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Sime Darby Motor Services Ltd v Director of Lands

Date of Hearing and Determination: 19 August 2024

Court of Final Appeal

CFA

Miscellaneous Proceedings No 71 of 2024 (Civil)

FAMV 71/2024

Citations:	[2024] HKEC 2950 [2024] HKCFA 26
Presiding Judges:	Ribeiro, Fok and Lam PJJ
Phrases:	Civil procedure - Court of Final Appeal - leave to appeal - granted on questions of (a) circumstances under which decision of Director of Lands in land exchange or lease modification applications or other Government lease related decisions amenable to judicial review; (b) if decision reviewable, whether application of policy of normally not entertaining non-small house land exchange applications within village environs boundaries, insofar as it might render land not capable of any meaningful development, illogical, irrational and perverse
Counsel in the Case:	Mr Rimsky Yuen SC, Ms Anna Chow and Mr Martin Ho, instructed by Reed Smith Richards Butler LLP, for the Applicant Mr Justin Lam and Mr John Leung, instructed by the Department of Justice, for the Respondent
Cases cited in the judgment:	BT v CBY (2020) 23 HKCFAR 447 Durga Maya Gurung v Director of Immigration CACV 1077/2001 Durga Maya Gurung v Director of Immigration unrep. CACV 1077/2001 Hang Wah Chong Investment Co Ltd v Attorney-General [1981] HKLR 336 International Trader Ltd v Town Planning Appeal Board [2009] 3 HKLRD 339 Kwok Cheuk Kin v Director of Lands (No 2) (2021) 24 HKCFAR 349 R v Warwickshire CC, ex parte Collymore [1995] ELR 217 Tullett & Tokyo International Securities Ltd v APC Securities Co Ltd [2001] 2 HKLRD 356

DETERMINATION

Lam PJ:

1. In 2020, the Director of Lands refused (" the Decision ") the applicant's application for land exchange regarding its land in Fanling Area 48 in northern New Territories (" the Application "). The applicant was successful before Wilson Chan J in its application for judicial review in respect of the Decision. On appeal, the Court of Appeal reversed the judgment of the Judge. The applicant now seeks leave to appeal to this Court and raises five questions as questions of great general or public importance. It also seeks leave on the "or otherwise" basis.

2. In the Form B of 7 June 2024, the applicant set out the five questions and elaborated the same with some sub-questions which it invites the Court to consider. The full contents of the questions are set out in the Annex to this Determination [1] . For present purposes, it is sufficient to set out the five main questions without the sub-questions. The five main questions are:

> "Question 1: Whether a decision made by the Director of Lands pursuant to and/or in implementing a purported or alleged policy ("Purported Policy") not to entertain non-small house land exchange applications within village environs ("VE") boundaries for the preservation of land for small house development by indigenous villagers under the Small House Policy is amenable to judicial review.
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> Question 2: In the context of judicial review applications, what is the correct approach in considering the inter-relationship between burden of proof and the duty of candour (or breach thereof).
>
> Question 3: Whether the Purported Policy (if exists), essentially in the nature of a blanket refusal of land exchange applications for land within VE boundaries other than for small house development, is necessarily or inherently illogical, irrational and perverse.
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> Question 4: In the situation where a respondent (as in the case of the Director of Lands in the present case) seeks to assert that an administrative policy provides for exception(s), what is the proper or correct approach in determining the applicable evidential threshold that such respondent has to overcome for the purpose of proving that: (a) the asserted exception(s) does/or exist; and (b) there had been proper operation of the asserted exception(s).
>
> Question 5: Whether, by virtue of s.13 of the Town Planning Ordinance (Cap 131) ("TPO"), a zoning designation in a plan approved by the Chief Executive in Council under the TPO constitutes a representation by the Government of its planning intention in respect of land subject to such zoning decision (i.e. that the Government and public officers, as are statutorily obliged under s.13 of the TPO, would not act in a manner that is inconsistent with the zoning decision), and whether the Respondent's invocation of the Purported Policy to preserve the subject lots for the building of small houses (when such proposed land use for the erection of small houses was and remained inconsistent with the relevant statutory zoning plans approved by the Chief Executive in Council and published under the TPO) would have frustrated the Applicant's legitimate expectation?"

