In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 163

BETWEEN:

THE CORPORATION OF HAMILTON

Plaintiff

-and-

BERMUDA ELECTRIC LIGHT COMPANY LIMITED

Defendant

Before: Chief Justice Hargun

Appearances: Mark Diel and Dantae Williams, Marshall Diel and Myers Limited for the Plaintiff

Keith Robinson and Henry Tucker, Carey Olsen Bermuda for the Defendant

Date of Hearing: **23 October 2018**

Date of Judgment: **16 November 2018**

JUDGMENT

Construction of a wayleave agreement; relevant principles of construction; relevance of commercial consequences; construction of an indemnity provision in the agreement

Introduction

1. This action relates to the construction of a Wayleave Agreement (the "Agreement") dated 10 May 2012 between The Corporation of Hamilton (the "Corporation") and the Bermuda Electric Light Company Limited ("BELCO"). In its Originating Summons dated 22 May 2018 the Corporation seeks a declaration that clause 3.22 of the Agreement be interpreted as placing an obligation on BELCO of relocating the Apparatus from overhead to underground upon receiving notice from the Corporation.

2. This issue arises in the context of a dispute between the Corporation and BELCO relating to the request of the Corporation that BELCO underground a portion of its supply network in Union Street in the City of Hamilton, as part of the refurbishment project being undertaken by the Corporation. The Corporation claims that its request to underground a portion of BELCO's supply network is "the relocation of Apparatus" and that BELCO is obliged to carry out its request under clause 3.22 at no cost to the Corporation. BELCO disputes the position taken by the Corporation and argues that the effect of the Corporation's request was to fundamentally alter the nature of the power supply to Union Street and that such a request does not come within the terms of clause 3.22.

3. The Corporation also claims that in any event, any and all costs incurred by it in relation to the relocation of Apparatus are recoverable by it from BELCO under the indemnity provision contained in clause 3.10. BELCO disagrees that clause 3.10, when properly construed, provides such an indemnity to the Corporation.

The relevant contractual provisions

4. *1.2 "Apparatus" means 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, switchgear, conduits and cables*

5. *2.1 Subject to the terms and conditions of this wayleave the Grantor agrees that during the Wayleave Period unless sooner terminated pursuant to clause 4 of the Utility Company may:*

    2.1.1 subject to the grant of Necessary Consents install, erect, inspect, keep, maintain, adjust, repair, alter, replace and/or remove the Apparatus at the Property in the locations indicated by the Plan and

    2.1.2 by its employees or agents or contractors with or without materials and appliances without notice to the Grantor at reasonable times on a Working Day (or at any time in emergency) enter onto the Property to install, erect, inspect maintain adjust repair alter replace and/or remove Apparatus

    Provided that such rights are personal to the Utility Company and may not be assigned shared transferred or disposed of to 1/3 party said as may be permitted pursuant to clause 3.19

6. *The Utility Company shall:*

    3.1 on or before the Commencement Date and thereafter on or before the first day of each year pay the Annual Fee which shall be paid proportionately for any part of a year to the Grantor

    3.3 prior to inspecting maintaining adjusting repairing altering replacing or removing Apparatus to obtain and maintain any Necessary consents

3.8 make good to the reasonable satisfaction of the Grantor any damage to the Property and adjoining property or any chattel of the Grantor or of any third party caused by the exercise of the rights hereby granted

3.9 pay indemnify keep and hold harmless the Grantor against any breach by the Utility Company of any Utility Company obligation contained herein

3.10 pay indemnify keep and hold harmless the Grantor 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

3.11 insure (with an insurance company of repute) for not less than One Million Dollars against any liability of the Grantor in relation to the Apparatus and the Property with respect to (1) death or injury to or accident to any person; (2) any breach of obligation herein on the part of the Utility Company; (3) the use or operation and presence of the Apparatus at the Property; (4) any operation of the Utility Company at the Property; (5) any act neglect or default by the Grantor or his respective employees or agents or any person on the Property with the actual or implied authority of the Grantor fifth

3.21 not interfere with the rights of the Grantor to occupation and ownership of the Property provided such does not interfere with the rights of the Utility Company hereunder

3.22 within an agreed period of time of receipt of a notice from the Grantor to relocate Apparatus as therein referred to and to make good any damage thereby caused to the reasonable satisfaction of the Grantor's and

3.23 insure at the Utility Company's own expense that any buildings or structures in which Apparatus is situated are maintained notwithstanding such buildings may be owned by the Grantor all the Utility Company

Respective arguments of the parties

7. In April 2017 at the Corporation notified BELCO that it required BELCO to relocate the Apparatus located on Union Street as part of the Union Street refurbishment project. The project involved the removal of the overhead electrical infrastructure in Union Street and replacing it with underground conductors. In response BELCO advised that it was willing to undertake this project provided that the Corporation made a contribution in the amount of BD $26,020. In seeking the financial contribution BELCO has taken the position that there is a significant difference between relocating their equipment and making a substantial change, in this instance from overhead distribution to underground. BELCO contends that clause 3.22 does not require BELCO to cover the cost of this substantial change.

