

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2013-03159-BLS2

Notice sent
10/23/2014

C. P. S.
D., C., B. & C.
A. S.

TOWN OF HINGHAM

J. A. C.
K. T. R.
M. W. & Z.

vs.

F. A. K., JR. AQUARION WATER COMPANY OF MASSACHUSETTS, INC. and
N. P. AQUARION WATER CAPITAL OF MASSACHUSETTS, INC.
J. S. V.

(sc) MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Town of Hingham (the Town), brought this action against the defendants, Aquarion Water Company of Massachusetts, Inc. (Aquarion Mass) and Aquarion Water Capital of Massachusetts, Inc. (Aquarion Mass-Cap). The Complaint sought declarations as to: (1) what the Town would have to pay if it exercised its right, pursuant to an 1879 statute, to purchase the water system from Aquarion Mass; and (2) whether the water treatment plant owned by Aquarion Mass- Cap should be considered part of that purchase. Resolution of the case turns on the meaning of certain words in that statute, which gave the Town the option to purchase the "corporate property" of the water company at a price based on "actual cost." Defendants now move for partial summary judgment, contending that statutory construction is an issue of law for the Court to decide and that these terms have a clear and unambiguous meaning. This Court disagrees, concluding that their interpretation necessarily requires the consideration of facts and circumstances that can only be explored at trial. Accordingly, the defendants' Motion is DENIED.

BACKGROUND

A. Factual Background

The Complaint sets forth the following facts, many of which the defendants do not dispute. The Hingham Water Company (HWC) was chartered and incorporated by a statute, St. 1879, c. 139 (the Charter) for the purpose of constructing a system which would furnish Town residents with water. The original incorporators were local citizens, including its Town Moderator, John Long (later elected governor). A public water distribution system was built and expanded over time. In 1995, the HWC (by then known as Massachusetts American Water Company or "MAWC") created a separate entity, Massachusetts Capital Resources Company ("Mass-Cap"), to construct a water treatment plant on land that MAWC owned. Once the plant was completed, Mass-Cap leased the facility to MAWC (the Facilities Lease). Through a series of transactions, the defendant Aquarion Mass ultimately became the successor company to MAWC, and Mass-Cap became the defendant Aquarion Mass-Cap.

In 2007, the stock of the defendants' parent, Aquarion Company (which owns 100 percent of the stock of the defendants) was sold. The Complaint alleges that as a consequence of this sale, the actual purchase price for the current water system was approximately \$18.5 million, plus the assumption of long-term debt. Relying on the expert testimony of an accountant, Carl Jenkins, the Town takes the position that the correct application of the Charter would permit it to purchase the water system for a price ranging between \$54.9 million or \$59.6 million. By contrast, Aquarion (using its definition of the Charter's language) places a purchase price on the water system of roughly \$184.46 million. The parties further dispute whether the water treatment plant would be part of the sale or whether the Town as purchaser would simply assume the Facilities Lease.

B. Procedural History

The Town originally filed this case in the Single Justice Session of the Supreme Judicial Court (SJC). Simultaneously, the Town filed a Motion to Reserve and Report and asked the Single Justice to reserve ruling and report the matter to the full Court. The defendants opposed the Motion, and complained that the Town was seeking to “short-cut their right to engage in discovery and fully and fairly litigate the issues in this case before a jury.” The defendants also maintained that the case would require “extensive discovery” and would “involve litigation of numerous disputes of fact.”

On August 30, 2013, a Single Justice of the SJC (Cordy, J.) denied the town’s Motion to Reserve and Report and ordered that the case be transferred to the Business Litigation Session of the Superior Court for disposition under the provisions of G.L. c. 211, § 4A. After fact discovery was completed, the defendants persuaded this Court to permit them to file a motion for Partial summary Judgment. See BLS Procedural Order Regarding Partially Dispositive Motions. Although the Motion would not eliminate the need for a trial and expert discovery was ongoing, the defendants maintained that a ruling on certain legal issues raised in this case would “inform the remaining expert discovery and focus the work that remains to be done to prepare this case for trial or other disposition.” A trial in this case is currently scheduled for February 23, 2015.

DISCUSSION

The Motion focuses on the interpretation of Section 11 of the Charter, which states as follows:

The town of Hingham shall have the right, at any time during the continuance of the charter hereby granted, to purchase the **corporate property**, and all the rights and privileges of **said company** at the **actual cost of the same**, together with interest thereon at a rate not exceeding ten per centum per annum, said cost

to include all actual loss or damage paid or suffered by said company for injury to person or property, deducting from said cost any and all dividends which may have been paid by said corporation, or at such a price as may be mutually agreed upon between said corporation and the town of Hingham; and the said corporation is authorized to make sale of the same, and this authority to purchase said franchise and property is granted on condition that the same is assented to by said town by a two-thirds vote of the voters present and voting thereon at any annual meeting, or at a legal meeting called for that purpose.

