Privy Council Appeal No. 1 of 1985

Lopinot Limestone Limited *Appellant*

v.

The Attorney General of Trinidad and Tobago *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD MACKAY OF CLASHFERN
LORD ACKNER
SIR DUNCAN MCMULLIN

*[Delivered by **Lord Bridge of Harwich**]*

The appellant plaintiff owns some 200 acres of land in the Lopinot Valley of the Northern Range in the island of Trinidad. This litigation is concerned with a parcel of 22 acres now disused, but formerly a cocoa plantation ("the site"). The relevant law to which it will be necessary to refer in this judgment is found in the Town and Country Planning Act ("the Act") and the Town and Country Planning (General Development) Order ("the Order") of Trinidad and Tobago.

On 14th December 1978 the plaintiff applied to the Minister pursuant to section 11 of the Act and clause 6 of the Order for permission to develop the site as a limestone quarry. Under section 11 of the Act, which in many respects mirrors the parallel United Kingdom legislation, the Minister is empowered to grant permission either unconditionally or subject to such conditions as he thinks fit, or to refuse permission. By clause 6(6)(b) of the Order he was required to give notice to the plaintiff of the determination of the application within two months or such extended time as might be agreed in writing between them. No such agreement was made. By letter dated 28th May 1980 the Minister notified the
[26] plaintiff that the permission sought was refused.

The plaintiff wrote to the Minister on 12th June 1980 claiming compensation under Part IV of the Act in respect of the refusal of permission, but, getting no satisfaction, instituted the present proceedings in the High Court of Justice of Trinidad and Tobago on 10th July 1980. The remedies sought included a number of declarations in the alternative. For present purposes it is sufficient to note that the plaintiff claimed: (1) a declaration that the purported refusal of the application for planning permission was a nullity; (2) alternatively a declaration that the plaintiff was entitled to compensation in respect of the refusal under Part IV of the Act.

Logically the issues raised by these two alternative claims fell for determination in the order indicated, i.e. first the nullity issue, second the compensation issue. But at the trial before Lennox Deyalsingh J. the judge was invited and agreed to determine the compensation issue first. He held that the refusal attracted compensation and so declared. But counsel for the plaintiff was understandably anxious, lest the case should go further on the compensation issue, to have the benefit of the judge's findings of fact bearing on the nullity issue. The judge proceeded to make findings of fact leading to the conclusion that the decision to refuse planning permission was made in breach of the rules of natural justice and was a nullity. But at the request of counsel for the plaintiff he refrained from making any declaration to that effect.

The Attorney General appealed to the Court of Appeal of Trinidad and Tobago on a wide variety of grounds. He failed on all of them save one. The Court of Appeal allowed the appeal on the narrow ground, put shortly, that, as the judge had rightly held the Minister's decision to be a nullity, there was no refusal of planning permission and therefore no basis for a claim for compensation. They expressed no opinion as to whether or not a valid refusal of the plaintiff's application for planning permission in this case would, on the true construction of the Act, attract compensation under Part IV. They set aside the judge's order and ordered that the plaintiff's application for planning permission be remitted to the Minister for due consideration according to law. The plaintiff appeals to the Board by leave of the Court of Appeal of Trinidad and Tobago.

It appeared to their Lordships at the outset that it would be most unfortunate that this lengthy, tortuous and no doubt expensive litigation should terminate without a decision of the question whether, in the event of a refusal of planning permission by

the Minister when he reconsiders the plaintiff's application, the plaintiff will be entitled to compensation. They put this view to counsel. Dr. Ramsahoye S.C., for the plaintiff, was content to accept that, if this question could be resolved by an appropriate declaration, he need not challenge the Court of Appeal's order remitting the plaintiff's planning application to the Minister. Mr. Anthony Lester Q.C., for the Attorney General, realistically and helpfully accepted that it would be appropriate for the Board in this way to determine the compensation issue which, though presently still hypothetical, is certainly not academic. The issue was accordingly fully argued and now falls for decision.

