Cordells

Case Note – September 2017

PROPERTY DISPUTES; LEASES
Government Grant Interpretation
Liability for Slope Maintenance
BA v Appeal Tribunal (Buildings)
Court of Appeal 11 August 2017 CACV 229/2016

Summary

The Court of Appeal allowed an appeal against the quashing by the High Court (on judicial review) of a decision of the Building Appeal Tribunal as to the scope of a land grant obligation to construct and maintain a road. The obligation did not extend to the maintenance of slopes supporting the road.

The case highlights the need in both Government and other forms of lease for specific drafting to cover existing works which are to be "taken over" by a new grantee or lessee. In such a case, the scope of the works, maintenance obligations, ownership rights and, potentially, reinstatement obligations all need to be specifically addressed in the drafting.

Facts

- Hilltop Road, on the hillside above Kwai Chung, was constructed before 1963. It was formed by cutting into the hillside and tipping the loose cut soil onto the hillside. The road was paved on top of the cut and the fill slopes supported the road. The dispute concerned two of these slopes: an area called Feature 156(1) to the south of Hilltop Road; and an area called Feature 33(1) to the west of Hilltop Road.
- The land grant in question (Grant) was issued in 1976 to ENM Holdings Limited (ENM) for the building of a country club, which is now in operation, the Hilltop Country Club (Club). The granted land did not include Hilltop Road nor the slopes alongside it. The only access to the Club is over Hilltop Road, that access being shared with others. Before the Grant, the Government was responsible for maintaining Hilltop Road.
- Special Condition (31) of the Grant (SC(31)) provided:

  "The grantee shall construct a paved way to the standards laid down in the Building (Private Streets and Access Roads) Regulations over the area shown coloured brown on the plan annexed hereto and shall uphold, maintain and repair such paved way and everything forming portion (sic) of or pertaining to it to the satisfaction of the said Director, and the grantee shall be responsible for the whole as if he were absolute owner thereof. Any alteration to the public street from which the paved way is to be constructed, absorbing a portion of such paved way or affecting the gradient thereof, shall not give rise to any claim by the grantee, who shall carry out all consequent alterations to such paved way constructed by him." (emphasis added).
- The brown land was Hilltop Road. Notwithstanding the obligation in the Grant, ENM did not do any works to Hilltop Road and consequently did not modify the two slopes incidental to any road construction. Feature 33(1) was, however, modified by ENM incidental to the construction of a car park platform within the Club.
- Two slope orders were issued by the Building Authority (BA) pursuant to its statutory powers in respect of Feature 156(1) and Feature 33(1).
- The question as phrased by the Court of Appeal (as to which see below) was:

  "Given that the grantee is to take over the maintenance responsibility of the original Hilltop Road from the Government, does this cover the adjoining hillslopes formed in the road

construction which support the road, and which on any view is a very substantial and onerous obligation."

- ENM appealed against the slope orders on the basis that it was not liable for their maintenance under the Grant. The Building Appeal Tribunal agreed with ENM.
- The BA sought judicial review of that decision in the High Court (Au J) which found in favour of the BA.
- ENM appealed and the Court of Appeal upheld the appeal in respect of the interpretation of SC(31).

High Court and BA Positions

- The High Court's reasoning was based upon the assumed intention of the parties at the time of the Grant:
  - As the grantee was to construct the road, it must have been within the parties' contemplation at the time of the Grant that corresponding works might have to be carried out on the hillside slopes along the original Hilltop Road and that the grantee would have to maintain not only the paved way constructed by it but also other necessary supporting structures formed as a result of the construction works.
  - It was of common and commercial sense that the grantee would be responsible to maintain those hillside slopes where construction works had been carried out by the grantee in constructing the paved road and which provide substantial support to that road.
  - At the time of the Grant the detailed works were not then known and it was thus impractical to describe the particular slope works. The scope of the liability depended on the evidence and the case was remitted to the Appeal Tribunal for re-hearing.
- This was not, however, the construction advanced by the BA. The Court of Appeal gave leave to the BA to submit notice out of time to argue its construction as an additional ground of supporting the High Court decision. The Court of Appeal thus heard the BA's construction of SC(31) which was:
  - The grantee was to be treated as having assumed the responsibility to construct or complete Hilltop Road and the necessary supporting slopes.
  - On this basis, it would be contrary to common and commercial sense if the grantee were responsible only for the maintenance of the paved way but not its supporting slopes. This is consistent with the words "pertaining to".
- ENM position was that SC(31) imposes an obligation to maintain everything within the boundaries of Hilltop Road, including the paved way and incidental structures such as manholes but this did not cover the slopes. It also pointed out that as parties had already accepted that no road works had been undertaken by it, the remittal to the Tribunal for a re-hearing was a "wild-goose chase".
- In summary, the difference between these positions was:
  - High Court: Both parties must have anticipated that the grantee might need to carry out construction works to the original Hilltop Road and thus it was a question of evidence as to what works were actually done and were thus to be maintained.
  - BA: The grantee had assumed the responsibility for the construction and maintenance of the original Hilltop Road.
  - ENM: The maintenance obligation was limited to the road and incidental structures within the brown land and there was no need to re-hear evidence that the parties had already agreed upon.

