1971

Utah Power & Light Company v. George F. L. Bishop : Appellants' Brief On Appeal

In the Supreme Court of the State of Utah

UTAH POWER & LIGHT COMPANY,
a corportion,

Plaintiff-Respondent,

vs.

GEORGE F. L. BISHOP, et al.,

Defendants-Appellants.

Case No.
~~13412~~
12208

APPELLANTS' BRIEF ON APPEAL

Appeal from a Judgment of the Second District Court
of Davis County
Hon. Charles G. Cowley, *Judge*

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STATEMENT OF KIND OF CASE

Plaintiff acquired written easements in 1913 from predecessors in interest of the appellants upon which a single row of towers and power lines were constructed in 1913-1914. Plaintiff commenced action against the defendants in 1968 alleging in one count its right to erect another row of towers and lines under the same easement and in the second count for condemnation of the easement for the second row of towers and lines if the original easement were held insufficient to allow the second row. From summary judgment for the plaintiff on its first count, the defendants appeal under consolidation of Civil Cases 13412 and 13413 in the District Court for Davis County, Utah.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the summary judgment and a trial on the issues framed by the second count for condemnation for the right to place the second row of towers and lines with compensation to the appellants therefor.

STATEMENT OF FACTS

Appellants, Ruby Olsen, George Bishop, et ux., George S. Diumenti, et ux., and Frederick R. Devereaux, et ux., are owners of tracts of land in the vicinity of West Bountiful, across whose tracts the plaintiff had acquired in 1913 written easements on printed forms with some written interlineations as appear more fully in the record as exhibits to the respective complaints. The printed portions of the easements are substantially as follows:

RIGHT OF WAY EASEMENT

> ..... and ....., his wife, of Davis County, State of Utah, Grantors, for One Dollar and other valuable considerations paid by Utah Power Company, a Maine Corporation, Grantee, receipt of which is hereby acknowledged, hereby grant, bargains, sell and convey to said Utah Power Company, its successors and assigns, an easement and right of way, and the right, privilege and authority to construct, erect, operate and maintain, a line or lines for the purpose

of transmitting electric or other power, and telegraph and telephone lines, in, upon, along, over through, across and under a piece of land 150 feet in width, situated in the County of Davis and State of Utah, and more particularly described as follows, to wit:

[Describes by metes and bounds a strip 150 feet wide]

Together with the rights to grantee, its successors and assigns, to place erect, relocate, inspect and operate thereon poles, towers, crossarms and fixtures, and to place and maintain such other appurtenances, useful or necessary to operate said line or lines, and string wires and cables, from time to time, across, through, under or over the above described premises; (however, as to the number of towers and poles to be places upon said land hereunder, it is understood and agreed that only ..... towers shall be placed upon said land under this easement for the above consideration: but if at any time the grantee shall desire to erect and maintain additional towers of poles upon said land, it may do so under this easement by paying to the then owner of said land the further sum of ..... for each tower so placed and maintained and the*further sum of ..... for each pole so placed and maintained, such payment to be made at the time such tower or pole is erected); also the right and privilege to cut and remove from said premises, and on either side thereof, any timber, trees or overhanging branches, or other obstruction, which do or may endanger the safety, or interfere with the use of said poles or towers or fixtures or wires thereto attached, and the right

of ingress and egress, to and over the above described premises for the purpose of repairing, renewing and inspecting said poles, towers, fixtures, wires and appurtenances, and for doing anything necessary, useful, or convenient for the enjoyment of the easement herein granted; also the privilege of removing at any time any or all of said improvements upon, over, under or on said lands.

Together with all the rights, easements, privileges and appurtenances which may be required for the full enjoyment of the rights herein granted.

*(The Bishop, Devereaux and Olsen easements had a hand-written insertion substantially as follows at this point: "Price of *future* towers to be agreed upon hereafter . . . price of poles to be agreed upon hereafter").

The important interlineations in the second paragraph of the easements are as follows:

(a) BISHOP. Provides for "four" towers and for additional towers or poles "price of future towers to be agreed upon hereafter" . . . "price of poles to be agreed upon hereafter." Two towers were installed in 1914 and one in 1968.