8. The Corporation argues that on ordinary interpretation of clause 3.22 there is an obligation on BELCO to relocate Apparatus upon receiving notice from the

Corporation. The Corporation rejects the argument advanced by BELCO that clause 3.22 is not engaged at all because the Corporation's request to relocate the Apparatus amounts to a request to install a completely different method of supply. The Corporation contends that clause 3.22 should be construed widely thus placing an obligation on BELCO to relocate the "Apparatus" – a term which encompasses underground and over ground supply equipment.

9. The Corporation accepts and indeed asserts that its interpretation of clause 3.22 means that the Corporation can require BELCO, without any cost to the Corporation, to place all of its Apparatus underground. At present approximately 20% of BELCO's distribution network in the City of Hamilton is by virtue of overhead network. The Corporation also accepts the logical extension of this argument that the Corporation could, exercising its right under clause 3.22, require BELCO, without any cost to the Corporation, to place all of Apparatus over ground. This would mean that BELCO would be required to remove the entirety of its Apparatus from underground and replace it with appropriate Apparatus over ground. At present approximately 80% of BELCO's distribution network in the City of Hamilton is by virtue of underground network.

10. BELCO contends that the resolution of the current dispute with the Corporation requires determination of the question whether the request by the Corporation to remove the existing overhead Apparatus referred to in the Plan (as defined in the Agreement) and to replace it with different Apparatus underground falls within the meaning of the words "*relocate Apparatus as therein referred to"* as that term is used in clause 3.22.

11. In this regard the affidavit of the Dennis Pimentel, Vice President, Grid Operations of BELCO, shows that the Apparatus required for overhead network is completely different from the Apparatus required for the underground network. At present the supply equipment in Union Street is mounted on above ground poles. The equipment consists of high-voltage conductors that have no insulation and are placed on insulators that are on the poles. The high-voltage electricity is then "stepped down" to low-voltage (for end customer use) by Transformers that are designed to be pole mounted. Branch lines and other tee-offs are readily accommodated on poles. Low-voltage distribution to end users is typically by insulated wires on the poles, with final conductors to customers' property by an overhead "drop" or underground cable.

12. Underground networks, in general terms, consist of high-voltage cables, transformers or switchgear (either stand alone or installed inside a dedicated room usually called a transformer or switching vault) and low voltage cables to take power from transformers to customers' meters. Any time a tee off transformer is required were some form of ground mounted insulation is necessary, BELCO uses a variety of ground mounted equipment such as switchgear and elbow cabinets as well as a variety of equipment which needs to be mounted inside a room for safety reasons.

13. In the case of the proposal for Union Street, a new pad mounted transformer would need to be installed on a concrete base adjacent to the public restroom block at Union Street. New high and low voltage cabling would be supplied and installed underground and the existing overhead cabling, poles and pole mounted

transformers then removed. BELCO points out that the type of cabling used for overhead supply is different from that used for underground supply.

14. Accordingly, BELCO argues that the Corporation's request is not a request to "*relocate Apparatus as therein referred to"* within the meaning of clause 3.22, but instead request to "*remove"* the Apparatus referred to in the Plan and to "*replace"* it with entirely new or different Apparatus not referred to in the Plan in a different location, namely underground.

15. It is the case of BELCO that clause 3.22 of the Agreement only imposes an obligation on BELCO to relocate the existing Apparatus referred to in the Plan, not to remove and replace the Apparatus referred to in the Plan with new and different Apparatus.

16. Mr Pimentel also points out that the decision whether to place the network underground or over ground has long-term operational consequences. The underground cabling and equipment remains the property of BELCO and BELCO remains responsible for future maintenance. This is an important consideration for BELCO because while overground equipment is more prone to weather damage and perhaps not aesthetically pleasing, it has certain important advantages from the perspectives of BELCO. Overground networks have inherent flexibility for connecting new supplies, are relatively easy and inexpensive to repair and require very little "footprint" on public or private property. While ground mounted equipment and underground cables are more aesthetically pleasing and more weather resistant, there is much less flexibility if a new service is required. It is also the case, generally, underground equipment requires much longer repair times in the event of a fault and transformers, switchgear and so on and is much more costly than thier overhead equivalents.

Relevant principles of contractual interpretation

17. There was no material dispute as to the relevant principles of contractual interpretation. Both parties accept that the relevant principles are those set out in the judgment of Kay, JA in *Aircare Ltd. v Wyatt Sellyeh* [2015] CA (Bda) 6 Civ (20 March 2015). In that case Kay, JA relied upon the following principles from the speech of Lord Hoffmann in *Investments compensation Scheme Ltd v west Bromwich Building Society* [1998] 1 WLR 896:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which there were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which has affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. V Eagle Star Life Assurance Co. Ltd.* [1997] AC 749.

