



The Swiss Federal Supreme Court rules that a Servitude which permits a Party to transport Electricity over a Power Supply Line running across private Property does not permit the Beneficiary to use the Servitude to also transport Data for Telecommunication Purposes

Facts

By agreement dated March 24, 1960, a property owner has granted the right to the beneficiary to build and operate a power supply line over his property for a period of 50 years.

In or around 1998, the beneficiary of the servitude replaced the cable on top of the pylons with a fibre optic cable and made the capacity available to TDC Switzerland AG, a licensed telecommunication operator.

The owner of the property requested, amongst others, the beneficiary not to permit the transportation of data by third parties, arguing that the contract did not permit the beneficiary to avail such use to third parties.

The defendants argued in substance that the use of the servitude for the transport of telecommunication data does not lead to an unjustified impairment of the property owner's use and enjoyment of the property.

The Swiss Federal Supreme Court rejected the defendants' argument. The owner of a plot of land has an absolute right to prevent third parties from making use of such property. The Swiss Federal Supreme Court held that the extent of the permitted use granted by a servitude is primarily determined based upon its entry in the land registry and, if the entry into the land registry is unclear or missing, by the agreement establishing the servitude was. Furthermore, the Swiss Federal Supreme Court held that the principle of "identity of servitude" is to apply. Pursuant to this principle, a servitude established for one purpose may not be used for a different purpose.

The Swiss Federal Supreme Court further continued that the agreement, pursuant to which the servitude was granted, clearly defined the extent of the

permitted use which only included the transportation of electricity. The use of the cables to transport data was not covered by the agreed purpose of the servitude. The arguments raised that the beneficiary must be permitted to use the servitude for other purposes in the interest of the technical development, did not find the support of the Swiss Federal Supreme Court.

The Swiss Federal Supreme Court also rejected the defendants' argument that Art. 36 Swiss Telecommunication Act imposes a duty upon the owner of plot of land to accept limitation of his enjoyment of his property for the benefit of a licensed telecommunication carrier. This argument was bluntly rejected by the Swiss Federal Supreme Court, arguing that the Swiss Telecommunication Act does impose a statutory servitude to the detriment of the owner of a plot of land.

Comment

The decision of the Swiss Federal Supreme Court may have a large impact upon the ancillary use of infrastructure which was built over private property. In each case it will have to be assessed, whether such ancillary use is permitted under the language of the existing servitudes and a new agreement entered into, if such ancillary use was not included. This may not only have an effect on power supply lines, identical issues may arise in connection with gas ducts.

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