(b) DIUMENTI. Exhibit C provides for "one" tower and "$50.00" for each additional tower and "$10.00" for each additional pole. Exhibit D provides for "one"

tower and "$25.00" for each additional tower and "$5.00" for each additional pole. No towers were installed in 1914 and one was installed in 1968.

(c) DEVEREAUX. Exhibit E provides for "two (2)" towers and for additional towers provides "price of future towers to be agreed on hereafter" and "price of poles to be agreed on hereafter." Exhibit F has interlineations identical to Exhibit E. One tower was installed in 1914 and one in 1968.

(d) OLSEN. Exhibit B provides for "two" towers and "price of future towers to be agreed on hereafter at time of erection" and "price of poles to be agreed on hereafter or when erected." One tower was installed in 1914 and one in 1968.

The first transmission line constructed in 1914 consisted of steel towers 82 feet high and having base dimensions of 18 feet by 18 feet, whereon are attached three cross arms which carry three cables on each side of the tower and was known as a 138,000 volt line. The second transmission line constructed in 1968-69 was constructed parallel to and about 65 feet westerly from the first line of towers, utilizing steel towers 119 feet high, having base dimensions of 26 feet by 26 feet, whereon are attached three cross structures from which are suspended three cables constituting one circuit of a 230,000 volt transmission line. The distance between the exterior lines

of each row of towers is about 112 feet. (R. 34-35 #13412) Photos of the respective towers and lines are filed as Exhibits (R. 52).

The trial court heard arguments of the parties upon motion of the plaintiff for summary judgment, and subsequently upon pretrial hearing, whereupon the court held there were no triable issues and directed the plaintiff to prepare judgments accordingly.

ARGUMENT

POINT I

RESPOONDENT IS LIMITED TO ONE LINE OF POLES OR TOWERS UNDER THE 1913 EASEMENT BECAUSE THE EASEMENTS ARE LEGALLY UNCERTAIN AS TO NUMBER OF LINES ALLOWED, TIME FOR ERECTION OF LINES AND PLACE OF ERECTION.

The "right of way easement" included the words "line or lines for purposes of transmitting electric or other power," was dated in 1913, and the construction of a line commenced shortly thereafter. For a period of over 50 years there were no further lines constructed. Under these circumstances the plaintiff is limited to the one line previously constructed and is not entitled to an additional line without condemnation and compensation therefor.

In the case of *Belusko v. Phillips Petroleum Company*, 308 F.2d 832 (1962) U.S. Court of Appeals Seventh Circuit, this issue was squarely litigated. Plaintiffs brought suit for an injunction requiring the defendants to remove a pipe line from their property and for an accounting for damages, because of a continuing trespass of the pipe line on their land. The District Court for Southern Illinois granted the injunction and ordered the second pipe line removed. The Court of Appeals affirmed. In January 1939, a widow executed a "Right of Way Contract" to a predecessor of the defendants which was recorded. Between February and October 1939, the company laid an eight inch pipe line across the widow's tract for which she was paid $50.00 upon delivery of the contract and an additional sum of $22.90 plus damages of $25.94. During September, 1951, over objections of the plaintiff, the defendants constructed within eight feet of the first pipe line another ten inch pipe line and tendered $73.10 as compensation plus an offer to pay damages. The "Right of Way Contract" provided that in consideration of $50.00 the widow granted

> ". . . the right to lay, maintain, inspect, alter, repair, operate, replace, remove and relay a pipe lines, for the transportation of oil . . . under across the following described land in Montgomery County, Illinois, to-wit:
>
> The West half of the Southeast quarter of Section 22, Township 8 North, Range 5 West of the Third Principal Meridian . . .

> Should more than one pipe line be laid under this grant, at any time, an additional consideration, calculated on the same basis per lineal rod as the consideration hereinabove recited, shall be paid for each line so laid after the first line."

