸ where it was stated that

“the Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter- there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.”

[20] Counsel for the defendant therefore goes on to argue that, in the circumstances of the current case, both the 1991 exemption provisions and the provisions contained in the **FAA**, deal with the same subject matter; that is the exemption from liability to pay taxes and/or duties. Counsel therefore

⁶(1995) 51 WIR 89

⁷(4th edn., 1973) Vol. 44 at paras 966 and 969.

⁸(1934) 1 KB 590

argues that the circumstances of the case are such that there must have been an implied repeal of the earlier regulations.

- [21] Counsel for the defendant submits that although the **Electricity Act** is a special enactment for the regulation of the supply of electricity, the **FAA** addresses the management of the revenues of the state and is “a specifically tailored enactment” for the purpose of regulating tax related matters. Whilst it is conceded that the **FAA** is an act of general application, in that it applies to all laws, it is a specific Act passed by the Legislature in which it seeks to control the mode and process of granting tax exemptions. The **Electricity Act’s** general purpose is to regulate the supply of electricity and not tax exemption issues. In light of this therefore, it is submitted that consideration must be given to the differences in the procedures contained in these two enactments.
- [22] It is submitted firstly that under section 32 of the **Electricity Act**, the Governor may exempt ANGLEC from liability to pay any tax during the currency or terms of its license. There is therefore no limit to the powers of the Governor in that regard. On the contrary, the **FAA** empowers the Governor in Council to exempt a person (whether real or corporate) from tax liability up to a maximum of \$1,000.00. The argument is that where an exemption above that amount is passed, the regulation must be approved by the House of Assembly. It is submitted therefore that the two provisions cannot reasonably co-exist in a manner which can give effect to both enactments. The latter must have therefore impliedly repealed the former. It is submitted therefore that the presumption against implied repeal must also yield to the circumstances of this case.
- [23] Following on from the argument that section 32 of the **Electricity Act** has been impliedly repealed, counsel for the defendant goes on to argue that the **ANGLEC Exemption Regulations** must have also been impliedly repealed on account of the fact that it is subordinate to the **Electricity Act**. It is argued that “*subsidiary legislation cannot extend beyond the reaches of primary legislation, and no legal instrument, except the constitution itself, can bind parliament or fetter its future law-making power.*”
- [24] Quite apart from the submissions on implied repeal, counsel for the defendant extends the argument even further to state that the **Exemption Regulations** passed in 1991 were unconstitutional in the

first place. Reference is made to section 47 of the Constitution which states that “... **the Governor, with the advice and consent of the Assembly, may make laws for the peace, order and good government of Anguilla.**” Insofar as it relates to the power to levy or regulate taxes, section 55(2) of the Constitution states as follows:

“Except on the recommendation of the Governor, the Assembly shall not-

(a) Proceed upon any Bill (including any amendment to a Bill) which in the opinion of the person presiding in the Assembly, makes provision for imposing or increasing any tax, for imposing or increasing any charge on the revenue or other funds of Anguilla or for altering any such charge otherwise than by reducing it or for compounding or remitting any debt due to Anguilla...”

[25] In support of that submission, reference was also made to the case of **BCB Holdings Limited & Anr v. The Attorney General of Belize**⁹ where the Caribbean Court of Justice noted the following at paragraphs 43 and 44:

“[43] Section 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country’s revenue laws. Counsel for the companies submitted that the deed merely resolved ‘uncertainties and ambiguities’ in the law, but the executive branch, whether for the purpose of ‘settling’ claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the Parliament and the courts. Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the state, but whenever this occurs the promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.

[44] There is and must continue to be a healthy relationship among the arms of government. The state certainly cannot function effectively with its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects

⁹[2013] CCJ 5 (AJ))

of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the minister to implement the promises recorded in the deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.”

[26] On the basis of these constitutional provisions and the substance of the case law cited, it is argued that the **Exemption Regulations** are offensive because they purport to limit Parliament’s future powers in express terms. The Regulations specifically state that ANGLEC is exempt from the taxes and duties referred to in section 32 of the **Electricity Act** “*whether imposed under any present or future written law.*” Counsel argues that this is repugnant to the constitution and therefore cannot stand as it purports to bind and override the functions of the Parliament.