Permission is required by section 8(1) of the Act for any development of land and "development", as defined by section 8(2), includes "the carrying out of building, engineering, mining or other operations in, on, over or under any land" and "the making of any material change in the use of any buildings or other land". By definition in section 2 "'use', in relation to land, does not include the use of land by the carrying out of any building or other operations thereon". Section 26(1) of the Act provides:-

> "If on a claim made to the Minister in the manner prescribed by Regulations made under this Act, it is shown that, as a result of a planning decision involving a refusal of permission or a grant thereof subject to conditions, the value of the interest of any person in the land to which the planning decision relates is less than it would have been if the permission had been granted or had been granted unconditionally, then the Minister shall, subject to the provisions of this Part, pay to that person compensation (to be assessed in accordance with the provisions of the Land Acquisition Act), of an amount equal to the difference."

Their Lordships were informed that no regulations for the purposes of this sub-section have been made. Section 27(1) of the Act, so far as material, provides:-

> "27.(1) Compensation under this Part shall not be payable -
>
> (a) in respect of the refusal of permission for any development that consists of or includes the making of any material change in the use of any buildings or other land;
>
> (b) ...
>
> (c) ...

(d) in respect of the imposition, on the granting of permission to develop land, of any condition relating to -

(i) the number or disposition of buildings on any land;

(ii) the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction;

(iii) the manner in which any land is to be laid out for the purposes of the development, including the provision of facilities for the parking, loading, unloading or fuelling of vehicles on the land;

(iv) the use of any buildings or other land; or

(v) the location or design of any means of access to a highway, or the materials to be used in the construction thereof;

(e) in respect of any conditions subject to which permission is granted for the winning and working of minerals; ..."

The submission for the Attorney General is that compensation is excluded in respect of a refusal of planning permission for development consisting in the quarrying of limestone by section 27(1)(a) in that such development consists of or includes the making of a material change in the use of land. In *Re Claim of Viscount Securities Limited*, an unreported decision of the High Court of the Republic of Eire dated 21st December 1976, Finlay P. had to consider a similar submission in relation to parallel provisions of Irish planning legislation. There, as here, a general entitlement to compensation for refusal of planning permission (section 55 of the Irish Act) was qualified by an exclusion of compensation in the case of refusal of planning permission for development consisting of or including the making of a material change in the use of land (section 56(1)(a) of the Irish Act) and "use" in relation to land was defined in terms to the like effect as those used in the Act under consideration. It was argued for the planning authority that no compensation was payable in respect of a refusal of permission to build dwelling houses on agricultural land because such development included the making of a material change in the use of the land. Finlay P. rejected the argument. He

pointed out that to accept it would attenuate the general right to compensation almost to vanishing point. The definition of "use" in relation to land, by giving the word an artificial meaning narrower than its meaning in ordinary parlance, had the effect of dividing development into two broad categories. In terms of section 8(2) of the Act which their Lordships have to consider, the broad categories are on the one hand "the carrying out of building, engineering, mining or other operations in, on, over or under any land" and on the other hand "the making of any material change in the use of any buildings or other land". Finlay P. concluded as follows:-

> "If one accepts these two broad divisions of development not necessarily always exclusive and sometimes inevitably overlapping it is reasonable and consistent with the general provisions of the Act to construe section 56(1)(a) as excluding from the right to compensation an owner of land whose development has been refused permission in respect of the second category namely in the artificial sense the material change of user in the land or structures. The practical effect of such a construction would be that the general right to compensation contained in section 55 would not be nullified or attenuated to a minimal extent as would arise if the narrower construction of section 56(1)(a) were made. ...
>
> I am, accordingly, satisfied that it is the proper construction to apply to this sub-section and that the true meaning of it is that it excludes only from compensation a development consisting of or including a material change in the use of a structure or land other than the carrying out of works on this land."

