NADI TOWN COUNCIL v KUSUM INVESTMENT LTD (ABU0022 of 2005)

COURT OF APPEAL — CIVIL JURISDICTION

TOMPKINS, SCOTT and WOOD JJA

3, 10 March 2006

Local government — town planning — whether Appellant's condition for payment ultra vires — whether promissory estoppel — whether originating summons proper — Land Transport Act 1998 Div 3 — Local Government Act (Cap 125) ss 80, 88, 88(1), 88(2), 91, 107 — Public Health (Building) Regulations (Cap 111) reg 25(2) — Town Planning Act (Cap 139) s 7 — Traffic Act (Cap 176) ss 76, 76(1).

The Respondent proposed to redevelop the shopping area adjacent to his land. He proposed to create an indented bus bay in front of the new store and the diversion of the footpath onto part of the Respondent's land which would then be dedicated to the state. There were lengthy negotiations with various interested authorities including the Native Land Trust Board, the Ministry of Works and Energy, the Director of Town and Country Planning and the Nadi Town Council (Appellant).

The Appellant had previously installed three parking meters at the edge of the road alongside the footpath which was to be moved back to accommodate the new bus bay. It would have to be removed to be replaced by the bus bay. The Appellant proposed to be compensated by the Respondent by making an annual payment of $800 for each meter removed. The Appellant issued the completion certificate upon receipt of the Respondent's letter proposing the waiver of the parking meter fee. The Respondent's appeal against the Appellant's proposed settlement was dismissed. There were no further payments by the Respondent after the initial payment of $2400. The Appellant reinstalled the three meters since the Respondent did not pay according to the demand. The Respondent by way of originating summons in the High Court sought an injunction directing the removal of the meters and the non-payment of the annual fee. The High Court granted the injunction restraining the Appellant from obstructing the use of the bus bay. The issues were whether: (1) the Appellant's condition for payment was ultra vires; (2) there was promissory estoppel; (3) the originating summons was proper.

Held — (1) The Respondent did not agree to the Appellant's demand of an annual payment but instead paid $2400 under protest and without prejudice and intended to challenge the payment. However, the completion certificate was still issued without any settlement by the parties. Also, the terms of the settlement were vague and uncertain making it doubtful to form part of a valid condition. Moreover, s 80 of the Local Government Act (the LG Act) did not confer upon the Appellant the right to impose conditions which were beyond the scope of the Public Health (Building) Regulations and the Town Planning Act. The Appellant sought to impose a vague but purely revenue-raising condition which did not have either a public health or a town planning purpose. There was nothing in the LG Act that enabled the Appellant to impose such a condition.

(2) There had to be an election between inconsistent rights for an estoppel to arise. Taking advantage of a disputed consent where the condition had not been performed was not inconsistent with exercising a right of appeal. Thus, no estoppel arose.

(3) The proceedings were commenced within a few days of the reinstallation of the parking meters. The Appellant did not object to the procedure adopted by the Respondent. The procedure chosen was not an abuse of the process of the court and there was no basis for the proceedings to be struck out.

Appeal dismissed.

Cases referred to

Mercury Communications Ltd v Director General of Telecommunications [1996] 1 WLR 48; [1996] 1 All ER 575; *S & C Waters v Hurstville City Council* [1991] NSWLEC 96; *Wingecarribee Shire Council v Pancho Properties Pty Ltd* (2001) 117 LGERA 104; [2001] NSWCA 271, cited.

S. Khan and *S. Khan* for the Appellant

A. Patel for the Respondent

Tompkins, Scott and Wood JJA.

Introduction

[1] The Respondent owns a substantial piece of land which abuts that part of the Queens Road which runs through the center of Nadi Town. It is a very busy shopping area.

[2] In 1999, the Respondent, wishing to take advantage of the forthcoming turn of the century celebrations submitted a proposal to redevelop the site with the construction of a substantial shopping complex to be known as "Prouds Millennium Department Store".

[3] As the number of tourists and the amount of vehicular traffic in Nadi has grown over the years the Queens Road has become more and more congested. Naturally, the Respondent hoped to be able to encourage substantial numbers of tourists to visit the new store and it envisaged that many of these would be dropped off to, or collected from, the store by motor coach. Unfortunately, in view of the congestion, this would be a difficult and inconvenient operation. In order to alleviate the problem the Respondent proposed the creation of an indented bus bay in front of the new store and the diversion of the footpath onto part of the Respondent's land which would then be dedicated to the state.

[4] Very lengthy negotiations began with all the various interested authorities. These included the Native Land Trust Board, the Ministry of Works and Energy, the Director of Town and Country Planning and the Nadi Town Council (the council). Finally the proposal was agreed, subject however to one condition which is the subject matter of this appeal. The condition (letter of 9 May 2000) read as follows:

> that the developer and the Nadi Town Council settle the compensation issue on the number of parking meters that would be removed by this proposal before the building completion certificate is issued.

