BENCON DEVELOPMENT SDN BHD v JABATAN PERKHDMATAN PMBENTUNGAN & 2 ORS

High Court, Pulau Pinang
6 April 1999
Originating Motion No 25-122-1997
ABDUL HAMID MOHAMAD J

Administrative law – Powers, rights and duties – Local authorities – Requiring payment of contribution to upgrade existing sewerage system as condition for permitting applicant to connect its sewerage system to public sewerage system – Whether first respondent has power to require applicant to make contribution for upgrading of existing sewerage system – Interpretation Act 1967, s 40 – Sewerage Services Act 1993, s 18(1), (2), (3), (4)

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Abdul Hamid Mohamad J
Alasan Penghakiman

This case involves the same project and the same developer as in Originating Summons No 24-95-98. In that case the Applicant, *inter alia*, sought for a declaration that it did not have to comply with the condition that it had to widen the existing bridge in the area, some seven years after it was imposed. I dismissed the application and had given my grounds.

In this case, briefly, the Applicant is challenging the requirement to pay a contribution of RM2,500,000.00 to upgrade the existing sewerage system as a condition for permitting the Applicant to connect its sewerage system to the public sewerage system.

Let me narrate the facts in chronological order.

The Applicant submitted an application for planning approval to the Majlis Perbandaran Pulau Pinang (MPPP) to develop a total of 1,628 units consisting of six types of buildings. In the plan submitted by the Applicant, the Applicant demarcated an area of 0.799 acre of its own land as a site for a private sewage treatment plant.

By a letter dated 17th December 1995, MPPP approved the application, with normal conditions. It goes without saying that the layout plan that was approved contained the Applicant's proposal to construct a sewage treatment plant at it own costs, on its own land to cater for the Applicant's housing project. Several amendments were made subsequently by the Applicant pertaining to the types and the number of units. However, the Applicant's proposal to construct its own sewage treatment plant, which was approved by MPPP, remained unchanged.

On 1st March 1996 the Sewerage Services Act 1993 came into force. The Act, as stated in the preamble, confers on the Federation matters relating to sewerage systems and sewerage services which previously were administered by the various local authorities, in this case, the MPPP. It also provides for privatisation of the services and was privatised.

To complete the picture, I think I am entitled to take judicial notice of a fact stated by the Applicant itself in one of its affidavits in Originating Summons No. 24-95-98 that the Applicant commenced work in May 1993.

In the meantime, the Applicant came to know that there was a public sewerage system in the area.

So, on 19th May 1997, the Applicant submitted an application for permission to connect its system to the public sewerage system.

The reason is not difficult to understand. If the Applicant could do that, then, it would not have to utilise its own land of 0.799 acres for the construction of its own sewage treatment plant. The land could be used for some other purpose, most probably to build more units. It would also save the costs of constructing it own sewage treatment plant.

By a letter dated 13th October 1997 the First Respondent replied that it had no objection subject to 14 conditions, one of which was payment of RM2,500,000.00 as contribution for the upgrading of the existing system. It is this condition which is now being challenged but not the approval itself.

There is only one ground in this application: whether the First Respondent has power to require the Applicant to make contribution for the upgrading of the existing sewerage system when it approved the Applicant's application to connect its sewerage system to the public sewerage system.

The relevant provision is section 18:

"18.
(1) No person shall, without the prior written permission of the Director General —

(a) Make or cause or permit any private connection pipe, drain or sewer to connect directly or indirectly to any public sewer or public treatment works; or
(b) close up, obstruct, stop or deviate any public sewer.

(2) The Director General may —
(a) order any person contravening sub-section (1) to discontinue the use of, or

demolish or otherwise remove, any obstruction, private connection pipe, drain or sewer in contravention of that subsection; or
(b) demolish or otherwise remove the obstruction, private connection pipe, drain or sewer and recover the expenses incurred in doing so from the person.

(3) The Director General may refuse to permit any person to make a connection to any public sewer or public treatment works if —
(a) the public sewer or public treatment work do not or will not have the necessary capability or capacity to receive the sewage which will be discharged through the proposed connection; or
(b) it appears to the Director General that the mode or construction or the condition of the public sewer or public treatment works is such that the making of the connection is likely to be prejudicial to the public sewerage system.
(4) Any person who contravenes subsection (1) to comply with an order issued under subsection (2) shall be guilty of an offence and shall, on conviction, be aliable to a fine not exceeding ten thousand ringgit".