Decision

- The rationale of the Court of Appeal was brief. Hon Kwan JA first repeated the principles of interpretation of contracts, that is, the court is to find the intention of the parties from the natural and ordinary meaning of the words; the overall purpose of the document; any other provisions of the document; the facts known or assumed by the parties at the time that the document was executed; and common sense. In other words, contractual terms are to be construed by interpreting the words in their documentary, factual and commercial context.
- Against this background, the Court of Appeal considered that Au J had proceeded on the false premise that the parties reasonably anticipated that works would be needed to upgrade the road but there was no evidence that any such works were needed. The obligation was

to construct a road to regulatory standards which was the existing road.

- If works to the slopes were required and envisaged, one would have anticipated a more detailed provision requiring statutory approval similar to other provisions in the Grant relating to services.
- The reference in the second sentence of SC(31) to the public street referred to the public street system from which Hilltop Road branched out. This spoke only to the grantee being obliged, in the case of works carried out to the public street by the Government, to carry out incidental works to the paved way, not the slopes. The court's reading of the first sentence of SC(31) was therefore consistent with this.
- The BA's position that the grantee was assumed to have taken over the maintenance responsibility of the entirety was strained. There was nothing to support the contention that the parties had intended to assume that "the factual basis of the Grant was to be otherwise than the state of affairs prevailing at the time".
- Separately, the Court of Appeal also considered the Building Appeal Tribunal's decision as to the limited scope of a separate slope maintenance obligation in relation to Feature 33(1). It held it had not given this matter sufficient and proper enquiry and quashed the decision of the Building Appeal Tribunal in this respect.

Comments

- The drafting and various interpretations of SC(31) raise a number of issues.
- The express obligation was to build the road to a specific standard and then to maintain it. From the very language itself, it therefore seems that certain works were anticipated, that is, works to bring the road up to standard. The Court of Appeal commented that the road was already built but that does not address the express provision itself which was, in effect, treated as superfluous.
- The Court of Appeal gave the BA's interpretation short shrift. However, the BA did not appear to be saying that the factual basis of the Grant should be something other than it was at the time of the grant, but rather that it was implicit that that the grantee was to take over the maintenance of the existing road and slopes. Still, the trouble is that the provision just does not say that. It refers specifically to the road constructed by the grantee and everything pertaining to it, so no road works, no maintenance obligation.
- An alternative interpretation of SC(31) might be that the road construction obligation lasts for the duration of the Grant and applies if at any time during the term the road ceases to be compliant with the regulations. This would make sense of the express obligation to build.
- If works are carried out to the road in the future, would the grantee only be obliged to maintain the supporting slope structures touched by the relevant works? Au J's judgement addressed this but the Court of Appeal did not. This would make sense but could itself give rise to evidentiary issues as to the extent of that obligation - it could be difficult to separate out one part of a cut road structure from another.
- ENM's own acknowledgment that it is obliged to maintain the paved area seems to be questionable and yet the Court of Appeal's decision was based on this. The maintenance obligation could readily be construed as relating only to the road works actually undertaken by the grantee rather than to the original road. SC(31) speaks of maintenance of "such paved way". If the obligation is that the grantee would maintain the original road in any event one would presume that is what it would say.
- The issue arose because works were not carried out by the grantee. Perhaps the question is should they have been? The case does not mention whether the road was or is compliant with regulations although the Building (Private Streets and Access Roads) Regulations do not contain provisions relating to slope stability.

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