

PAPUA NEW GUINEA

N/395

IN THE NATIONAL )  
COURT OF JUSTICE )

CORAM: Bredmeyer J.  
Wednesday  
10th November, 1982

SYLVANUS GORIO

Plaintiff

v.

NATIONAL PARKS BOARD

Defendant

W.S. 629/1982

REASONS FOR DECISION

1982

Nov. 1 & 10

WAIGANI,  
NATIONAL  
CAPITAL  
DISTRICT

Bredmeyer J.

The facts of this case are not really in dispute. The National Parks Board, a statutory body, at a meeting held on 6th October 1981 approved the sale of four staff houses to those staff members currently occupying them. No mention was made of price but the Board approved that they be sold "through arrangements similar to that undertaken by the Government". The plaintiff who was the Executive Officer of the Board was occupying one of the four houses referred to and on 19th January 1982 he entered into a contract of sale with the Board to purchase that house together with contents for K13,000. He paid the deposit of K1,300 required under the contract and began paying the monthly instalments. In the meantime the Board had asked a valuer to value the property. He inspected it on 14th December 1981 but did not provide his valuation certificate until 1st February 1982. He valued the house and contents which passed on the sale as K53,100. The plaintiff resigned from the Board on 17th March 1982. He wishes to pay off the balance of the K13,000, get the lease transferred into his name, but the Board has refused to complete the sale.

Prima facie the contract of sale 19 January 1982 is enforceable and should be enforced. It has been signed, stamped, and approved under s.75 of the Land Act.

The deposit has been paid and the purchaser is given the right to pay it off earlier than the instalments payable over five years. He is ready and willing to pay it off. On settlement clause 5 requires the vendor to hand the duplicate Crown Lease and a "registrable transfer" to the purchaser. Although I have not heard argument on the point I consider a registrable transfer means one which has been approved under s.75 of the Land Act. The Board has signed a transfer and it has been stamped. The Board initially submitted it Dept. of Lands for approval but then withdrew it.

Counsel for the Board, Mr. Goodman, argued that the sale was invalid and should not be enforced. His first argument was that the Board members who approved the sale of the house at a meeting held on 6th October 1981 were not validly appointed. The relevant parts of s.4 of the National Parks Act Ch. No. 157 reads:

4 Constitution of the Board

- (1) The Board shall consist of seven members appointed by the Minister by notice in the National Gazette.
- (2) The Minister shall appoint one of the members to be Chairman of the Board and another member to be the Deputy Chairman of the Board.
- (3) Subject to this Act, a member -
  - (a) holds office for a period of three years, and
  - (b) may, by written notice to the Minister, resign from office as a member of the Board.

The relevant Gazette entries, four in number, are found in the National Gazette G74 of 1.10.1981. I consider that Mr. H. Dickson was not appointed to the Board and had no right to be at its meeting on 6th October 1981. One of the Gazette notices appointed the person holding the office of Secretary for the Department of Lands, Surveys and Environment to be a member.

On the evidence before me Mr. Dickson was not holding that position. He is recorded in the minutes as a delegate of the Secretary of Lands. I consider, and it was not argued to the contrary, that the Secretary, appointed ex-officio to the Board, had no power to delegate that appointment to anyone else.

Four of the members who took part in the meeting - and I note that by s.9(1) four is a quorum - Messrs. Tavai, Abe, Manton and Hill were appointed by a notice appearing at p.754 of National Gazette G.74. They were appointed as members of the Board for three years from 7.10.1979 to 7.10.1982 by a notice dated 10.9.1981 and published in the Gazette G.74 of 1.10.1981. Clearly this notice is fraught with legal difficulties. By s.4 of the National Parks Act, the appointment is only valid on publication in the Gazette. I can therefore ignore the actual date the notice bears; the operative date is the date of gazettal. I agree with Mr. Goodman that the gazettal is not effective retrospectively. Prima facie it is a valid appointment of the men named there from 1.10.1981 the date of gazettal to 7.10.1982 the expiry date of their term. Mr. Goodman then argued that such an appointment, for a period of one year and six days is invalid because s.4 stipulates that a member holds office for three years. He argues that there is no discretion in the section to appoint someone for a lesser term, therefore this appointment is invalid. By s.4 the members of the Board are to be appointed by notice in the Gazette and hold office for 3 years. What are the consequences of failure to obey this? Is the appointment null and void, good for 1 year 6 days or for three years? When a statute such as this one gives a power - in this case a power to appoint - and specifies how it is to be used, and that statute is disobeyed what are the consequences? De Smith calls the topic intractable and discusses it in Judicial Review of Administrative Action (4th ed.), pp. 142ff. I quote from pp. 142-143:

" When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions.