3. After hearing submissions, we indicated that leave to appeal will be granted on reformulated Questions 1 and 3. We refused leave on the other questions. Here are our reasons for the determination.

4. Question 1 on amenability to judicial review should be reformulated to facilitate the Court's consideration of the general approach in respect of decisions on land exchange or lease modification or other Government lease related applications. It should also be modified as we do not find any sufficient basis for disturbing the findings of the Court of Appeal as mentioned below. We are satisfied that the question as reformulated is of the requisite importance, namely:

"Under what circumstances is a decision made by the Director of Lands in land exchange or lease modification applications or other Government lease related decisions amenable to judicial review?"

5. In substance, Question 2 is a challenge to the finding of the Court of Appeal as to the existence of the Director's policy of normally not entertaining non-small house land exchange applications within village environs boundaries ("the Policy"). Though it is framed by reference to the duty of candour, it relates to the specific finding in the present case in light of the evidence before the courts. There is no universal approach as to how an inference is to be drawn and much depends on the context and the evidence. We refuse to grant leave in respect of Question 2.

6. The applicant identified two sub-questions under Question 3. The first sub-question is premised on a scenario where the subject land falls into an "Industrial" zone under the Town Planning Ordinance

Cap 131 ("TPO"). Such scenario did not arise in the present case as at time of the Decision the applicant's land fell within a "Government, Institution or Community" zone.

7. The second sub-question is premised on a blanket application of the Policy prohibiting the applicant from putting its land to any meaningful use merely because of the possibility that at some time in the future those plots of land would be acquired by indigenous villagers. There are two inaccuracies here. First, the Court of Appeal found that the Director did not apply the Policy rigidly and in the present case he had given full consideration to the applicant's submissions for exceptional treatment before rejecting the Application. We cannot see any basis for disturbing that finding. Second, notwithstanding the change of zoning into "Government, Institution or Community", the pre-existing use of the plots is allowed [2] . Hence, it is not correct to suggest that the land could not be put to any meaningful use.

8. However, it could be said that there is a restriction on future development in the use of the land. We are prepared to accept that Question 3(2) as modified below is of the requisite importance:

"If the Decision is reviewable, whether the application of the Policy, insofar as it may render land not capable of any meaningful development, is inherently illogical, irrational and perverse?"

9. Question 4 has two limbs: the first limb focuses on the existence of the exception, the other limb focuses on the application of the exception. In light of the findings of the Court of Appeal, the first limb is not reasonably arguable. As highlighted by the Court of Appeal [3] , the Director duly took account of the oral and written representations made on behalf of the applicant in assessing whether the Application could be justified exceptionally under the Policy. It is plain that the Director genuinely exercised his discretion in such assessment and did not shut his ears to the Application [4] . Thus, the second limb has no merits and it cannot give rise to any question of great general or public importance.

10. We are not satisfied that Question 5 is reasonably arguable. The Notes to the Approved Fanling/Sheung Shui Outline Zoning Plan No. S/FSS/24 clearly provide:

> (2) "Any use or development which is always permitted or may be permitted in accordance with these Notes must also conform to any other relevant legislation, the conditions of the Government lease concerned, and any other Government requirements, as may be applicable."

11. In light of that, the zoning under the TPO and Section 13 of the TPO cannot give rise to any legitimate expectation that a change of land use under the government lease or government grant would be permitted. The applicant relied on International Trader Ltd v Town Planning Appeal Board [2009] 3 HKLRD 339 . That case was about an application for permission under Section 16 of the TPO and has nothing to do with modification of lease conditions.

12. The application on the "or otherwise" limb relates to Questions 1 to 5. It adds nothing of substance to the intended appeal in light of our analysis above.

