CONSTRUCTION AGGREGATES LTD.

v.

CORPORATION OF THE DISTRICT OF MAPLE RIDGE

B.C. Court of Appeal

Before: CHIEF JUSTICE H.W. DAVEY
MR. JUSTICE C.W. TYSOE
MR. JUSTICE H.A. MACLEAN

Reasons for Judgment of Chief Justice H.W. Davey

The appellant Municipality claims the right under sections 327 and 335 of the *Municipal Act*; R.S.B.C. 1960, Cap. 255, to tax the respondent in respect of part of Langley Indian Reserve No. 5, which it alleges the respondent occupies and uses as a gravel pit.

The land had not been surrendered to the Minister under section 37 of the *Indian Act*, R.S.C. 1952, Cap. 149. By written agreement, not under seal, dated in February 1964, the Minister granted Valley Ready-Mix Ltd. a permit to use and occupy the whole of Langley Indian Reserve No. 5, except that part shown on a sketch thereto attached, for the purpose of removing gravel. By deed dated July 8, 1966 Valley Ready-Mix Ltd., under its then name Fort Nelson Lumber Co. Ltd., assigned the permit to the respondent, and the Minister consented thereto. By letter dated July 20, 1967 the respondent gave Walske Ready Mix Ltd. a licence to occupy and use in common with the respondent that part of the Indian Reserve covered by the permit. Walske Ready Mix Ltd. used the lands, installed gravel removing machinery thereon, and operated the gravel pit at all material times. It paid the taxes in respect thereof levied by the appellant. It does not appear that the respondent installed any machinery on the lands, or otherwise used the lands or operated the gravel pit.

At the time the material part of section 327 of the *Municipal Act* read as follows:

> "327. (1) Except as otherwise provided in this Act, the following property is exempt from taxation to the extent indicated:-
> (a) All land or improvements or both land and improvements vested in or held by Her Majesty:
> . . .
> (f) All lands or improvements, or both land and improvements, held in trust for a tribe or band of Indians unless demised by lease to or occupied by a person who is not a member of the tribe or band:"

Section 335 (1) and (2) provides that lands the fee of which is in the Crown, but which are held or occupied otherwise than by or on behalf of the Crown are, with the improvements thereon, liable to assessment and taxation under that section, but not so as to make taxable lands or improvements that are exempt under section 327(1)(b) to (l). Lands and improvements

assessable under section 335(1) in the name of the holder or occupier shall be assessed at their actual value.

"Occupier" is defined by section 2 of the *Municipal Act* in three ways, one of which (a) reads as follows:

> "(a) one who is qualified to maintain an action for trespass:"

"Occupy" is not defined.

Counsel for the appellant puts its case in two ways. First, she submits that the permit in question creates an interest in the lands for a term of years, namely, a profit a prendre to take gravel, and that an action for trespass *quare clausum fregit* will lie for any interference with respondent's possession of that incorporeal estate. Second, that respondent is in exclusive occupation of the land and that exclusive occupation constitutes sufficient possession to support an action for trespass, and so the respondent comes within the statutory definition of occupier.

Those two submissions turn in part on the construction of the permit. It recites that it was granted by the Minister under sections 28(2) and 58(4) of the *Indian Act*. The operative words are "grant to the Permittee the sole and exclusive right to use, and occupy the whole of Langley Indian Reserve No. 5, together with the right to interfere with the riparian rights of the owner with respect to that portion of tile foreshore of the Fraser River fronting on the Reserve, SAVING AND EXCEPTING . . ."

Clause 1 states that the permit "shall be for a term of twenty years". The last paragraph of the permit states that the agreement shall not be deemed to set up a "tenancy by implication or otherwise".

While the granting of sole and exclusive possession of a parcel of land is an important consideration in determining whether a document creates a tenancy, it is not decisive. The effect of modern cases is correctly stated in 23 *Halsbury 3rd* p. 428, para. 1023, and is supported by the cases cited.

In my opinion the permit construed in the light of the powers conferred upon the Minister under sections 28(2) and 58(4)(b) does not confer an interest in the land in the nature of a profit a prendre, but only an exclusive licence to occupy and use the lands for the purpose of excavating and removing the gravel therefrom. So if the appellant is to succeed it must be upon the second branch of its argument.