The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act." In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although "nullification is the natural and usual consequence of disobedience," breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

Applying this common law to the facts of this case I consider that I should hold this breach of the section to be an irregularity only. I am influenced towards this conclusion by the fact that no substantial prejudice will be suffered by anyone if I hold the appointment valid. I apply the common law in a similar manner to s.54 of the Interpretation Act which states that if a statute prohibits the appointment of a person above a certain age and the purported appointment is for a period that extends beyond that date the appointment is valid in respect of the period that does not extend beyond that date. I believe that this case is akin to an old English decision, Foot v. Truro (1725) 1 Stra 625, where acts of aldermen who had been in office for several years without re-election were held valid until their successors were appointed; it was held that the provision requiring them to be elected annually was merely directory. This case is also somewhat akin to Re Aldridge (1893) 15 M.Z.L.R. 361 where the convictions and orders made by a judge were held to be valid although the Privy Council in an earlier case had found his appointment invalid. Contrast this with Cullimore v. Lyme Regis Corporation (1962) 1 Q.B. 718 where rates were levied in defiance of a statutory time limit and a ratepayer successfully challenged the rate as ultra vires. In that case the rights of the ratepayer were affected by the unlawful levy of rates. For these reasons I hold that the appointees were validly appointed for a period of 1 year 6 days. The first challenge to the sale of the house approved at the meeting on 6th October 1981 therefore fails.

Mr. Goodman's second argument is that the contract of sale is ultra vires the powers of the National Parks Board. The Board is established by statute and its powers are limited by statute. It is has been well established by a long line of authorities that a statutory body can only act within the limits of its powers and with "Whatever may be regarded as incidental to, and consequent upon, those things which the legislature has authorised" A - G v. Great Eastern Railway Co. (1880) 5 App. Cas. 473, 478. Most of the cases cited in the text books, e.g. in de Smith, Judicial Review of Administrative Action (4th ed.) p.94ff, Vol.9 Halsbury (4th ed.) para 1333, are 19th century cases involving railway companies. Benjafield and Whitmore in Principles of Australian Administrative Law (4th ed.), at p.162 suggest that the reason why such cases are comparatively rare in modern law is because of the tendency to confer wide discretionary powers on 20th century administrators.

I consider that the English Common Law on the powers of statutory corporations is apposite and applicable to the circumstances of Papua New Guinea; indeed it is most important and highly desirable that bodies established by statute should not exceed the powers given to them by Parliament. The law is conveniently stated in Vol.9, Halsbury (4th ed.), para 1333

"The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited."

The learned author of Halsbury goes on to cite numerous examples of the application of that law to various corporations. Most of the examples are 19th century ones. I cite a few 20th century ones. In A-G v. Smethwick Corporation (1932) 1 Ch. 562 the corporation established its own printing, stationery and book-binding department and to save the cost of having its printing done by, and its stationery purchased from, outside companies.

A ratepayer through the Attorney-General challenged the validity of this. The Court held that the establishment of printing, stationery and bookbinding department was necessarily incidental to the performance by the corporation of its statutory duties. Contrast this case with Helicopters Utilities Pty Ltd v. Australian National Airlines Commission (1963) 80 N.S.W. Weekly Notes 48. Australian National Airlines Commission, a statutory corporation akin to Air Niugini, successfully tendered for the hire of helicopters and crews to the Australian Government for work in the Antarctic. It was held that supply of helicopters for this purpose was ultra vires the powers of the commission.

The effect of entering into a contract outside the powers of the corporation is stated in Halsbury op. cit., para 1334

(If) the subject matter of a contract is beyond the scope of the constitution of the corporation, it is ultra vires and void ab initio. Such a contract cannot become intra vires by reason of ratification, estoppel, lapse of time, acquiescence or delay.