[5] At the edge of the road alongside the footpath which was to be moved back to accommodate the new bus bay the council had previously installed three parking meters. These would have to be removed to be replaced by the bus bay however the council wanted to be compensated for the revenue which it claimed it derived from the three meters. The council therefore proposed that the "compensation issue" be settled by the Respondent making an annual payment to it of $800 for each meter removed.

[6] On 1 December the Respondent wrote to the council as follows:

> We are disappointed to learn from you that your Council has not accepted our proposal to waive parking meter fee.
>
> We had expected a more considerate and favourable response to our proposal particularly in view of the generous concessions Government has granted to businesses and investment.

The least Nadi Town Council could have done was to play its facilitating role to ratepayers and investors like us especially in the current difficult and trying times.

We have no option at this time but to pay under duress the sum of $2400 for three parking meters. This payment is made on without prejudice basis as we are still pursuing through relevant authorities to dispense with the parking meter fee requirement.

Now that we have complied with all the council's conditions and requirements please let us have the building completion certificate before midday today Friday 1 December 2000.

[7] The completion certificate was issued by the council upon receipt of the Respondent's letter. According to the papers, the Respondent appealed against the council's proposed settlement but the appeal was apparently dismissed. After the initial payment of $2400 for the three meters was made no further payments were forthcoming. In February 2003 the council demanded payment and threatened to reinstall the three meters if payment was not made.

Proceedings in the High Court

[8] On 9 June 2003 the three meters were reinstalled. On 8 July the Respondent began proceedings by way of originating summons in the High Court. It sought an injunction directing the removal of the meters and declarations that the council's demand that it pay an annual sum of $2400 was "unlawful, illegal, void" and ultra vires the provisions of the Public Health (Building) Regulations (Cap 111), the Town Planning Act (Cap 139) and Div 3 of the Land Transport Act 1998.

[9] As will be seen from the written submissions filed in the High Court the Respondent's case was that the council's demand for an annual payment did not have a planning purpose, did not fairly and reasonably relate to the proposed development and was so unreasonable as to be an invalid condition. In answer, the council simply stated, without any supporting argument, that it had acted "within the ambit" of the legislation referred to in the originating summons. Alternatively, it suggested that the Respondent, having elected to accept the benefit of the council's conditional approval, was now estopped from challenging the condition in question.

[10] On 18 March 2005 the High Court (Connors J) declared that:

> the condition of consent requiring the Plaintiff to pay the Defendant compensation for removal of parking meters is ultra vires the Defendant's powers pursuant to Regulation 25(2) of the Public Health (Building) Regulations and Section 7 of the Town Planning Act.

The High Court also granted an injunction restraining the council from obstructing or in anyway whatsoever impeding the use of the bus bay.

[11] The Land Transport Act was not referred to by the parties in their written submissions and was not considered by the High Court. Division 3 of the Land Transport Act is concerned with traffic infringement notices and demerit points and appears to us to have little relevance to these proceedings.

Grounds of appeal

[12] Nine grounds of appeal were filed, however Dr Sahu Khan (who did not appear for the council in the High Court) accepted that:

> the principal issue in this appeal is the question of whether the condition as to the payment in question was ultra vires the Appellant council.

[13] Dr Sahu Khan's central submission was that in view of the very wide powers and responsibilities given to the council by the Local Government Act (Cap 125) the High Court had taken too restrictive a view of the factors which could legitimately be taken into account when deciding how to apply the Regulations and the Planning Act.

[14] Dr Sahu Khan referred to s 88 of the Local Government Act which reads as follows:

> 88 — (1) Every Council shall do all such things as it lawfully may and as it considers expedient to promote the health, welfare and convenience of the inhabitants of the municipality and to preserve the amenities or credit thereof.
>
> (2) The provisions of this Act relating to the powers and duties of councils are in addition to and not in derogation of the provisions of any other written law relating to such powers and duties and in the exercise of their powers and the performance of their duties in relation to any matter for which provision is made by any other law, a council shall act in conformity therewith.

Relying on that section, Dr Sahu Khan suggested that the installation and removal of parking meters clearly related to the "welfare and convenience of the inhabitants of the municipality" of Nadi and that therefore the council was well within its rights not only under the Local Government Act but also under the Regulations, as well as the Planning Act, to apply a compensation condition to their removal.

[15] Dr Sahu Khan also relied on ss 91 and 107 of the Local Government Act. He suggested that the council's power to acquire land gave it the right to impose conditions under which the land was acquired. Furthermore, since the Queens Road in Nadi was vested in the council, the Respondent had no right to complain of the levy imposed on it following the disturbance to the road.

[16] In its brief written submissions filed in answer, the Respondent focused not on the powers of the council in relation to the Regulations or the Planning Act but rather on its duties under the Land Transport Act 35/1998. As already noted this Act was referred to in the originating summons but was not considered by the High Court.

Discussion

[17] In our view the council's submission faces a number of difficulties. The first is that although the condition required the parties to settle the compensation issue before the completion certificate would be issued, in fact the completion certificate was issued without any settlement having taken place. What happened was that the council demanded an annual payment of $2400. The Respondent did not agree to this request but instead paid $2400 under protest without prejudice and at the same time making it quite plain that it intended to challenge the council's demand. Notwithstanding that position, clearly set out in the letter of 1 December 2000, the completion certificate was issued the next day.

