The Court of Appeal for Bermuda

CIVIL APPEAL No. 20 of 2018

B E T W E E N:

THE CORPORATION OF HAMILTON

Appellant

v

THE BERMUDA ELECTICAL LIGHT COMPANY LIMITED

Respondent

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: Mark Diel and Dantae Williams, Marshall Diel & Myers Ltd., for the Appellant;
Keith Robinson and Henry Tucker, Carey Olsen Bermuda Ltd., for the Respondent

Date of Hearing: **Friday, 7 June 2019**
Date of Judgment: **Friday, 21 June 2019**

JUDGMENT

KAY JA:

Introduction

1. This appeal is concerned with the construction of a wayleave agreement between the Corporation of Hamilton ("the Corporation") and the Bermuda Electric Light Company Limited ("BELCO"). In April 2017 a refurbishment project was being carried out on Union Street in the City of Hamilton. The Corporation notified BELCO that it required BELCO to relocate apparatus by

removing its overhead electrical infrastructure and replacing it with underground conductors. BELCO sought a contribution of $26,020. The Corporation responded that the entire cost fell to be borne by BELCO, pursuant to clause 3.22 of the wayleave agreement.

2. Clause 3.22 provides that BELCO shall:

> *"…within an agreed period of time of receipt of a notice from [the Corporation] to relocate apparatus as therein referred to and to make good any damage thereby caused to the reasonable satisfaction of [the Corporation]."*

3. "Apparatus" is defined by clause 1.2 as

> *"…the underground ground and overhead electrical supply apparatus and equipment necessary to supply electricity to, from and within the City of Hamilton boundaries together with ancillary items including, but not limited to, buildings manholes and covers, poles, pole stays, ducts, switches, conduits and cables."*

4. I shall have to refer to other provisions in the wayleave agreement, but at this stage, I need only set out clause 3.10, which is also relied upon by the Corporation. Under it, BELCO is obliged to

> *"Pay indemnify keep and hold harmless [the Corporation] against all claims, liabilities losses damages demands costs and expenses (including but not limited to costs and expenses in connection therewith) related to the apparatus"*

5. The wayleave agreement was expressed to last for twenty-one years from 1 June 2012.

6. On 16 November 2018, Chief Justice Hargun handed down a judgment in which he rejected the construction advanced on behalf of the Corporation. The Corporation now appeals to this Court.

The Judgment Below

7. The Chief Justice stated that he preferred the construction of clause 3.22 put forward by BELCO. He said:

> *"[21] Clause 3.22 appears to contemplate the 'relocation' of the existing Apparatus. The obligation is to 'relocate' Apparatus 'as therein referred', indicating that the obligation is to relocate the Apparatus as specified in the notice.*
>
> *[22] The proposal for refurbishment of Union Street does not involve 'relocation' of existing apparatus but involves 'removing' and 'replacing' with new and different apparatus."*

8. However, because he also considered the Corporation's construction of clause 3.22 to be tenable, he went on, in accordance with the authorities, to consider the commercial consequences of the rival interpretations. He concluded that, on the Corporation's approach, it could require BELCO, without any cost to the Corporation, to place all apparatus in the City of Hamilton underground. He found this to be "a wholly unexpected and uncommercial result and…a strong indication that this could not be the intention of the parties."

9. On the Corporation's alternative case under clause 3.10, the Chief Justice said:

> *"[34] On its proper construction clause 3.10 entitles the Corporation to claim against BELCO in respect of damage suffered by the Corporation itself. On its proper construction clause 3.10 does not allow the Corporation to make a claim against BELCO in respect of expenses incurred by the Corporation as a result of*

the Corporation's unilateral decision to underground part of BELCO's overground material."

10. The Corporation now seeks to overturn these conclusions.

Discussion

11. The judgment of the Chief Justice sets out the approach to construction, citing my judgment in *Air Care Ltd. v Wyatt Sellyehv [2015] CA (Bda) Civ, 20 March 2015*, which in turn drew on the speech of Lord Hoffman in *Investments Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896* and the judgment of Lord Clarke in *Rainy Sky SA v Kookmin [2011] UKSC 50*. The principles are well known and, since the parties to this appeal are in agreement about them, I shall not set them out again here.

12. The primary submissions of Mr. Diel on behalf of the Corporation is that the Chief Justice was wrong to conclude that clause 3.22, read in the context of the wayleave agreement as a whole, is susceptible to two interpretations. He says that, particularly when read with the definition of "Apparatus" in clause 1.2, the words "relocate Apparatus" must have the wider meaning for which the Corporation contends. That is to say that it extends to, *inter alia*, the removal of the existing overhead equipment and its replacement by admittedly different underground equipment. He further submits that the Chief Justice was wrong to read into clause 3.22 the word "existing". I do not accept these submissions. It seems to me that the Chief Justice did not read into the text the word "existing". He took the view, as do I, that the single word "relocate" must refer to the movement of something that is already in situ at the time of the notice. In this case, that which would end up underground would be necessarily different from that which had been overhead at the time of the notice (which was informal in this case).

