[1979] 1 MLJ 135

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd

SUFFIAN LP, RAJA AZLAN SHAH AG CJ (MALAYA)
AND CHANG MIN TAT FJ
Federal Court, Kuala Lumpur, 12 September 1978, 21 October 1978

RAJA AZLAN SHAH AG CJ (MALAYA)

This is an appeal from a judgment of the High Court, Kuala Lumpur, declaring that a condition imposed by the Land Executive Committee, Federal Territory, when approving of a proposed conversion and sub-division under sections 124 and 137 of the National Land Code was invalid. The judgment was given in an action brought by the respondents as the registered proprietors of a parcel of town land held under Grant No. 2412, Lot 82, Section 53, measuring 31,853 sq. ft. in the city of Kuala Lumpur ("the said land"). The defendants were the Land Executive Committee, Federal Territory, and they are the appellants in this appeal.

We have been informed that this is the second case in which the question has arisen for determination in our courts. The first case was in the High Court, Ipoh, where judgment was reserved pending the determination of this appeal. It therefore falls to us to determine for the first time what are the considerations by which the courts should be guided. Before dealing with the important question of law of which the appellants have sought to obtain a determination in this appeal, it is necessary, at the outset, to state briefly the relevant facts, none of which are disputed.

In 1900 the respondents' predecessor was granted the said parcel of land in perpetuity under the provisions of the Land Enactment, 1911 (now repealed), subject to three express conditions, one of which was that "the grantee shall within two years from the date of the grant build upon the land a substantial house to the value of $250", in default the said land would revert to the Government. In March, 1974 the respondents became the registered proprietors.

The respondents proposed to develop it for commercial purposes, i.e., to build a 3 four-storey shop-houses on 3 lots and a four-storey hotel complex on the remaining 4 lots.

The legal position is this. All land alienated before the commencement of the National Land Code is subject to an implied condition that it shall be used for agricultural purposes (section 53). There is an exception, that is, the section does not apply to such land which is already subject to an express condition. Therefore the said land is still subject to the 3 express conditions (section 104), and if the respondents proposed to develop it for commercial purposes, that condition must be amended. Hence the necessity to apply for amendment to the Land Executive Committee (section 124(1)(c)). Further, since the said land is to be sub-divided into separate lots to be held under separate titles for the purpose of erecting the shop-houses and the hotel complex, application for permission to sub-divide it must also be made to the Land Executive Committee (section 137).

The respondents did that in early 1975. They also applied to surrender a part of the said land for the purpose of a service road, side lanes and back lane (section 200). That is in accordance with the approved lay-out plan.

The Land Executive Committee, by letter dated March 22, 1976, gave the respondents the approval they applied for, but subject to certain conditions. First, the respondents had to surrender the whole of the said land and in return it would alienate part of it as comprised in the 4 lots for the building of a four-storey hotel and the 3 lots for a shop site; secondly, the grant in perpetuity would be substituted with a registry title of 99 years lease; thirdly, the express condition would be restricted to commercial building; fourthly, documents of title would not be issued and compensation would not be paid for the areas required for road reserve; and fifthly, additional premium in the sum of $43,392 based on gross acreage of the land to be issued with new titles, i.e., 18,080 sq. ft. at $2.40 must be paid within 6 months.

It is of course well known, and it would be unrealistic to pretend that it is not, that the respondents have a strong feeling that they have never had their case determined by the Land Executive Committee in accordance with law, or to borrow a recent phrase of Lord Russell of Killowen in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 1265-6 that in the circumstances the respondents have not had "a fair crack of the whip." They appealed to the High Court under the

provisions of section 418 of the National Land Code, and on their behalf their counsel has cogently submitted and contended that that is the true position. At the hearing a number of preliminary points regarding procedure were raised and argued by Senior Federal Counsel but the learned judge rejected them. We are no longer concerned with those points as they were, quite properly, abandoned in this Court.

It is important to note that the respondents consented to surrender part of the said land for the purpose of a service road without compensation. But they objected strongly to exchange the title in perpetuity for a 99 year lease. Therefore the only point of any public importance that has emerged in the course of the argument is whether the condition imposed by the Land Executive Committee was valid. That condition was challenged on the ground that the Committee went beyond its powers and therefore the condition was *ultra vires*.