[18] Second, the terms of the settlement demanded by the council seem to us to be so vague and uncertain that we doubt whether such a term could form part of a valid condition.

[19] Third, we are unable to agree with Dr Sahu Khan that s 80 of the Local Government Act confers upon the council the right to impose conditions which are beyond the scope or ambit of the Public Health Regulations and the Town Planning Act. Dr Sahu Khan emphasised that s 80 specifies that:

> the provisions of this Act relating to the powers and duties of Coucils are *in addition to and not in derogation of the provisions of any other written law*

but did not consider the effect of the words which follow:

> and in the exercise of the powers and the performance of their duties in relation to any matter for which provision is made by any other law, a Counsel shall act in conformity therewith.

It may also be worth pointing out in passing that the Town Planning Act dates from 1946, the Public Health (Building) Regulations from 1959 but the Local Government Act did not become law until May 1972. The relationship between these three pieces of legislation in our view perfectly illustrates the operation of the maxim *generalia specialibus non derogant*.

[20] As already seen, the council did not attempt to explain how precisely the demand for an annual payment of $2400 fell within the scope either of the Public Health Regulations or the Planning Act. Neither did Dr Sahu Khan. The High Court found that it did not and nothing that we were told leads us to disagree. Since s 80 itself requires the council to act in conformity with the provisions of the Public Health and Planning laws, a mere revenue raising condition of the type in issue, cannot be brought within their scope. Had, for example, the council demanded payment of a sum specifically to be devoted to the provision of alternative off-street parking, the position might well have been different.

[21] There is a further consideration. The council's own case was that the meters in question had been installed under the Parking Meters (Nadi) Order 1987 — L/N 46. That order states that it is made with the authority of the Central Traffic Authority and in exercise of the powers conferred upon it by s 76 of the Traffic Act (Cap 176). In view of s 76 (1) which appears clearly to restrict the right to remove meters to the Central Traffic Authority, it is at least arguable that the right to remove the meters did not lie with the council at all. While we reach no conclusion on that question, the resolution of which is not made more straightforward by the repeal of the Traffic Act, it is clear to us that Dr Sahu Khan's suggestion that the installation of the meters (and their removal) were no more than the exercise by the council of the rights of a freeholder to charge for admission to its land, is unsustainable. We also note that there is nothing before us to suggest that in fact that part of the Queens Road colloquially known as Nadi Main Street had ever actually been vested in the council, pursuant to a declaration under s 107 of the Local Government Act.

[22] Two remaining matters should briefly be mentioned. The first is promissory estoppel, the second is the appropriateness of the originating process chosen by the Respondent.

[23] In the High Court the council argued that, having taken the benefit of the council's removal of the meters, the Respondent was now estopped from asserting that it was aggrieved by the consequential requirement that it compensate the council for their removal. In support of this proposition the council relied principally on a decision of the New South Wales Land and Environment Court *S & C Waters v Hurstville City Council* [1991] NSWLEC 96 (*S & C Waters*).

[24] Although Connors J referred to the authorities cited by the council he did not explicitly reject the council's argument. The point was not raised in the grounds of appeal, however Dr Sahu Khan referred to it in his written submissions.

[25] *S & C Waters* was considered, but not followed, by the New South Wales Court of Appeal in *Wingecarribee Shire Council v Pancho Properties Pty Ltd* (2001) 117 LGERA 104; [2001] NSWCA 271 together with a number of other

authorities in which the consequences of acting on a disputed conditional approval were discussed. The Court of Appeal, referring to basic principles of promissory estoppel, held that for an estoppel to arise there had to be an election between inconsistent rights. Taking advantage of a disputed consent where the condition had not been performed was not inconsistent with exercising a right of appeal and accordingly no estoppel arose. We agree.

[26] Grounds of appeal 6 and 7 were that the High Court had erred by allowing the Respondent to proceed by way of originating summons rather than by way of judicial review. These grounds were not addressed by Dr Sahu Khan who however advised us that he was not withdrawing them. The proceedings were commenced within a few days of the reinstallation of the parking meters. This is not a case where the plaintiff has attempted to avoid the 3-month judicial review limitation period. The council did not object to the procedure adopted by the Respondent. It was not obviously unsuited to the disposal of the matters in dispute. We are not satisfied that the procedure chosen amounted to an abuse of the process of the court and therefore there was no basis for the proceedings to be struck out: see *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48; [1996] 1 All ER 575. These grounds also fail.

Conclusion

[27] In our view the council sought to impose a vague but purely revenue-raising condition which did not have either a public health or a town planning purpose. We are satisfied that nothing in the Local Government Act enabled the council to impose such a condition. Accordingly it must be set aside.

Result

(1) Appeal dismissed.
(2) Injunction granted on 4 April 2005 to continue until further order.
(3) Respondent's costs fixed at $500.

Appeal dismissed.