The ultra vires doctrine applies to companies as well as statutory corporation, de Smith, op. cit., pp.94-95. It arises in two situations, one is where a company has entered into a contract and this action is challenged as ultra vires its objects, the other is where a shareholder seeks an order to wind up a company on the ground that it was not operating for the purpose for which it had been formed, a reason commonly expressed by saying that the company's substratum has failed. Mr. Goodman urged me to follow In re German Date Coffee Company (1882) 20 Ch. D. 169 where a company was wound up for that reason. The headnote of that case is as follows:

"The memorandum of association of a company stated that it was formed for working a German patent which had been or would be granted for manufacturing coffee from dates, and also for obtaining other patents for improvements and extensions of the said inventions or any modifications thereof or incident thereto; and to acquire or purchase any other inventions for similar purposes, and to import and export all descriptions of produce for the purpose of food, and to acquire or lease buildings either in connection with the above-mentioned purposes or otherwise, for the purposes of the company.

The intended German patent was never granted, but the company purchased a Swedish patent, and also established works in Hamburg, where they made and sold coffee made from dates without a patent. Many of the shareholders withdrew from the company on ascertaining that the German patent could not be obtained; but the large majority of those who remained desired to continue the company, which was in solvent circumstances.

A petition having been presented by two shareholders:-

Held (affirming the decision of Kay, J.), that the substratum of the company had failed, and it was impossible to carry out the objects for which it was formed; and therefore that it was just and equitable that the company should be wound up, although the petition was presented within a year from its incorporation.



The effect of general words describing the objects of a company in the memorandum of association considered."

Lindley L.J. at p.188 said the following:

"The first question we have to consider is, What is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are. Taking that as the governing principle, it appears to me plain beyond all reasonable dispute that the real object of this company, which, by the by, is called the German Date Coffee Company, Limited, was to manufacture a substitute for coffee in Germany under a patent, valid according to German law. It is what the company was formed for, and all the rest is subordinate to that. The words are general, but that is the thing for which the people subscribe their money."

I do not propose to apply that case strictly to the National Parks Board and to ascertain which is the dominant or main object of the Board. The Board's objects are five-fold and are set out in s.11 therein called "Functions of the Board" and its powers are contained in ss.3 and 12. I consider I can look at all its objects and not limit them to a main objective. I note too that the case was distinguished in Bell Houses Ltd. v. City Wall Properties Ltd. (1966) 2 Q.B. 656 ( C/A).

The law on gifts by companies is directly relevant to this case. A trading company may wish to give money ex gratia to an employee or to a charity. A shareholder may object to the gift; the company is giving away part of the profits and therefore there is less money to be returned to shareholders in dividends. If the donor company goes into liquidation the liquidator may question the validity of the gift. For a gift by a company to be intra vires there must either be an express enabling object or power in the Memorandum of Association or the gift must be fairly regarded as incidental to some express powers. For example power to engage employees implies as fairly incidental a power to pay a bonus to employees, Hampson v. Price's Patent Candle Co. 1876 24 W.R. 754. A gift of ₹100,000 to various universities and scientific institutions by a large chemical manufacturing company was held to be incidental to its objects, Evans v. Brunner Mond Co. Ltd. (1921) 1 Ch. 359. On the other hand, in Parke v. Daily News Ltd. (1962) Ch. 927 gifts by a company to its employees were struck down. In that case the company sold its newspapers and 2,800 employees became out of work. The directors agreed to pay the workers compensation and pension benefits for loss of jobs although the company was under no legal obligation to do so. A minority shareholder brought an action to stop the distribution of money and the court held that the proposed payments were ultra vires and illegal.

The five functions of the National Parks Board are contained in s.11 of the National Parks Act. The Board's powers are found in ss. 12, 13 - 16; and further powers are found in s.3(2) (d) and (e) Section 3 provides:

"3. Establishment of the Board.