[27] Counsel for the claimants respond to those submissions by referring firstly to the definition of implied repeal as expressed in **Bennion on Statutory Interpretation**¹⁰. The text states as follows:

“Where a later enactment does not expressly repeal an earlier enactment which it has the power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier... The principle is a logical necessity, since two inconsistent laws cannot both be valid without contravening the principles of contradiction.”

[28] It is therefore submitted that any discussion on the issue of the implied repeal of an enactment must touch on the intention of Parliament. Counsel for ANGLEC refers to the case of **Attorney General of Antigua and Barbuda and another v Lewis (Arland)** which I have mentioned earlier. The argument here is that the presumption against implied repeal is applicable to the circumstances of the present case. In the case of **BH(AP) and another v. Lord Advocate and another (Scotland)**¹¹, the UK Supreme Court, in citing the statement outlined in **Bennion** noted the following at paragraph 30:

“... the courts presume that Parliament does not intend an implied repeal.... In modern times, when standards of parliamentary draftsmanship are high, the presumption

¹⁰ Lexis Nexis (Fifth Edition, section 87

¹¹ [2012] UKSC 24

against implied repeal is strong... and it is even stronger the more weighty the enactment that is said to have been impliedly repealed...

[29] Reference was also made to the case of ***Hamnet v. Essex County Council***¹² where Gross LJ noted that ***“... it must be underlined that the Court will not lightly invoke the doctrine of implied repeal; necessary repeals are usually effected expressly.”*** Counsel’s argument here is that the presumption against implied repeal may also be considered from a different perspective; that is the repeal of an enactment is typically done expressly by Parliament as opposed to being left to implication. It is submitted therefore that in the case currently before me, the defendant will have to satisfy this court that the **ANGLEC Exemption Regulations** and the **Financial Administration and Audit Act** are so incompatible or inconsistent with or repugnant to each other, that they cannot stand together.

[30] In her submissions, counsel for ANGLEC referred the court to the case of ***The Permanent Secretary of the Ministry of Finance v. Financial Investments and Consultancy Services Ltd***¹³. In that case the court of appeal came to consider the question of whether section 41 of the Public Finance Management Act of Grenada had impliedly repealed section 21(2) of the Crown Proceedings Act in that jurisdiction. In response to the submissions put forward by counsel for the appellants in that case, Webster JA noted as follows:

“The principle does not turn solely on inconsistency between the provisions of the two pieces of legislation. The same passage was updated in the 6th edition of Bennion and the passage now reads:

“Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication repeals the earlier in accordance with the maxim leges posteriores priores contrarias (later laws abrogate earlier contrary laws). This is subject to the exception embodied in the maxim generalia specialibus non derogant.”(underlining added)

I highlight the difference between the two versions of the passage because the addition of the final sentence in the 6th edition is directly relevant to Mr. Bristol’s

¹² [2017] EWCA Civ. 6

¹³ GDAHCVAP2016/0001 (delivered 13th March 2018, unreported)

submission that the exception to the general rule of implied repeal embodied in the maxim generalia specialibus non derogant applies in this case.”¹⁴

[31] I will return to the decision of Webster JA later on in this judgment. However, in returning to the submissions of counsel for ANGLEC, further reference was made to Bennion where it was stated that ***“[w]here the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly, the earlier provision is not treated as impliedly repealed.”*** Counsel also referred to the rather succinct statement in **Halsbury’s Laws of England** that ***“it is difficult to imply a repeal where the earlier enactment is particular, and the later general.”***

[32] In light of the authorities referred to, counsel for the claimant submits that the **ANGLEC Exemption Regulations** is a specific enactment, and the **FAA** is a more general statute. Section 16 of the **FAA** speaks to a broader power granted to the Governor in Council, to remit all or any part of a tax imposed on a class or classes of persons. On the other hand, the **Exemption Regulations** is designed for the more specific purpose of granting an exemption to ANGLEC as a public supplier of electricity.