13. We therefore grant leave to appeal to the applicant based on the following questions of great general or public importance (with renumbering of the questions in light of what has been said above):

> (1) Under what circumstances is a decision made by the Director of Lands in land exchange or lease modification applications or other Government lease related decisions amenable to judicial review?
> (2) If the Decision is reviewable, whether the application of the Policy, insofar as it may render land not capable of any meaningful development, is inherently illogical, irrational and perverse?

14. The appeal will be listed for hearing on 1 April 2025.

ANNEX

Question 1: Whether a decision made by the Director of Lands pursuant to and/or in implementing a purported or alleged policy ("Purported Policy") not to entertain non-small house land exchange applications within village environs ("VE") boundaries for the preservation of land for small house development by indigenous villagers under the Small House Policy is amenable to judicial review. In particular:

> (1) Whether and to what extent does the preferred approach of focusing on the nature of the functions (rather than the source of power) in determining the applicability of public law principles (or amenability to judicial review) apply to land decisions of the Director of Lands

(especially decisions concerning land exchange applications)?

(2) What is the proper or correct understanding of the principle laid down in Hang Wah Chong Investment Co Ltd v Attorney-General [1981] HKLR 336 (" Hang Wah Chong Principle ")? Specifically in the context of land decisions made by the Director of Lands on behalf of the Government:

(a) under what circumstances would the role played by the Director of Lands be one of a "protector of the public interest" which decision is "almost certainly liable to judicial review" as per Hang Wah Chong at p 341H-J?

(b) alternatively, what should be the proper or correct approach (or relevant criteria) in determining whether decisions made by the Director of Lands are made as a "protector of public interest" and thus amenable to judicial review?

(3) Whether the Government's control of land use through administrative means (such as land exchanges or other non-statutory policies), which runs in parallel to prevailing statutory regimes (such as those laid down under the Town Planning Ordinance (Cap 131) and the Buildings Ordinance (Cap 123)), should be holistically regarded as a discharge of the Government's role as a "protector of the public interest" in ensuring that limited land resources would be used in the best interest of Hong Kong and hence amenable to judicial review?

(4) Whether the implementation of the Purported Policy should be regarded as part and parcel of the overall scheme concerning the Small House Policy (in that the availability of government land for sale to indigenous villagers has always been "an essential adjunct to the Small House Policy" as per Kwok Cheuk Kin v Director of Lands (No 2) (2021) 24 HKCFAR 349 § 17) and is hence amenable to judicial review on that basis.

(5) In any event, given the time lapse since the decision in Hang Wah Chong 's case (above), the impacts that decisions made by the Director of Lands may have on the parties concerned and the development of Hong Kong as a whole, and the development of the law in other common law jurisdictions concerning the dichotomy between public and private law matters in the context of judicial review, whether the Hang Wah Chong Principle should be revisited by the Court of Final Appeal so that the law in this area can be developed to achieve the aims of, among others: (a) unshackling the over-legalistic dichotomy of public and private law; and (b) developing an overarching, coherent and principled approach to facilitate good governance in accordance with the rule of law (which is an essential objective of judicial reviews)?

Question 2: In the context of judicial review applications, what is the correct approach in considering the inter-relationship between burden of proof and the duty of candour (or breach thereof). Specifically in the present case:

(1) In the context of an asserted government policy (i.e. such as the Purported Policy in the present case): (a) the existence of which was specifically put in issue by the Applicant; (b) that was not documented by any documentary evidence, but was only said to be evidenced by a "Technical Circular No 620C" dated 5 December 1994 issued by a Senior Estate Surveyor; and (c) the relevant and surrounding documents relating to "Technical Circular No 620C" the Respondent had refused to disclose, in breach of its duty of candour; what is the correct approach of the Court in determining whether the Purported Policy does in fact exist.