We quote now from the decision of the Court:

> "The District Court concluded that the Right of Way Contract is too indefinite and uncertain to authorize the claimed right to lay a second pipe line, and that Phillips acted at its peril when it entered plaintiff's land for that purpose despite plaintiff's protests.
>
> We hold the Right of Way Contract is too indefinite and uncertain to authorize the claimed right of the defendant to lay a second pipe line some twelve years after the original pipe line was constructed."

The Court then quoted at length from *Winslow v. City of Valejo,* 148 Cal. 723, 84 P 191, 5 L.R.A. N.S. 851 where the question was whether the City of Valejo after the installation of a single water main had the right to lay an additional main by virtue of a grant of right of way for "any water pipes or mains which may be laid by the city." Holding that the city had no such right, the court at page 192 of 84 Pacific said:

> ". . . We see nothing in the language of this grant, or in the conditions existing when it was executed, to indicate that it was intended to give the

> defendant the right to increase from time to time the number of pipes laid. The appellant's plea for such construction is based largely on the fact that the conveyance throughout used the words 'pipes' and 'mains' in the plural number, and that, therefore the parties could not have intended to limit the city to a single pipe. But, while the city might, at the outset have laid more than one pipe, the most that can be said regarding this language is that the grant is indefinite as to the number of pipes."

The California Court went on to state that the city having elected to lay one line is bound by this election. An injunction was granted against the city from laying a fourteen inch pipe within three feet from the ten inch pipe which it had laid some nine years previously.

A similar result is reached in the case of *Jackson Electric Membership Corporation v. Eckols*, 84 Ga. App. 610, 66 S.E. 2d 770. In 1941 a grant to the plaintiff was deeded:

> "To place, construct, operate, repair, maintain, relocate and replace thereon . . . an electric transmission of distribution line or system, . . ."

Plaintiff, in about 1941, erected a line and about four years later plaintiff commenced to construct an additional line claiming the right to do so under the grant. It was held that the plaintiff must condemn and pay for the additional line, stating:

> "While the easement relied upon by the plaintiff did not specifically designate the location or extent of the line or system of lines to be erected on and over the defendant's lands, the subsequent erection of a line and the termination of the work thereon for a considerable period of time operate to fix and determine this feature of the contract."

Having thus established the location of the line or system, after the lapse of substantial period of time the plaintiff cannot without condemnation construct additions or extensions to the original line or system.

POINT II

THE WIDTH OF THE RIGHT OF WAY IS NOT 150 FEET, BUT IS LIMITED TO A REASONABLE WIDTH FOR THE ONE LINE OF TOWERS CONSTRUCTED OVER FIFTY YEARS AGO.

The easement does not specify a right of way 150 feet in width, but is a right of way for a line or lines over a tract 150 feet in width. This restricts the location of the line to the 150 foot area as distinguished from allowing the construction anywhere upon the larger tract, but does not specify that the width of the easement is 150 feet. As shown by the affidavit of George Evan Taylor the towers constructed in 1913 were about 18 feet wide at the base and at most would require only about 20 feet on either side thereof for construction and maintenance.

No where is the width of the right of way stated. The specification of the tract 150 feet in width is in effect a statement by the landowner that "you may have a reasonable easement somewhere over this part of my land not over any other part." It is to be noted that the 1913 easement parallels the two-pole line placed under a 1902 easement and assures both parties that the 1913 line would be located somewhere within the 150 foot width which avoids the possibility that the landowner or the company would contend for a different general location.

The general rule is stated in 25 Am. Jr.. 2d 484, Easements, Section 78, as follows:

> "Ordinarily, however, a grant or reservation of a right of way 'over' a particular area, strip or parcel of ground is not considered as providing for a way as broad as the ground referred to."

This general rule is restated in 28 A.L.R. 2d 265 citing cases in Alabama, Maine, Massachusetts, New York and Rhode Island in support thereof. The case of *Cleves v. Brannan,* 103 Me. 154, 68 A 857, held that a grant of

> "right of way for all purposes of a way over a piece of land forty feet wide in every part, lying easterly of and adjoining said lots and extending from the northeast corner of the east described lot to the county road"

did not grant a right of way forty feet wide, but a reasonable way which may be ten, fifteen or such as needed

for the puropses intended, and in this case fourteen feet was deemed sufficient.