[33] It is also argued that the court must examine the context within which the exemption was granted to ANGLEC. ANGLEC was granted a public supplier license on 28th March, 1991. As per the arrangements with the Government of Anguilla, this license requires that the Government ensures that ANGLEC operates profitably. Notwithstanding this, it was also accepted in evidence that the Government controls the unit price of electricity which ANGLEC can in fact charge to the customer. Reference was therefore made to Motion 54 where the House of Assembly, under the provisions of section 27 of the **Customs Duties Ordinance 1977**¹⁵, abolished the duties leviable on goods imported by ANGLEC for the purpose of electricity at low cost. This underscores the continued motive behind the exemptions traditionally granted to ANGLEC.

[34] Counsel’s argument, therefore, is that if Parliament had considered all of those factors and circumstances, it must be presumed that a specific enactment relating generally to the remission of

¹⁴ Ibid at paragraph 25.

¹⁵ Repealed by section 145 of the Customs Act, Chapter C169 of the Revised Statutes of Anguilla.

taxes and fees was not intended to interfere with the specific exemptions enjoyed by ANGLEC without expressly saying so. It is further submitted that this is made all the more implausible as 73 of the **FAA** specifically lists the statutes which Parliament expressly intended to repeal. Reference was therefore made to **Maxwell on the Interpretation of Statutes**¹⁶ where the authors stated that “[i]f, as with all modern statutes, the later Act contains a list of earlier enactments which it expressly repeals, an omission of a particular statute from the list will be a strong indication of an intention not to repeal the statute.”

- [35] Counsel for the claimant goes on to make what I consider to be an even more forceful argument here against the implied repeal of the **Exemption Regulations**; that is the actual distinction between the two provisions which are allegedly in conflict here. It is argued that the **Exemption Regulations** seek to exempt ANGLEC from customs duties on specific goods. That, it is submitted, is an entirely different concept altogether from a remission of taxes as provided for in section 16 of the **FAA**. It is argued that a remission of taxes addresses a circumstance where taxes or other fees have been lawfully paid or are payable and later remitted to the taxpayer within the provisions of section 16 of the **FAA**. An exemption, on the other hand, excluded a person or corporation from a legal duty to pay taxes in the first place. Reference was therefore made to **Black’s Law Dictionary**¹⁷ where the distinction was defined. Exemption is there referred to as:

“Freedom from a general duty or service; immunity from a general burden tax, or charge. A privilege allowed by law to a judgment debtor, by which he may hold property to a certain amount, or certain classes of property, free from all liability to levy and sale on execution or attachment.”

- [36] On the other hand, a remission is ***“in civil law a release of a debt ... At common law, the act by which forfeiture or penalty is forgiven.”*** The submission is that if these definitions are taken into account, it would seem clear that on one hand the exemption creates a circumstance where the debt or obligation to pay the debt does not arise in the first place. On the other hand, to remit taxes paid or payable is to forgive and/or return funds duly paid in accordance with the law. Reference is

¹⁶ Sweet and Maxwell (12th Edition 1969)

¹⁷ West Publishing Co. Second Edition 1910

therefore made to the case of **Kaufring AG v. Commissioner of the European Communities**¹⁸ where the following was noted at:

“The essential difference between the remission and non-recovery of customs duties is that in the case of remission, customs duties have already been entered in the accounts by the customs authorities, while that is not the case with non-recovery. Entered in the accounts is to be understood to mean the entry by customs authorities of the amount of import duty or export duty resulting from a customs debt in the accounting records or in any other equivalent medium.”

[37] Further reference was made to the case of **Re Frangieh and Federal Commissioner of Taxation**¹⁹. In considering a question of whether the Administrative Appeal Tribunal had certain jurisdiction under the Tax Administration Act 1953, the court noted that a taxpayer’s request for a remission ***“necessarily presupposes that the taxpayer is liable to pay the FTL penalty, and the decision is whether the taxpayer should be relieved from that liability.”*** This further enhances the submission that a remission is designed as a relief from a liability which has already arisen. Whereas the exemption seeks to exclude the liability in the first place. Given the distinction between the two, the argument therefore, is that section 32 of the **Electricity Act** and the **ANGLEC Exemption Regulations** are not incompatible in any way with the provisions of section 16 of the **FAA**.