Briefly, the section gives the Director General a discretion whether to permit or to refuse any private connection to the public sewer. He may refuse if, *inter alia*, the public sewer does not have the capability or capacity to receive the sewage which will be received through the proposed connection.

In this case the proposed connection is not from one unit or house, but from a major development consisting of 1,628 units. The First Respondant has said very clearly that the existing sewerage system does not have the capability or capacity to receive the sewage which will be discharged through the proposed connection. Indeed, the First Respondent could rightly have refused the Applicant's application and that would cost the Applicant millions of Ringgits, in terms of land value and utilisation and costs of constructing its own sewage treatment plant, which the Applicant had, in the first place, proposed to do. But the First Respondent gave permission to the Applicant to connect its sewerage system to the public sewerage system. But as the existing system would have to be upgraded, the First Respondent required the Applicant to make a contribution, as it would require everybody else in similar situation to do. The calculation of the contribution has been worked out by the Department and is applicable throughout Malaysia.

Section 40 of the Interpretation Act 1967 provides:

"40.
(1) Where a written law confers a power on any person to do or enforce the doing or any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.
(2) Without prejudice to the generality of subsection (1) —

(a) power to make subsidiary legislation to control or regulate any matter includes power to provide for the same by licensing and power to prohibit acts whereby

the control or regulation might be evaded;
(b) power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted; and
(c) where a power is conferred on any person to direct, order or require any act or thing to be done, there shall be deemed to be imposed on any person to whom a direction order or requisition is given in pursuance of the power a duty to comply therewith."

Sub-section 2(1)(b) in particular clearly empowers an authority when granting a licence, permit, authority, approval or exemption to require conditions to be imposed thereto. Indeed no permission, approval *etc*. whether by public authority or a private person is ever given without condition. Even the Applicant will not permit just anybody to walk into the 1,628 units of premises that he build. They will have to either buy or rent them and for a price. It would be a dereliction of duty on the part of the First Respondent if it were to allow just anybody to connect his/its sewerage system to the public sewerage system without considering the effects thereof, and where necessary, upgrade it. The Sewerage Services Act 1993 was made by the Federal Parliament "for the purpose of improving sanitation and environment and promoting public health …" — see long title. Surely, Malaysian public too does not want to suffer from effects of overflowing sewage while the developer laughs his way to the bank. And when that happens the Government gets the blame.

I do not think it is necessary for me to discuss the English cases referred to me. Those cases were decided on the facts, the law and the circumstances in England. We do not have to try to fit in every local situation with that in England. Malaysian cases should be decided according to Malaysian law and local circumstances. After all, if the sewer in question overflows it is the Malaysian public in the area who will suffer the consequences. It is the Malaysian authorities that will be blamed.

The situation here cannot be equated with the situation in Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd(1) (1979) 1 MLJ 135. The condition imposed here is neither unrelated nor unreasonable nor used for an ulterior object. Indeed, it is absolutely necessary and reasonable.

The requirement to pay the contribution in this case should not be equated with taxation. Article 96(1) of the Federal Constitution provides: "No tax or rate shall be levied by or for the purposes of the Federation by or under the authority of federal law". But, this is neither tax nor rate. This is a simple case of someone seeking a service from somebody and that somebody says "yes I'll provide it but you must pay for it". That is all that there is to it. The Applicant wants the service, but for free.

The other point that should not be overlooked is that certiorari is not a right that

the Court must always grant so long as a party makes out a case. It is a discretionary remedy. In Khoo Ah Imm @ Chang Bee Kiam & Ors v. Datuk Bandar Kuala Lumpur & Anor(2) (1997) 2 MLJ 602 C.A. Gopal Sri Ram JCA said:

" Now, it is well settled that certiorari is one of those remedies in public law which cannot be claimed *ex debito justitiae*, but is a discretionary remedy. An Applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case. For example, an applicant for certiorari who is able to establish that a wrong has been done him in public law may be denied relief on the ground that the public interest outweighs his grievance (see Smith & Ors v.Inner London Education Authority(3) [1978] 1 All ER 411) . The factors which a court may take into account when denying relief are so numerous and so variable that it is unwise and impossible to list them out."

In this case, besides what I have stated, the Applicant has a choice. If it does not want to make the contribution it can always construct its own treatment plant. That was what it originally planned, applied for approval and was approved. This is clearly a case where public interest outweights the Applicant's interest, which is nothing but financial gain at whatever costs to the public. For these reasons I dismissed the application with costs.

Lakhbir Singh and Jagjit Kaur (Lakhibir Singh & Co) for applicant — Syed Marzidy b Syed Marzuki, SFC for respondent