I turn again to a consideration of the permit to see if it gives the respondent that kind of occupation of the lands that will allow it to sue in trespass for a wrongful interference with its possession.

In *Keeves* v. *Dean* (1924) 93 L.J.K.B. 203, a majority of the Court of Appeal held that the right of a former tenant to retain possession or occupation of the premises under the *Rent Restrictions Act* after the landlord had terminated the tenancy was only a personal right and did not constitute an interest in the land; in other words it was a licence. In the *Minister of Health* v. *Bellotti* (1944) 1 K.B. 298, it was held that persons having the exclusive occupation by permit of the Minister of Health of household premises requisitioned under the Defence (General) Regulations were not tenants, but licensees only.

In *Errington* v. *Errington* (1952) 1 All E.R. 149, followed in *Cobb* v. *Lane* ibid 1199, it was held in the circumstances of those cases that a person entitled to and in exclusive occupation of a house was a licensee, and his exclusive occupation was called possession. In *Keeves* v. *Dean*, *supra*, Scrutton, L.J., who apparently considered a statutory tenant something more than a mere

licensee, said at p. 207 that whatever the statutory tenant's relationship to the premises, he could bring an action of trespass against an invader.

In *Thompson* v. *Ward* (1953) 1 All E.R. 1169 the Court of Appeal held, probably obiter, that whatever the nature of the personal rights of occupation enjoyed by a statutory tenant, those rights were good as against all the world, and upon the authority of the dictum of Scrutton, L.J. in *Keeves* v. *Dean*, *supra*, would support an action of trespass. Those rights of occupation, as I have said, were licences.

I take it now to be settled on principle and authority that a person in sole and exclusive occupation of land as licensee may bring an action of trespass for any wrongful disturbance of his possession.

The question then is whether the respondent had sole and exclusive occupation of the land under its licence. The operative words of the permit, as I have said, grant it the sole and exclusive right to occupy and use the land. Condition No. 2 restricts that *use* to extracting and removing the gravel. By condition 3 it may construct and place upon the land buildings and machinery for that purpose. Condition 7 provides that the Minister may re-enter the land for non payment or breach of conditions. A further provision is that the Minister shall not during the life of the permit grant a right, licence or permit to any other person to *use* the lands for the purpose of excavating or removing gravel, or to put buildings and machinery on the lands for that purpose. The restrictions refer to the use of the land, not to its occupation. I do not consider the negative provision authorizes the Minister to grant permits to other persons to occupy the lands for other purposes, since that would be inconsistent with the right of sole and exclusive occupation of the lands granted to the respondent by the first operative paragraph.

So as I construe the permit it confers on the respondent the sole and exclusive right to occupy the lands, but restricts their use to the removal of gravel.

It is then suggested that the lands are and have been used for some years by a member of the band for a small scale logging operation on them and on nearby lands. The evidence does not disclose under what right that logging is done, or the extent of those rights.

The evidence of the logging goes no further than to indicate that the Indian has a licence to enter the lands and remove the timber. That does not show occupation. He apparently uses some roads on the land because he gets gravel from the pit for them. That is consistent with the right reserved in the permit for Indians of the band to use the access roads, and does not show occupation of the lands.

The substantial question is whether the respondent was in fact in occupation of these lands under its permit for the purposes of sections 327(1)(f) and 335, as distinguished from its right to occupy them; there arises out of that a second question, which is the relationship of Walske Ready Mix Ltd. to the lands, and the effect of that on the alleged occupation of the respondent. In order to answer those questions I find it desirable to go back to some of the English decisions dealing with the ratability of occupants of land for poor rates.

In *Allan* v. *Liverpool* (1874) L.R. 9 Q.B. 180, Blackburn, J. anticipated one of the definitions of occupier in the *Municipal Act*, namely, a person capable of maintaining an action for trespass. He said that a person liable for the poor rate must be the exclusive occupier of the premises who would be entitled to bring an action of trespass in respect of them. He then drew the familiar distinction between a lodger who as licensee has the exclusive use of his rooms, but who does not have exclusive occupation of them because that is retained by the landlord, and so cannot bring an action of trespass, and the tenant of a flat who does have exclusive occupation and so can sue in trespass. It is true that Blackburn, J. considered that a person who had exclusive occupation would hold under a demise, but later authority mentioned above has shown that is not

necessarily so. An exclusive occupant may hold under a licence and yet be liable for the poor rates:

> *Cory* v. *Bristow* (1877), 2 App. Cas. 262, per Lord O'Hagan at pp. 280-1.
> *Westminster Council* v. *Southern Ry. Co.* (1936) A.C. 511.