Restitution

[38] On the issue of restitution, counsel for the defendant did not place any submissions before the court. Counsel for the claimant however refers firstly to the case of **Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd and another** ²⁰ where Goff J noted the following:

“From this formidable line of authority certain principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is aid to discharge, and does discharge, a debt owed to the payee (or a

¹⁸ [2001] 2 C.M.L.R. 43

¹⁹ 113 ATR 172 [2021]

²⁰ [1980] QB 677 at 695

principal on whose behalf he is authorized to receive the payment) by the payer or by a third party to whom he is authorized to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.”

[39] ANGLEC therefore submits that it is entitled to a repayment of the sums paid to the government in duties on the importation of diesel fuel from 2011 to June 2022. This was on account of the fact that the funds were paid in error and/or that the Government would be unjustly enriched if the funds were not returned.

Analysis

[40] Having examined the evidence presented in this case, and the submissions put forward by counsel for the parties, I find that there has been no implied repeal of section 32 of the **Electricity Act** and the **ANGLEC Exemption Regulations**. Firstly, I agree with the submission made that a distinction should be drawn between an exemption, as has been provided to ANGLEC on the one hand, and the remission of taxes as contained in section 16 of the **Financial Administration and Audit Act** on the other.

[41] In the later Act, the Governor in Council is duty bound to seek approval from the House of Assembly if what is contemplated is a remission of taxes exceeding \$1,000.00. However, that addresses a situation where the taxes are already paid or perhaps due to the treasury. The section also contemplates a tax liability which is likely to arise in the future. For this section to be relevant there must be a liability which has already arisen or is due to arise. What the Governor in Council seeks to do, in the exercise of those powers, is to remit an identifiable amount of taxes back to the taxpayer or relieve him from the duty to pay the tax which already exists according to the law. This is perhaps why there is a cap on the amount which can be remitted without legislative approval. What is contemplated however, in the **Electricity Act** and the **Exemption Regulations**, is an exemption from liability to pay certain taxes in the first place. There is not an identifiable amount of taxes being remitted to ANGLEC, but rather an exemption to pay duties on imports referred to in section 32 or any other future legislation which imposes similar taxes as contained in that section. No liability therefore arises in the first place.

- [42] In light of this, I am of the view that the two issues legislated for are different and therefore one does not impliedly repeal the other. There is nothing incompatible or repugnant about the earlier provisions which offends the provisions of section 16 of the later in any way so as to warrant the determination that the earlier act and regulations have been impliedly repealed.
- [43] The second point which I raise here is the fact that the **FAA** specifically outlined, in section 73, the various statutes and regulations which were to be repealed at the point of its promulgation. I agree with the submission of counsel for ANGLEC that this stands as a very strong argument against the implied repeal of the provisions under which ANGLEC is entitled to an exemption. To my mind, there are a number of key facts which lend further support to that submission. When one examines the peculiar nature of ANGLEC's business and the fact that various aspects of its operation, including pricing in particular, are regulated by the Government, it would seem highly unlikely that had Parliament given direct thought to that question, it would have concluded that there was an intention, expressly or impliedly, to remove or repeal the exemptions already afforded to ANGLEC.
- [44] The legislation relating to ANGLEC's operations gives this company the exclusive right to provide electricity to the entire island. Electricity is not a luxury, but a necessity. ANGLEC is also guaranteed a profit in its operations by the legislation. Yet, ANGLEC cannot, on its own volition, increase the unit price of electricity to the consumer. The Government must approve any increase. The evidence suggests that in more recent times, the Government has expressed a reluctance to approve an increase. This is perhaps because of the very impact ANGLEC's billing will have on the entire economy and on the lives of the average citizen. It is my view, that all of these facts point away from the proposition that the intention of the **FAA** was to repeal the exemptions enjoyed by ANGLEC without expressly saying so or drawing the minds of the members of the House of Assembly to the necessary impact of such a repeal. This seems highly unlikely.
- [45] It is also important to note, that when one examines the submissions put forward by counsel for the defendant, it would appear that what is claimed to be incompatible and repugnant about the **Electricity Act** and the **Exemption Regulations** is the procedure by which the exemptions were granted in the first place. The Governor, in the exercise of the powers conferred on the office, in 1991 granted an exemption to ANGLEC. Putting the constitutional question aside for a moment, there is

no argument here that the Governor was not acting on powers duly granted by the House of Assembly at the time. It is argued however, that from 2003 onwards, such an exemption would have to be approved by the House of Assembly. For that argument to be accepted it would mean that Parliament would have intended not only to change the procedure for granting exemptions, but to also repeal all exemptions granted under previous legislation without approval of the House of Assembly, regardless of whether that was a legislative requirement at the time the exemptions were granted. I do not accept that as being correct in law.