13. Mr. Diel seeks to circumnavigate this analysis by reference to the definition of "Apparatus" in clause 1.2 which he submits, contemplates the totality of the equipment, "underground ground and overhead", before and after any change. I do not consider this to be correct. Clause 1.2 provides a definition for all the circumstances in which Apparatus is referred to in the wayleave agreement. When it is applied in the context of clause 3.22 it must relate to something capable of being relocated, in the sense of being moved from one place to another.

14. All this disposes me to the conclusion that the construction of clause 3.22 is even clearer than the Chief Justice found it to be. I consider that it means, and can only mean, what he found it to mean, without the need to consider business efficacy commonsense. However, if I am wrong about that, it is appropriate to revisit the "business common sense" approach to the resolution of ambiguity.

15. The Chief Justice's conclusion that the interpretation contended for by the Corporation produced "wholly uncommercial results" was founded, at least in part, on the hypothetical example of the Corporation deciding to replace all of its remaining overhead equipment (about 80% of its distribution network in the City) with underground equipment. If it could pass on the entire cost of such a project to BELCO pursuant to clause 3.22, that would be "a wholly unexpected and uncommercial result" and therefore "a strong indication" that it could not have been the intention of the parties. At the time of the hearing before the Chief Justice, Mr. Diel's submission was that such a result was within the wording of clause 3.22 and the contemplation of the parties to a wayleave agreement under which the Corporation only receives $30,000 a year as a fee.

16. Before us, Mr. Diel had taken a different approach, submitting that BELCO is protected against the harsher application of clause 3.22 by the approach illustrated in *Braganza v BP Shipping Ltd [2015] 4 All ER 639*, whereby

unilateral discretions arising under a contract are subject to an implied term which ensures that they are not exercised abusively. In *Braganza,* the Supreme Court approved what Rix LJ had said in in *Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116:*

> *"…a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality."*

17. I accept that the *Braganza* principle would protect BELCO against a resort to clause 3.22 which was tainted by dishonesty, bad faith, arbitrariness, capriciousness, perversity or irrationality. However, such taints would be highly unusual. A decision to require the replacement of the entire overhead network with an underground network, as postulated by the Chief Justice, could well be made on untainted grounds of, say, aesthetic improvement. On Mr. Diel's analysis, that would still leave BELCO to pick up the bill. The question would remain; is it consistent with business commonsense that the parties intended such an outcome? Mr. Diel submits that it is, mainly because BELCO could then pass on the costs to its customers.

18. I do not accept this submission. BELCO is a monopoly supplier whose prices are controlled by a regulator. It cannot be assumed, in the absence of evidence, that it would be permitted to increase its prices (which apply uniformly across Bermuda) in order to subsidise a project desired by the Corporation, however munificent.

19. It is also submitted on behalf of the Corporation that it is unthinkable that it would have contracted on a basis that exposes it to the ultimate cost of a project such as the one in this case in return for an annual fee as low as $30,000. As this case demonstrates, one local project can easily account for a year's fee income. That is so. However, it is for the Corporation to choose, on a

cost/benefit analysis, what it wants to do, no doubt taking into account its limited recourse against BELCO.

20. For these reasons I consider that the Chief Justice correctly construed clause 3.22.

21. I turn to clause 3.10, the indemnity provision. I do not consider that it assists in the construction of clause 3.22, nor is it a freestanding provision upon the basis of which the Corporation is protected in this case. It seems to me that, by reference to its language and its context, it is a straightforward indemnity provision relating to claims etc against the Corporation by third parties relating to BELCO's apparatus. I have nothing to add to the judgment of the Chief Justice on this issue.

Conclusion

22. It follows from what I have said that I would dismiss this appeal.

SMELLIE JA:

23. I agree.

CLARKE P:

24. I agree. The argument for the Corporation seeks to construe the clause as if it obliged BELCO, on notice from the Corporation, to make whatever change the Corporation sought in the overall distribution of the Apparatus, as between overhead, ground and underground. That is not, however, what the clause says. The obligation is to relocate, which, as Kay JA has said, must involve moving something from one place to another.

25. In relation to clause 3.10 I would only add that I find it difficult to understand how it could avail the Corporation in any event. If BELCO is not obliged to underground a portion of its supply network, it would be entitled to decline to

do so unless the Corporation agreed to pay the cost. Clause 3.10 would only, potentially apply, if BELCO volunteered to do so without any agreement being made as to who should bear the cost thereof – a most unlikely scenario.

Kay JA

Clarke P

Smellie JA