- (1) A National Parks Board is hereby established.
- (2) The Board -
  - (a) is a corporation; and
  - (b) has perpetual succession; and
  - (c) shall have a seal; and
  - (d) may acquire, hold and dispose of property; and

Leaving aside those special cases covered by ss. 13 to 16 of the Act because I am not concerned with land of that kind in this case, I consider s. 3(2)(d) and s.11 must be read together, that the land powers given by s.3(2)(d) are not unlimited, that <sup>like the s.12 powers</sup> they must be used by the Board in ways which are necessary and/or incidental to the performance of its functions" as given in s.11. Thus the Board could buy land for a national park and then recommend to the Minister under s.13 that the land so bought be reserved for that purpose. To buy land for that purpose is obviously in performance of the Board's function to promote the concept of national parks etc. To buy or lease land for an office for the Board would be necessary for the Board to perform its functions. To buy or lease land for housing for its staff would also I think be necessary or incidental to the performance of its functions, in a country where staff housing is provided by nearly all employers at least for senior staff. The Board could not buy a block of flats as an investment to rent out commercially except with the approval of the Minister as its power to invest spare monies is limited by s.18 and the Schedule of the Act to those forms of investment described in s.6(a), (c) and (e) of the Public Bodies (Financial Administration) Act Ch. No.6.

Although I think it incidental to the Board's function to house its staff, and to buy and lease houses for that purpose, I do not consider it is necessary or convenient or incidental to the performance of its functions to sell a house to its staff at one-quarter of its true value as was done in this case. It may be necessary to provide housing even at sub-economic rents to attract staff when other employers are offering that perquisite. It may be necessary or convenient for the Board in some circumstances to sell a house it has bought for its staff. For example if the number of staff are reduced it might be convenient to sell a house surplus to its needs and to invest the money elsewhere or apply it towards to development or the upkeep of the national parks. Also if a staff house was inconveniently situated it would be convenient to sell it and purchase as equivalent house better situated.

Likewise if staff housing was short it might be necessary and convenient to sell a big staff house and buy two flats with the proceeds. It would not be ultra vires for the board to sell a house surplus to its needs or inconveniently situated to a staff member provided it was sold at full valuation. The Board is a public body appointed by the Minister to carry out the functions given to it by the statute. The Board members are not appointed to line their own pockets, to help their friends or the staff. They are there to use the assets and properties of the Board to carry out the functions of the Board which does not include the distribution of large-scale benefits to staff members.

I look at the circumstances of this case another way. Suppose instead of selling to the plaintiff for K13,000 the Board's house in East Boroko worth K53,100, the Board had given the plaintiff a cheque for K40,100 as an ex gratia payment for his hard work when he resigned. Clearly that reward would be illegal; it is not one of the functions of the Board under s.11, nor does it come under any of the powers enumerated in s.12. The size of the bonus is clearly well beyond the kind of bonus which would at common law be fairly regarded as incidental to the Board's power to employ staff. Similarly if the Board were to give a sum of money to *Cheshire Homes*: to support such a charity is not directly or incidentally in performance of its stated functions. The contract of sale to the plaintiff amounts to gift of K40,100 worth of assets to the plaintiff. I consider the contract ultra vires.

It can and should be said for the plaintiff that his purchase of the house was in accordance with N.E.C. decision No. 151. I have not seen that decision but I have been tendered a circular from P. Gaiyer, the Secretary of the Department of Urban Development, No. 27/80 dated 12.12.1980 which deals with the Sale of Houses- Statutory Authorities and Semi-Government Bodies. That circular says that the N.E.C. in decision No. 151 approved the sale of houses by statutory authorities and semi-government bodies to their current tenants excepting Special Purpose and Institutional houses which are defined. However Parliament has created the National Parks Board and defined its powers and functions by statute and that N.E.C. decision cannot alter those statutory powers and functions.

The Board was generally led astray or misled itself at its meeting in October 1981 into thinking that it could ignore its statute and implement that decision. The contract of sale is ultra vires the statute and hence null and void. There will be judgment for the defendant with costs.

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Following discussion with counsel, the following orders were made, The plaintiff is to vacate the house within one week. The defendant is to refund to him all moneys paid under the contract of sale less rent and less the costs of this action and costs of an earlier abortive action : M.P. 81 of 1981 where costs were awarded to the National Parks Board. It was agreed that the plaintiff has paid K1300 rent plus 3 instalments of K90 each total K1660. Rent has been agreed at K380. I fix the Board's costs of this action at K330 and of action M.P. 81 of 1981 as K70. K1660 less K380 rent, less K400 costs is K880. I order the Board to refund to the defendant C/- Mr. Awaita the sum of K880.

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Counsel : D. Awaita  
Solicitor for the Defendant: STATE SOLICITOR  
Counsel : J. Goodman