The occupation of Walske Ready Mix Ltd. was to be enjoyed in common with the respondent, so it was not an exclusive occupation, and it could not maintain an action in trespass for interference with its rights as sub-licensee. Therefore it was not an occupier of the land for the purpose of taxation under the definition in the *Municipal Act*. Even if Walske Ready Mix Ltd. and the respondent could both be considered occupants of the land for taxation purposes, it would fall to the Court to determine whose position in relation to occupation was paramount: *Westminster Council* v. *Southern Ry. Co.*, *supra*. By that test I have no doubt it was the respondent who was in occupation of the land. Its active occupation of the land as distinguished from its mere right to occupy under the permit lay in the physical occupation by Walske Ready Mix Ltd. under the licence from the respondent: *Brown* v. *Draper* (1944) 1 K.B. 309, at pp. 312, 314, 315.

I would allow the appeal.

Reasons for Judgment of Mr. Justice C.VV. Tysoe

I would dismiss the appeal for the reasons given by my brother Maclean with which I agree.

Reasons for Judgment of Mr. Justice Maclean

The appellant appeals against the judgment of Gould, J. wherein it was held that the respondent Construction Aggregates Ltd. is entitled to a declaration that it is not liable to real estate taxation by the defendant in the provisions of the *Municipal Act*, R.S.B.C. 1960, Chap. 255 with respect to its rights arising under an agreement in writing made between Her Majesty the Queen represented by the Minister of Citizenship and Immigration of the first part and Valley Ready-Mix Ltd. of the second part bearing date the 18th day of February, 1964 as assigned to the plaintiff respecting certain lands and premises situate in the Municipality of Maple Ridge, in the Province of British Columbia, more particularly known and described by the defendant for the purpose of assessment and taxation as:

> "Parcels 'A', 'B' and 'C', Langley Indian Reserve, No. 5, Permit No. 4588."

or alternatively as:

> "Parcels 'A', 'B' and 'C', Langley Indian Reserve No. 5 Lease 8/67."

The judgment appealed against is reported in (1971) 4 W.W.R. commencing at page 214. The learned Judge held that the lands were exempt from taxation under sec. 327(1)(f) of the *Municipal Act*, R.S.B.C. 1960, Chap. 255.

The lands in question are an Indian Reserve and have never been surrendered pursuant to sec. 37 of the *Indian Act*.

The agreement referred to above (Ex. 22) the relevant parts of which are set out at p. 217 and following pages of the report, [1971] 4 W.W.R. "hereby grants unto the permittee the exclusive right to use and occupy the whole of the Langley Indian Reserve No. 5". This grant is expressly made on certain stipulated conditions. With deference to contrary opinion, in my view when one reads the whole of the agreement and particularly paragraphs numbered 1, 2, 3, 4 and the fourth clause of number 14 of the conditions to which the permit is subject it is clear that the exclusive rights granted to the permittee relate to the use which the permittee may make of the land, i.e. for

the purpose of "digging, extracting, removing, hauling, processing, … gravel ... and for no other purpose".

It is I think implicit in the agreement that the Minister reserves his right to grant permits authorizing use of the land for other purposes.

The rule of interpretation stated by Chitty on Contracts (23rd ed.) at paragraph 627 is relevant here. The learned author there states:

> "Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected. Where two clauses in a contract are so totally repugnant to each other that they cannot stand together, the old rule was that the earlier was to be received and the later rejected. This rule, however, was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. In any event, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement."

By a sub-permit dated July 20, 1967 (contained in a letter of that date, Ex. 24) the plaintiff, subject to the consent of the Minister, gave to Walske Ready Mix Ltd. the right to use and occupy the lands. Walske has extracted gravel from the lands since January, 1967 but the respondent has never used the land for the taking of gravel.

As a matter of fact the Indian Band is still in possession of the Reserve and is in active occupation of the lands, and a logging operation is being carried on there. It cannot be said that the permittee or his assignee enjoys an exclusive right of occupation.