It would appear that the Land Executive Committee in granting approval for conversion, is relying on the provisions of section 124(5)(c) which reads thus: "Any direction given by the State Authority under this section may be made conditional upon all or any of the following matters—(c) compliance with such other requirements as the State Authority may think fit." The learned judge seems to think that the power given by the legislature to the Land Executive Committee by the section to impose

conditions as it may think fit is restricted to conditions that it may otherwise impose under the National Land Code or under any other written law, and for that reason he held that the Committee had exceeded its jurisdiction in directing approval for conversion subject to the condition. In my opinion the learned judge came to the right decision, though not for the right reason.

In my opinion, the present case falls to be decided on well established principles and they are to be found in the cases decided under the (U.K.) Town and Country Planning Acts. It is unfortunate that neither in the court below nor in this court has reference been made to any of them. The Acts empower planning authorities to refuse permission or to grant permission unconditionally or to impose such conditions "as they think fit". On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene M.R. in *Associated Provincial Picture Houses, Ltd v Wednesbury Corpn* [1947] 2 All ER 685, have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat Lord Denning M.R.'s words in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 All ER 625, approved in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503 the conditions to be valid must fairly and reasonably

relate to the permitted development. The dictum of Lord Denning M.R. has been frequently quoted and followed in these matters. See *R v Hillingdon Council, Ex parte Royco Homes Ltd* [1974] QB 720 Lord Denning said (page 572):

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and

that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts L.J. in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 442).

The Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament. Therefore when a power vested in it is exceeded, any act done in excess of the power is invalid as being *ultra vires*. If authority is needed for what may be considered as axiomatic, I need only refer to the cases of *Chertsey UDC v Mixnam's Properties, Ltd* [1964] 2 All ER 627 and *Hall & Co Ltd v Shoreham-by-Sea UDC* [1964] 1 WLR 240. In the former case, a statute required the occupier of land to obtain a licence before he used his land as a caravan site, and in granting such a licence the authority were empowered to impose such conditions "as the authority may think necessary or desirable to impose", it

was held that these conditions must be confined within the general purpose of the Act, and in so far as they exceeded this, they were void. In the latter case, Willmer L.J. cited the well known judgment of Lord Greene M.R. in *Associated Provincial Picture Houses* (*ante*) which has several times been approved in the House of Lords, that it is in excess of power to "come to a conclusion so unreasonable that no reasonable authority could ever have come to it", and he held that the condition to be "utterly unreasonable and such as Parliament cannot possibly have intended".

For the above reasons, it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than *ultra vires*. It had exceeded its power and the decision was therefore unlawful as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly only when acting reasonably. In such circumstances I would follow the dictum of Hodson L.J. in *Pyx Granite* (*ante*, page 579), to the effect that, if a condition is held to be *ultra vires*, it nullified the whole planning permission. For it must be assumed that without the impugned condition the permission would never have been granted.

It remains to deal with the order made by the learned judge. He found that the respondents had fulfilled all the conditions under the National Land Code and accordingly

he made an order to the effect that the Land Executive Committee approve the applications for conversion and sub-division but excluding the impugned condition, and that the Registrar issue titles in continuation of the grant in perpetuity to the sub-divided lots retained by the respondents in accordance with section 202(3)(a) of the National Land Code. With respect, that is not an appropriate order to make and one which certainly does not commend itself to this Court. In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration: see *Pyx Granite* (*ante*). Secondly, all that a declaration does is to declare the rights of the parties, and the effect of making a declaration would be that it would give the Land Executive Committee an opportunity of having second thoughts at the problem. Lastly, it is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as an usurpation. That clear statement of principle has since been approved and applied by the appellate courts. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* (*ante*), Lord Greene M.R. in the course of a judgment since approved by the House of Lords in *Smith v East Elloe Rural District Council* [1956] AC 736 763, and in *Fawcett Properties Ltd. v. Buckingham County Council* (*ante*), in dealing with the power of the court to interfere with the decision of a local authority which has acted unreasonably, said (page 686):

> The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it.

That is the reason for such cases to be remitted to the relevant authority for a fresh consideration and conclusion according to law. In *Kingston-upon-Thames Royal London Borough Council v Secretary of State for the Environment* [1974] 1 All ER 193, the case was sent back to the Secretary of State for reconsideration; in *R. v. Hillingdon London Borough Council* (*ante*), the Council was required to reconsider the application for planning permission and reach a conclusion on it according to law. In my opinion the appropriate order would be to remit the case to the Land Executive Committee for reconsideration and reach a conclusion on it according to law.

I am therefore of the opinion that this appeal should be dismissed with costs.

Appeal dismissed.

Lim Beng Choon (Senior Federal Counsel) for the appellant.

Lim Kean Chye (*Wong Soon Foh* with him) for the respondent.

Cur. Adv. Vult.