[46] If one were to examine the facts of the **Planviron** case referred to, for example, one can see a clear distinction. In that case the court of appeal was considering which procedure is to be adopted for the grant of prescriptive title. It was determined that the two sections were incompatible and could not be reconciled so that the procedure under the Land Registration Act had impliedly repealed the provisions of the Civil Code of Saint Lucia. But that decision does not stand for the proposition that any order for prescriptive title duly granted under the Civil Code prior to the promulgation of the Land Registration Act, would have also been impliedly repealed. That would not be right.

[47] To my mind, even if one were to find that the procedure in section 32 of the **Electricity Act** should conform to the provisions of section 16 of the **FAA**, that does not stand to reason that the exemptions duly granted under the earlier Act must be impliedly repealed. I am of the view that where an exemption of this nature is granted, the court should not be too quick to determine that the House of Assembly would have impliedly repealed that benefit which has already been duly granted by merely altering the procedure in which a benefit of that nature is granted in the future.

[48] In light of this, I also find that, even if the court were to have concluded that there were contradictions in the procedures adopted in the **Electricity Act** and the **FAA**, the sections do not operate in such a manner so as to be irreconcilable and repugnant to each other. One would necessarily have to look at the broad purpose of each legislative provision. Unlike in the case of **Planviron**, where the section of the Civil Code of Saint Lucia dealt mainly with procedure, in the **Electricity Act**, the general purpose of section 32 is to empower the Governor to grant an exemption to ANGLEC from the payment of duties regarding certain aspects of its operations. It is the tax exemption, more than anything else, which is the subject of this provision. If indeed, section 16 of the **FAA** was designed

to change this procedure, all that would be required is for the sections to be read in conjunction with each other and the later procedure adopted for any future attempt to grant an exemption under section 32 of the **Electricity Act**. To repeal the entire section, as well as the subordinate regulation, would not only be altering the procedure, but would be taking away a benefit altogether. In any event, I am not of the view that an exemption of this nature is what section 16 of the **FAA** was addressing in the first place. As I have determined, the subject of this section is a remission and not an exemption.

[49] I return briefly to the judgment of Webster JA in the case of **The Permanent Secretary of the Ministry of Finance v. Financial Investments and Consultancy Services Ltd.** As I outlined before, Webster JA noted that “[t]he principle does not turn solely on inconsistency between the provisions of the two pieces of legislation.” The question is not merely whether there is an inconsistency between the enactments under review. For there to have been an implied repeal of an earlier statute, the inconsistency must be such that it is irreconcilable and repugnant to the later act. It must also be observed that the court is slow to find that an earlier statute has been impliedly repealed. To my mind, this becomes all the more important where the implied repeal of an earlier statute or regulation, as in the present case, would deprive a person or class of persons (including a corporation of the ANGLEC’s nature) from a benefit which has been duly extended by way of regulation founded on a statutory basis. Having examined the test, I am not satisfied that there has been an implied repeal of section 32 of the **Electricity Act** and the **ANGLEC Exemption Regulations**.

[50] I turn now to the constitutional question, and state that I am not of the view that the **Exemption Regulations** offend the provisions of the constitution as identified by counsel for the defendant. The regulations do not seek to impose, increase, or reduce any tax as is provided for in section 55 of the constitution. The Governor here is acting on legislative powers duly granted by Parliament to exempt ANGLEC from the payment of certain duties. There is nothing offensive to the constitution for such an exemption to be provided, once the power to do so has been granted by Parliament and can thus be taken away by Parliament if it is so resolved.

[51] I also note the submission that the regulations seek to bind future Parliaments when it states that ANGLEC is exempted from the “**duties enumerated in section 32 of the Electricity Act, whether**

imposed under any present or future written law.” I do not find this section to have the effect as submitted by counsel. The section itself does not impose taxes or legislate for any specific tax. What section 32 does is to highlight, in broad terms, the nature of the taxes from which ANGLEC may be exempted by regulation. Those taxes are provided for in various other pieces of legislation. What the regulations merely seek to do is to indicate that ANGLEC would be exempt from any duty, the nature of which has been highlighted in section 32 of the **Electricity Act**, whether it is imposed by a currently existing act or any future act. That does not take away the right of the House of Assembly to repeal or limit the exemption expressly if in the future it deems a tax outlined in the general terms of section 32 should be payable by ANGLEC.