St. 1879, c. 139, § 11. The defendants contend that the term “actual cost” refers to and means the “original cost” of the corporate property – namely, what was paid by Aquarion Mass’s predecessor to acquire the water system. As to what is encompassed by the term “corporate property,” the defendants argue that that does not include the water treatment plant that was constructed by Mass-Cap (its successor being Aquarion Mass-Cap) which then leased the plant to Aquarion Mass.

No court has ever defined the term “actual cost” as it appears in this particular Charter. The SJC has, however, defined that term in several cases involving other water company charters. See e.g. Southbridge v. Southbridge Water Supply Co., 371 Mass. 209, 215-217 (1976) (“Southbridge I”); see also Oxford v. Oxford Water Co., 391 Mass. 581, 585-591 (1984) (“Oxford I”). As those decisions make clear, the term “actual cost” is not “a technical term that has the same meaning. It is a general or descriptive term that may have varying meanings according to the circumstances in which it is used.”” Southbridge I, 371 Mass. at 215, quoting Boston Molasses Co. v. Molasses Distributors Corp., 274 Mass. 589, 594 (1931).

The defendants maintain that “actual cost” means the price paid to purchase the water system (that purchase occurring in or around 2007), and that no deduction should be made from that price for depreciation. It is equally irrelevant (they argue) whether the interpretation they urge this Court to adopt would result in a substantial windfall for their investors: the Charter was clear in providing for a return of 10 percent per annum, as applied against the purchase price, and

to reduce that return to something else would not only contravene the Charter but raise a constitutional question. The defendants contend that in determining the meaning of “actual cost,” this Court need only look at the definition given it by two law dictionaries in existence at the time the Charter was written. That definition makes clear that “actual cost” is the actual price paid for the goods and not the market value.

Although actual cost is clearly not market value, the Court’s task in determining precisely what should be taken into account in calculating the purchase price is by no means as straightforward as the defendants maintain. Take, for example, the question of whether depreciation should be included. In Southbridge I, *supra*, the methodology that the SJC ultimately endorsed did include depreciation as a component. Eight years later, in Oxford I, the SJC reached a different conclusion, holding that the term “actual cost” meant the amount of money originally paid for the system, “as distinguished from any estimated costs, such as fair market value, or *depreciated value*.” 391 Mass. at 590. In so holding, the SJC did not overrule Southbridge I, however, and added that there may very well be situations where depreciation should be deducted from the original cost in order to prevent a “windfall” to the company at the Town’s expense. 391 Mass at 590.

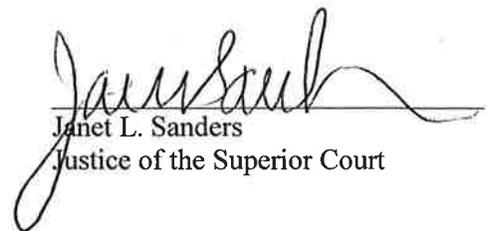
The water charters in both Oxford I and Southbridge I were virtually identical, and yet the term “actual cost” was not defined the same in each case. The Oxford I decision is instructive as to how that is possible where the court is interpreting a statute. The SJC began with the proposition that the language of a statute must be “considered in connection with the cause of its [the statute’s] enactment, the mischief or imperfection to be remedied and the main object to be accomplished,” so that the legislature’s purpose could be effectuated. *Id.* at 587-588, quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934). “The dictionary definition is

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helpful, but it should not be dispositive.” 391 Mass. at 588. Statutes are to be interpreted “not alone, according to their simple, literal or strict verbal meaning,” but must be construed so as to take into account their development, the history of the times, contemporary conditions, and the result that the legislature sought to achieve. Id. The SJC noted that the legislature’s intent in drawing up the water Charter was plainly “to reimburse the company for its investment.” Id. Accordingly, the Court was bound to select that method of calculation which would best achieve that purpose as of 1984 when the dispute arose, not in 1904 when the Charter was written. Id. at 588-589. In the context of that particular case, the SJC concluded that did not make sense to consider depreciation whereas in Southbridge I, the facts warranted a different outcome.

These two cases highlight why it is impossible for this Court to adopt the definitions that the defendants urge on me without taking into account how those definition actually translate into dollars. Contrary to defendants’ position, this Court does not simply apply dictionary definitions but must ask itself a variety of questions, taking into account all the facts together with expert testimony. Thus, if the definition of “actual cost” is calculated so as to make it virtually impossible for the Town to purchase a water system, then that may not be in keeping with the purpose of the Charter. And although historical context is important, times do change, and what made sense back in 1879 may not make any sense today. In short, the meaning of the terms at issue here cannot be decided based on the summary judgment record before me.

SO ORDERED.


Janet L. Sanders
Justice of the Superior Court

Dated: October 21, 2014