Their Lordships find this reasoning convincing and applicable to the Act which they have to construe. Mr. Anthony Lester Q.C. did not seriously challenge this view, but sought to distinguish building operations on the one hand and mining operations on the other, at all events where the latter consist of working a quarry. Erecting a building, he submitted, is a once and for all operation. Working a quarry, on the other hand, although involving a series of mining operations, is a continuing activity involving a use of land in ordinary language which the definition of "use" in section 2 of the Act is not effective to exclude. Their Lordships cannot accept the validity of this distinction. The winning and working of minerals from a quarry is no more than a series of mining operations, as the minerals are progressively excavated, to which the activities carried on for the purpose of working the quarry are merely incidental. For present purposes there can be no distinction in principle, based on the difference

in time scale, between such mining operations and building operations, to which the activities of builders carrying out the operations are likewise incidental. Like building operations, mining operations are "other operations" excluded by the definition from the statutory meaning of "use" in relation to land.

But, independently of all these considerations, the issue, in their Lordships' judgment, is put beyond doubt by section 27(1)(e) of the Act. It is inconceivable that the legislature should have relied on the generality of the language of section 27(1)(a) to express an intention to exclude compensation in respect of the outright refusal of planning permission for the winning and working of minerals when they thought it necessary, by section 27(1)(e), to provide clearly and specifically for the much less draconian exclusion of compensation in the case of a grant of such a permission subject to conditions.

That is sufficient to resolve the compensation issue, but it may be of assistance to the parties and reduce the scope for disputes in this matter in the future if their Lordships add some supplementary observations.

Reading the documents which constitute the application for planning permission dated 14th December 1978, which include a quarry survey report, as a whole, it appears that the permission sought is to win and work the limestone on the site by blasting, crushing, screening and washing; outline permissision is sought for the erection of certain ancillary buildings such as an office, storeroom and rest room. It is proposed to work the quarry in stages, taking 3 acres at a time, and then, as each 3 acre portion is exhausted, to reclaim the land for agricultural use. If, on reconsideration, the Minister decides to grant permission, all these matters will no doubt require to be regulated by carefully defined conditions, which can properly be imposed without attracting liability to pay compensation in virtue of section 27(1)(e) of the Act. The conditions which may be imposed must not, of course, be so restrictive as to frustrate the working of the quarry. That would amount in effect to a refusal of permission disguised as a conditional grant.

If, on the other hand, the remission of the application for reconsideration by the Minister leads to a refusal, the resulting claim for compensation under section 26(1) will fall to be quantified, in the light of section 27(1)(e), by comparing the value of the site without permission for quarrying with its value if permission had been granted subject to such conditions as might reasonably and properly have been imposed.

It is common ground that the planning application must now be determined with all reasonable expedition and to that end the plaintiff has undertaken to submit to the Minister any such further evidence and representations as it wishes the Minister to consider within three months of the Board's order and the Attorney General has undertaken on behalf of the Minister that he will (whether or not any further evidence or representations are submitted to him) give notice to the plaintiff of the determination of the application within six months of the Board's order. Upon those undertakings their Lordships affirm the order of the Court of Appeal that the plaintiff's application for planning permission be remitted to the Minister for due consideration according to law. But their Lordships vary the order of the Court of Appeal by the addition of a declaration that, if the application is refused, the plaintiff will be entitled to compensation under and subject to the provisions of Part IV of the Act. To that extent the appeal is allowed.

In the light of this outcome, it is very properly conceded on behalf of the Attorney General that he should pay the plaintiff's costs of the proceedings before the judge of first instance and of the appeal from the Court of Appeal to the Board and their Lordships so order. As regards the costs of the proceedings before the Court of Appeal their Lordships can find no sufficient reason to depart from the view of the Court of Appeal that each party should be left to bear its own costs. Accordingly there will be no order in respect of the costs incurred in the Court of Appeal.