The appellant Municipality assessed and taxed the respondent as an occupier of the lands described in Ex. 22 and the taxes were paid by the sub-permittee Walske Ready Mix Ltd.

The appellant Municipality purported to assess and tax the lands under sec. 335 of the Municipal Act (as amended 1965 C.28, s.17) and further claims that the land is not exempt under sec. 327(f).

The relevant sections of the *Municipal Act* read as follows:

> "335. (1) Lands the fee of which is in the Crown, or in some person or organization on behalf of the Crown, but which are *held or occupied* otherwise than by or on behalf of the Crown are, with the improvements thereon, liable to assessment and taxation in accordance with this section, but this section does not apply to make liable to taxation lands or improvements which would otherwise be exempt from taxation under clauses (b) to (f) inclusive, of subsection (1) of section 327 ...
> (2) The lands referred to in subsection (1) with the improvements thereon shall be entered in the assessment role in the name of the *holder or occupier* thereof, whose interest shall be assessed at the actual value of the lands and improvements."

> "327. (1) Except as otherwise provided in this Act, the following property is exempt from taxation to the extent indicated:
> (a) All land or improvements or both land and improvements vested in or held by Her Majesty
> (f) All lands or improvements, or both lands and improvements, held in trust for a tribe or band of Indians *unless demised by lease to or occupied by* a person who is not a member of the tribe or band. (The italics are mine.)"

In construing the exemption section 327 (f) it seems to me that the word "lease" occurring in what is in effect an exception to the exemption section does not apply to the right given to the respondent under the licence Ex. 22, because that document in my view is no more than a licence to enter and to remove gravel from the premises. It conferred an exclusive right to remove gravel, but not an exclusive right to use or occupy the premises. In the definition of lease contained in Earl Jowitt's Dictionary of English Law the learned author says:

> "Again, if the intention of the parties is that the grantee is not to be entitled to exclusive possession of the property, the grant is a licence and not a lease."

Further, it appears to me that the word "occupied" also occurring in that part of sec. 327 (f) providing an exception to the exemption should be read as referring to the occupation of a person having the exclusive right of occupancy and not to the present case where the respondent is given only an exclusive right to dig and take gravel but not an exclusive right of occupancy. I agree with what the learned trial Judge said in his reasons as reported at page 223 of his judgment as reported in [1971] 4 W.W.R. 214:

> "To 'occupy' land for the purpose of municipal taxation there must be an element of exclusive occupancy: see *Re Oshawa and Loblaw Groceteria Co. Ltd.*, [1963] 1 O.R. 605, 38 D.L.R. (2d) 216. There is, and has been, as an agreed fact, logging over the land in question, being lawfully carried out by an Indian or Indians, and in the light of Ex. 22, I find that the Crown Dominion could grant an interest in this land, including a lease, to a third party, subject only to the permittee's rights under Ex. 22 to come onto it for the limited purpose of removing gravel, etc. I hold that the plaintiff permittee is not an 'occupier' of the land within the definition of s. 2 of *The Municipal Act*, nor is the land 'occupied' by the plaintiff within s. 335 or s. 327(1)(f) of the same Act."

If this statute were to be interpreted as taxing a restricted and limited interest such as held by the respondent here an absurd situation would result. If a person is taxable as an occupier section 335(2) authorizes assessment of the occupier at "the actual value of the lands and improvements"

In the present case, unless "occupier" means exclusive occupier, the lands could be assessed for their actual value against a person having the right to occupy for the purpose of cutting and removing timber as well as assessing and taxing for the actual value for persons having other non exclusive rights such as the present respondent.

As Ferguson, J. said in the *City of Oshawa* case already referred to: "When one interpretation leads to an absurdity or an injustice and the other does not, it is the duty of the Court to adopt the latter construction: *Hill* v. *East & West India Dock Co.* (1884), 9 App. Cas. 448 at p. 456".

In the present case the expression "occupied by a person" should be interpreted as referring to an exclusive right of occupation.

In the result the respondent is entitled to exemption from taxation in respect to its limited interest in these lands, even if it can be said that a licence to dig and remove gravel can be said to be an interest in land.

I would dismiss the appeal and would not vary the judgment in any respect.