(2) To what extent and/or in what circumstances should the Court draw adverse inferences against the Respondent in relation to its burden of proving the existence of the Purported Policy, based on: (a) the principle in Tullett & Tokyo International Securities Ltd v APC Securities Co Ltd [2001] 2 HKLRD 356 at 365C-J; and (b) the Respondent's breach of its duty of candour?

(3) If such adverse inference is to be drawn, how and to what extent should such adverse inference be taken into account in considering whether the applicable burden of proof has been discharged?

Question 3: Whether the Purported Policy (if exists), essentially in the nature of a blanket refusal of land exchange applications for land within VE boundaries other than for small house development, is necessarily or inherently illogical, irrational and perverse. Among others:

(1) In circumstances where the Purported Policy is not said to be confined to "Government, Institution or Community" land but extends to (say) "Industrial" land on which small house development is legally unviable, whether the Purported Policy would result in scenarios where certain pieces of land in the New Territories may not be legally utilised at all.

(2) In circumstances where the Government would not appropriate private land owned by

other private landlords for the use of indigenous inhabitants for their building of small houses, such that the subject lots held by the Applicant had no objective or factual prospect of being subject to any small house application, whether the blanket application of the Purported Policy would mean that the subject lots in question would be prohibited from being put to any meaningful use merely because of the possibility that at some indefinite time in the future, those plots of land may end up being owned by an indigenous villager who may decide to erect small houses thereon.

Question 4: In the situation where a respondent (as in the case of the Director of Lands in the present case) seeks to assert that an administrative policy provides for exception(s), what is the proper or correct approach in determining the applicable evidential threshold that such respondent has to overcome for the purpose of proving that: (a) the asserted exception(s) does/or exist; and (b) there had been proper operation of the asserted exception(s). Specifically, in considering the aforesaid:

(1) Is the approach expounded by Le Pichon JA in Durga Maya Gurung v Director of Immigration, unrep. CACV 1077/2001 (19 April 2002) (at § §24-25) good law in holding that the burden rests with the respondent to adduce "convincing evidence" of the existence and operation of the alleged exception(s), bearing in mind: (a) it is a general evidentiary principle that he who asserts must prove; and (b) the respondent is under a duty of candour to disclose all relevant materials in the first place?

(2) If answer to (1) above is in the affirmative:

(a) what is the proper or correct approach to decide what constitutes "convincing evidence" in such context?

(b) where a respondent has adduced no evidence on what is meant by the alleged exception of "exceptional circumstances" and/or how the alleged exception had actually been operated in practice (if at all), whether the Purported Policy would fall foul of the principle in R v Warwickshire CC, ex parte Collymore [1995] ELR 217 at 226 and hence would be unlawful?

(3) If answer to (1) above is in the negative, what should be the correct approach to apply?

Question 5: Whether, by virtue of s.13 of the Town Planning Ordinance (Cap 131) ("TPO"), a zoning designation in a plan approved by the Chief Executive in Council under the TPO constitutes a representation by the Government of its planning intention in respect of land subject to such zoning decision (i.e. that the Government and public officers, as are statutorily obliged under s.13 of the TPO, would not act in a manner that is inconsistent with the zoning decision), and whether the Respondent's invocation of the Purported Policy to preserve the subject lots for the building of small houses (when such proposed land use for the erection of small houses was and remained inconsistent with the relevant statutory zoning plans approved by the Chief Executive in Council and published under the TPO) would have frustrated the Applicant's legitimate expectation?

1 BT v CBY (2020) 23 HKCFAR 447 At the hearing, it was pointed out to counsel for the applicant that the form of the questions for which leave was sought was inappropriate and unhelpful to the court in that they included fact-specific assumptions and were argumentative in form. This practice is to be discouraged: [13]-[21].

2 See paragraph 3(a) of the Notes to the Approved Fanling/Sheung Shui Outline Zoning Plan No. S/FSS/24.

3 Durga Maya Gurung v Director of Immigration CACV 1077/2001 The CA also explained that the applicant's reliance on the dissenting opinion in is misplaced, see CA Judgment at [72].

4 See CA Judgment [75] to [81].