[52] In my view, there are distinctions between the facts of the case of **BCB Holdings Limited & Anr v. The Attorney General of Belize** which was referred to by the defendants. In that case the CCJ was addressing a circumstance where a Prime Minister had negotiated and contracted for **derogations from the revenue laws of the state** for the benefit of the other parties to the contract. This was done without legislative approval. In the case before me, the **Exemption Regulations** were duly passed in accordance with the express provisions of the **Electricity Act**. Even if the court were to have found that the **FAA** had altered the procedure for granting exemptions, that would not mean that the Governor was acting ultra vires in 1991 when the regulations were passed. It also follows that there is nothing unconstitutional about the passage of the regulations in this way.

Restitution/Damages

[53] As I indicated before, the defendant grounded the defence on the issue of implied repeal. There was no defense against restitution other than this narrow submission and the putting of the claimant to strict proof as it relates to damages. I find no fault with the general submissions put forward by counsel for the claimant on the law relating to restitution. There is therefore no need to rehash the principles in full here. It would be sufficient to state that if funds were paid over to the treasury by mistake, then a compelling argument is made for it to be returned to ANGLEC. However, I wish to make a few observations on this issue.

[54] I highlight one point which I had raised with counsel for both sides during oral submissions. I do have a concern in my own mind about whether it is equitable to allow for a claim in restitution for monies paid over 12 years ago on account of a mistake on the claimant's part. Mrs. Rogers' evidence was that even though ANGLEC had presented invoices to her, as the Permanent Secretary in the Ministry of Finance, she was unable to determine what had in fact been paid in duties by ANGLEC. In fact, from the evidence presented to the court it is unclear as to precisely what invoices were forwarded to the Permanent Secretary. This is precisely the challenge which emerges when persons sit on rights for far too long. It places the defendant in a precarious position of having to defend itself against an over \$28,000,000.00 claim without being able to properly ascertain whether any of those funds were actually paid into the treasury; especially the claims made for the repayment of taxes going all the way back to 2011.

[55] Mrs. Rogers also indicated, in oral evidence in court, that the Customs Department had not done sufficient checks of the diesel fuel imported at the time, in order to ascertain what was being invoiced. That was perhaps because no one at the time even informed the government that some of what was being imported by the third-party supplier was subject to an exemption. Mrs. Rogers' evidence suggests to me that one challenge which was faced when the issue was subsequently raised was in ascertaining the veracity of what was being claimed by ANGLEC after the fact. It seems clear from Mrs. Rogers' evidence, that the Customs Department employs its own internal control mechanisms for verifying imports against the exemptions being claimed. There is therefore a process to follow, which the Government was deprived of when ANGLEC failed in its own duty to claim those exemptions. Though this is apparent from the evidence presented in court, I recognize that this was not pleaded as a defence to the claim of restitution.

[56] In any event, what has been claimed is special damages. It is trite that such damages must be specifically pleaded and proven. Mrs. Small-Davis K.C., on behalf of the claimants, argues that there is only so far the defendants can go to put the claimants to strict proof on the issue. However, to my mind, one must always be reminded of the fact that it is the duty of he who asserts to prove that which has been asserted up to the requisite standard. When one examines the nature of the bills and invoices presented into evidence, the court is in no better position than Mrs. Rogers was when the documentation was presented to her. As I have pointed out, some of the invoices appeared to have

been duplicated and some related to payments for which ANGLEC is not exempt, such as payments on gasoline. It was submitted that ANGLEC was relying on a reconciliation done between the amount of fuel consumed during that period and the amount of duties chargeable on such imports. This was based on a generation report prepared by Mr. Lamontagne. It seeks to balance the amount of diesel fuel generated during the period with what was chargeable in diesel fuel. Although Mr. Lamontagne noted that audited accounts would show the amount of duties actually paid, those were not presented to the court.