(5) The "rule" that word should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191, 201:

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield the business commonsense".

18. Kay, JA in *Aircare* also recognised that the language used by the parties may have more than one potential meaning and in that context referred to in the judgment of Lord Clarke in *Rainy Sky v Kookmin* [2011] UKSC 50:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which there were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with the business commonsense to reject the other".

19. In *Wood v Capita Insurance Services Limited* [2017] UKSC 24, Lord Neuberger explained the iterative process at [12] as follows:

> "This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each other".

Construction of clause 3.22

20. The rival interpretations of clause 3.22 are set out at paragraphs 7 to 16 above. I consider that, having regard to the wording of clause 3.22, both rival interpretations are possible. However, if the Court had to decide by reference to the wording used alone the Court would prefer the interpretation contended for by BELCO for the following reasons.

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 the refurbishment of Union Street does not involve "relocation" of existing Apparatus but involves "removing" and "replacing" with new and different apparatus.

23. As the evidence of Mr Pimentel shows the overhead Apparatus in place on Union Street would not function if it were to be merely "relocated" underground. In order to supply electricity to Union Street through underground Apparatus, the existing Apparatus would need to be "removed" from one location and "replaced" with a different Apparatus in another location. The proposal for refurbishment is that (a) a new pad mounted transformer will need to be installed on a new concrete base; (b) new high-voltage cabling will need to be supplied and installed; (c) new low-voltage cabling will need to be supplied and installed; and (d) the existing overhead cabling, poles and pole mounted transformer will need to be removed. Mr Pimentel highlights that the type of cabling used for overhead supply is different from that used for underground supply.

24. It is to be noted that the Agreement itself distinguishes between "replace and/or remove" and "relocate":

> Clause 2.1.1: "*The Utility Company <u>may</u>… Subject to the grant of Necessary Consents, install, erect, inspect, keep, maintain, adjust, repair, alter, <u>replace</u> and/or <u>remove</u> the Apparatus at the Property in the locations indicated by the Plan and…"* (Emphasis added)

Clause 3.3: "*The Utility Company shall… Prior to inspecting maintaining adjusting repairing altering replacing or removing Apparatus to obtain and maintain any Necessary Consents". (*Emphasis added*)*

Clause 3.22: "*The Utility Company shall… Within an agreed period of time of receipt of the notice from the Grantor to relocate Apparatus as therein referred to and to make good any damage thereby caused to the reasonable satisfaction of the Grantor's".* (Emphasis added)

25. It is noted that the definition of "Apparatus" includes both underground and over ground networks and that definition is understandable given that BELCO has both underground and over ground supply networks within the City of Hamilton. Clause 3.22 however is concerned with the "Apparatus" as referred to in the notice ("as therein referred").

26. It is also noted that clause 3.22 does not refer to "the" Apparatus but to "Apparatus". However, the fact that clause 3.22 requires the relocation of Apparatus as referred to in the notice does indicate that it is referring to the existing Apparatus.

27. The need for provision such as clause 3.22 is readily understandable as the Corporation may need to redesign roads and streets within the City and as a consequence require BELCO to "relocate" the existing BELCO network. The fact that BELCO has historically been under such an obligation under its incorporating Act forms part of the background to this Agreement. Sections 8 and 9 of the The Bermuda Electric Light Company Act 1951 provide that where conditions have altered so that the existing position of Apparatus "… *becomes an obstruction or impediments to traffic…"* then the Corporation "… *shall have the right to require [BELCO] to alter the position of such Apparatus on the road concerned so as to minimise such obstruction or impediment."*

28. Given that the Court accepts the wording of clause 3.22 is open to both interpretations, the court is required, in accordance with the judgments of Lord Clarke in *Rainy Sky v Kookman* and Lord Neuberger in *Wood v Capita Insurance Services*, to consider the commercial consequences of the opposing interpretations.

29. As set out at the paragraph 9 above, the corporation readily accepts that its interpretation of clause 3.22 means that the Corporation can require BELCO, without any cost to the Corporation, to place all of its Apparatus underground. It follows that the Corporation can require BELCO, under clause 3.22, to place underground the existing 20% of BELCO's distribution network in the City of Hamilton which is presently over ground.

30. Counsel for the Corporation further accepted that the interpretation contended for by the Corporation will also mean that the Corporation could, exercising its right under clause 3.22, require BELCO, without any cost to the corporation, to place all Apparatus in the City of Hamilton overground. This would mean that BELCO would be required to remove the entirety of its Apparatus from underground and replace it with overhead Apparatus. This would involve removing 80% of BELCO's existing distribution network in the City of Hamilton and the replacing

it with an over ground network. This would be a wholly unexpected and uncommercial result and is a strong indicator that this could not be the intention of the parties. This is in circumstances where the Corporation receives an annual fee for allowing BELCO to erect its network on the Corporation's land. Accordingly, I reject the interpretation contended for by the Corporation on the basis that it produces wholly uncommercial results.