Also, in the case of *Barrett v. Duchaine,* 254 Mass. 37, 149 NE 632, where a deed granted

> "Together with a right of way over a strip of land lying between two houses on premises this day conveyed to me by said grantee herein, and at present used as such."

It was held that it did not grant a way over the whole of that land but had reference only to the area in which the way was to be located.

To this effect, also, is the California case of *Ballard v. Titus,* 110 P. 118 at page 121. Accordingly, the wording of the easement to Utah Power & Light grants an easement "across and under a piece of land 150 feet in width" but does not grant a right of way 150 feet wide. There are a number of cases cited in 19 C.J. 968 which support the foregoing proposition.

POINT III

ALTHOUGH THE EASEMENTS SPECIFY THE NUMBER OF TOWERS INITIALLY PAID FOR, THERE IS NO SPECIFICATION OF NUMBER OF LINES, AND THE TOWERS ARE LIMITED TO THE ONE LINE INITIALLY CONSTRUCTED.

The extent of the lines is no where stated. The reference is to a line or lines. Even if the language as to the width of the right of way were distorted as suggested by the respondent, the extent of the burden is fixed by the passage of time. Consequently, the plaintiff cannot, as it contends, saturate the entire 150 foot width to the practical exclusion of the landowner therefrom. Appellants would have less room for argument if the towers constructed in 1968 were in the same line as the towers constructed in 1914, but even if constructed in the same line as the 1914 line, the appellants would be entitled to compensation by way of condemnation for the reason that even though initially they were authorized to construct, say, four towers, but only constructed one the reasoning of the above cited cases precludes the respondent from placing additional towers after the passing of a substantial period of time. Accordingly, if respondent were precluded from constructing additional towers in the old line, *a fortiori,* it is precluded from constructing additional towers in a parallel line.

POINT IV

ALL OF THE EASEMENTS EXCEPT DIUMENTI'S PROVIDE FOR NEGOTIATION OF PRICE OF "FUTURE" TOWERS AND POLES, INDICATING THAT WHATEVER TOWERS WERE ALREADY PAID FOR WOULD BE PLACED INITIALLY OR FORFEITED.

The easements involving the properties of Bishop, Devereaux, and Olsen specify a certain number of towers to be placed under this easement and add "price of *future* towers to be agreed upon hereafter, price of poles to be agreed upon hereafter." The use of the word *futtre towers* clearly shows the intention of the parties that the specified number would be presently located under the initial line, otherwise the parties would have used the words *additional towers* instead of future towers. Accordingly, at most, the the plaintiff could place the specified number of towers only on the initial line. The specification of a greater number of towers than that actually used does not carry the right to additional *lines* in a place removed from the alignment of initiail installation, even if the remaining towers are constructed.

POINT V

A PROVISION FOR FUTURE DETERMINATION OF PRICE RENDERS THE EASEMENT TOO INDEFINITE AND UNCERTAIN TO BE ENFORCEABLE AS TO ANY ADDITIONAL LINES.

The general rule is stated in 17 AM. JR. 2d, Contracts, Section 82, as follows:

> "An agreement which does not specify the price or any method for determining it, but which leaves the price for future determination and agreement of the parties is not binding."

Also, to this effect are the cases cited in 68 A.L.R. 2d 1222-1223. The Annotation in 92 A.L.R. 1396 says the general rule is that price must be ascertainable from the contract itself to be enforceable and the citations in 49 A.L.R. 1464 state that specific performance is usually denied because of uncertainty where any item is left for future negotiation.

A Utah case, *Hansen v. Snell*, 11 Utah 2d 64, 354 P.2d 1070, held that where the terms of sale were to suit the seller and the seller demanded ten percent interest before he would agree to the proposes sale set up by the broker, there was no perfrmance on the part of the broker in that the broker did not find a willing buyer for the seller's land siene the buyer would not pay ten percent interest. The court held that for a contract to be binding it must spell out obligations of the parties with sufficient definiteness that it can be performed.