[57] I do not accept such a reconciliation of fuel generated against the customs duty payable on importation as meeting the standards of proof for what is required in a claim for special damages of this nature. Given that this is a claim for restitution, one must prove that these funds were in fact paid over to the treasury. To my mind, even invoices may not be sufficient proof of payment. Receipts are what is normally accepted as proof of payment. Whilst there may be other ways to prove payment, such as banks transfers, checks and the like, one would expect that in a commercial setting such as this, the evidence of payment would be more concisely stored for future reference by ANGLEC. This becomes all the more complicated by the fact that ANGLEC was not the actual importer of the fuel and did not pay the duties directly to the Government. This was supposedly done by a third-party supplier. However, it is here that the evidence becomes even more murky.

[58] Correspondence presented into evidence by ANGLEC suggests that in May of 2022 the Government was offsetting payments for ANGLEC's fuel supplier on account of the fact that certain charges had remained outstanding. This suggests to me that even ANGLEC's suppliers had not been consistent in their own payments to the Government. It must be noted that the duties which ANGLEC claims to have been paid were allegedly paid by those very third-party suppliers. The evidence does not go far enough to enable the court to examine precisely much of the duties payable were being offset and for what period the payments remained outstanding.

[59] In Mr. Mardenborough's email of 23rd May, 2022 to members of the Cabinet of Ministers, he lamented the fact that ANGLEC was being held hostage for the supply of fuel on account of unpaid invoices. The statement of claim also seems to suggest that ANGLEC may not have been up to date on its own payments to its suppliers at the time. Yet, the statement of claim seeks to recover payment of

duties on diesel fuel up to 30th June, 2022. In addition to that, Mr. Lamontagne's email to Mrs. Rogers, dated 20th April, 2022 claimed the sum of \$15,424,172.50 in duties paid going back 6 years from January, 2016 to March, 2022. Yet, by 23rd September, 2022, the figure had morphed into over \$28,000,000.00 spanning a 12 year period.

[60] Bearing in mind that this is a claim not for damages in general, but for restitution of monies actually paid, the court must expect that proof of payment would meet the requisite standard. There are significant doubts in my mind regarding the reliability of the evidence and whether it has in fact been proven that the amount claimed by ANGLEC were paid into the treasury and therefore ought to be subject to an order for restitution.

[61] In these circumstances, whilst I am prepared to enter judgment in favour of ANGLEC, I am of the view that further assistance from counsel would be necessary in order to reconcile whether, and to what extent, the evidence presented in this case meets the standard of actual proof of payment of duties on the importation of diesel fuel. That is an exercise which I found someone difficult to undertake, given the manner in which the evidence was presented. For the sake of clarity, this court is not prepared to accept the reconciliation done on the basis of fuel consumption over the period as proof of payment. The reconciliation exercise which the court envisages is an assessment of the invoices already presented into evidence in order to determine whether and the extent to which these meet the standards of proof required to determine the quantum of damages which may be awarded in this case, if any.

[62] In the circumstances I make the following orders and declarations:

- (a) That there has been no implied repeal of sections 32 of the **Electricity Act** and the provisions of the **Exemption Regulations**;
- (b) That section 32 of the **Electricity Act** and the provisions of the **Exemption Regulations** are not unconstitutional;

- (c) That judgment is therefore entered in ANGLEC's favour and it is declared that ANGLEC is entitled to restitution of duties paid to the treasury on the importation of diesel fuel during the relevant period;
- (d) That the reconciliation of the amount of diesel fuel consumed during the relevant period with the duties payable on the importation of diesel fuel is not sufficient proof of payment of the sum of EC\$28,349,774.00 in duties during the relevant period. ANGLEC must provide proof of the actual payment of duties sufficient to meet the standard required by law.
- (e) That within 60 days from the date of delivery of this judgment, ANGLEC is to file an additional affidavit reconciling the invoices presented in this case and carefully outlining the amount of duties which have been specifically proven based on those invoices.
- (f) The matter will thereafter be listed for further submissions from counsel for both sides on the quantum of damages which should be awarded in this case.
- (g) The court will also entertain submissions on the issue of costs at this subsequent hearing.

Ermin Moise
High Court Judge



By the Court


Deputy Chief Registrar