31. For the sake of completeness I should add that had the Court taken the view that the interpretation contended for by the Corporation was the correct interpretation of clause 3.22 the court would have held that it was the obligation of BELCO to perform its obligation without any cost to the Corporation. The Court would also have held that clause 3.22 was not unenforceable on the basis that it was an agreement to agree. The court would have held that in this case if the parties could not agree the "period of time" the Court would have implied a term providing for a reasonable period of time.

Construction of clause 3.10

32. Further, and in any event, the Corporation argues that the Agreement expressly states in clause 3.10 that BELCO will indemnify the Operation against all losses, damages, costs and expenses associated with the Apparatus. Relying upon clause 3.10 the Corporation argues that BELCO is not only obliged to relocate the Apparatus but also bear the costs of the relocation. As a freestanding basis for liability the Corporation argues that clause 3.10 extends immunity to the Corporation, thereby excluding the Corporation from facing liability for losses related to and in connection with the Apparatus.

33. The Court is unable to accept the Corporation's submission that, on a proper construction of clause 3.10, the Corporation is able to make a claim against BELCO in respect of costs incurred by the Corporation in undergrounding BELCO's over ground network.

34. Clauses 3.8 to 3.11 are dealing with the Corporation's liability arising out of claims made by the third parties against the Corporation in respect of the Apparatus. Thus, clause 3.8 places an obligation upon BELCO to make good any damage to the property of the Corporation or any third party caused by BELCO. Clause 3.9 places an obligation upon BELCO to pay indemnify and keep and hold harmless the Corporation against any breach by BELCO of any of its obligations under the Agreement. Clause 3.10 requires BELCO to pay indemnify and keep and hold harmless the Corporation against all claims liabilities losses damages demands cost and expenses related to the Apparatus. On its proper construction clause 3.10 entitles the Corporation to claim against BELCO in respect of claims made by third parties against the Corporation related to the Apparatus and 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 over ground network. Clause 3.11 requires BELCO to maintain a valid policy of insurance in respect of liabilities assumed by it under the Agreement.

35. The Corporation relies on a number of authorities relating to waiver of liability and/or provision of an indemnity in favour of directors contained in the byelaws. However, none of those authorities assist in the construction of clause 3.10 and in particular none of the authorities support the Corporation's case that it may make a valid claim against BELCO under clause 3.10 in respect of expenses incurred by it as a result of its unilateral decision to underground part of BELCO's over ground network.

36. The Corporation relies upon *Intercontinental Natural Resources Limited (in liquidation) v Conyers, Dill and Pearman et al* [1982] Bda LR 1. In this case the byelaws of the company provided that "*the directors… shall be indemnified and secured harmless… from and against all actions, costs, charges, losses, damages and expenses which they or any of them… shall or may incur or sustain by reason of any act, concurred in or omitted in or about the execution of their duty, or spores duty, in their respective offices… accept such (if any) as they shall incur or sustain by or through their wilful neglect or default…"* In an action by the liquidators against the directors, the Court of Appeal held that this provision conferred immunity from liability for any loss or damage which may occur in the execution of his duties as directors unless there was wilful default or dishonesty and the burden of proving wilful default and dishonesty rested with the company.

37. *In re City Equitable Fire Insurance Company, Limited* [1925] 1 Ch 407, the company's articles provided that none of the directors of the company shall be answerable for any loss, misfortune, or damage unless the same should happen by or through their own wilful neglect or default. The court held that on the evidence none of the directors (other than the managing director) was liable for the losses alleged in the action, and that in those instances in which all or some of the directors had been guilty of negligence, such negligence was not wilful and as a result the article applied to exonerate them from liability.

38. To the same effect is the third case relied upon by the Corporation, *In re Brazilian Rubber Plantations And Estates, Limited* [1911] 1 Ch 425. The articles provided that no director should be liable for any loss or damage occasioned by any error of judgment unless the same happened to his own dishonesty. The court held that there was no liability on the part of the directors as their conduct did not amount to negligence, let alone dishonesty.

Conclusion

39. The court declines to make a declaration that clause 3.22 of the Agreement executed by the parties on 10 May 2012 be interpreted as placing an obligation on BELCO to pay the costs of relocating the Apparatus from overhead to underground in Union Street in the City of Hamilton upon receiving adequate notice from the Corporation of Hamilton.

40. The court will hear counsel in relation to costs.

Dated the 16 of November 2018.

NARINDER K HARGUN
Chief Justice