In the case at bar the contract was so indefinite as to the number of lines and as to the matter leaving the price for future determination that the contract cannot be specifically enforced and is not binding upon the appellants.

POINT VI

AN EASEMENT FIXING A PRICE IN 1913 TO BE PAID AT SOME INDEFINITE FUTURE TIME FOR ERECTION OF ADDITIONAL LINES OR POLES SHOULD NOT BE ENFORCED.

In view of the great change of conditions, both from an economic development standpoint and from the inflationary trend of prices, to enforce the provision of the easements providing for a fixed amount for the placement of a tower would clearly violate basic eminent domain law in Utah. Our Utah Constitution provides that a property owner be paid "just compensation" for taking of his properties, together with damages incurred by properties remaining and not taken. Furthermore, as this Court is well aware, the date for determining damages is fixed as of the time of the service of Summons. In effect, the respondent suggests to the Court that as to the portion of the easements involving construction of towers at a time clearly beyond anything contemplated by the parties, the date for assessing compensation is retroactive to 1913.

We have many cases and situations where a fixed period of time will govern contractual relationships, such as repayment of mortgage loans, where the contract is subject to the effect of inflation and change of circumstances. But such instances are fixed to an exact time well within the contemplation of the parties. Here, no time is fixed, and it could as well be argued that the time should be one thousand years as fifty-four years.

The uncertainty as to the time when the additional towers might be constructed gives these right-of-way easements what is analogous to a liquidated damage or

penalty provision. In the penalty cases there exists a determination of damages prior to the occurrence of a breach; in the instant cases there exists a determination of damages or compensation prior to the taking. This would create no problem if the extent of the taking was known and the time during which the "option" must be exercised was restricted to a reasonable time. However, in these cases there is absolutely no restriction upon the time during which additional towers can be constructed. This allows the respondent to liquidate the damages it causes in 1968, with reference to 1913 prices.

POINT VII

RESPONDENTS ACTION SHOULD BE LIMITED TO THE SAME RESTRICTIONS APPLICABLE TO FLOATING EASEMENTS SOUGHT ON CONDEMNATION.

This Court in the case of *Jackson v. Memmott,* 11 Utah 2d 16, 354 P.2d 569, denied a condemnor the right to acquire a floating easement stating:

> "The principal issue on this appeal is whether a permanent right-of-way may be condemned across a servient estate but made subject to relocation according to the needs of the parties.
>
> The Eminent Domain Statute of Utah contemplates the giving of compensation to the condemnee for the value of all property rights con-

demned. Where, as here, the determination of the trial court allows the owner of the dominant estate to relocate the right-of-way at will, the condemnee is left with the uncertainty of not knowing, nor being able to prove, the extent to which the condemned right-of-way will damage his property, because of the difficulties in presaging what might later occur with respect to such a floating right-of-way. In theory the defendants could change their mining plans abruptly after the judgment for condemnation which might necessitate a re-evaluation and the institution of a new law suit and the other difficulties incident thereto. It seems more practical and in conformity with established patterns of law that if the plaintiffs desire to condemn a right-of-way as permitted under the statute, they be obliged to make a definite designation of it so that the damages to the defendants may be ascertained.

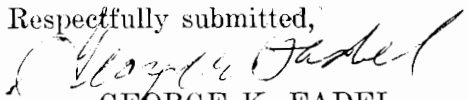
CONCLUSION

It is respectfully concluded and submitted that the plaintiff is not entitled to any use of the land of the defendants over and above that which was made in connection with the initial installation in about 1913 without condemnation and without compensation according to the statute relating to eminent domain.

The language of the easement and the passage of over fifty years without additional burdens thereon seems clearly to indicate that the landowner could not have intended other than as claimed by the appellants,

t: at the landowner did not virtually part with a 150 foot strip of land but gave the right for the construction accomplished before the passage of a substantial period of time.

Respectfully submitted,



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