Mir Hassan bin Abdul Rahman and Another v Attorney-General
[2008] SGHC 147

Case Number : OS 941/2008, SUM 3135/2008

Decision Date : 05 September 2008

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Michael Hwang SC, Fong Lee Cheng (Michael Hwang), Phang Sin Kat, Susan Wong (Messrs Phang & Co) for the applicants; Soh Tze Bian (Attorney-General's Chambers) for the respondent; N Sreenivasan, Valerie Ang (Messrs Straits Law Practice LLC), Siva Krishnasamy (Messrs Tan Lee & Partners) for the 1st to 60th respondents in STB 2/2008; Ng Poh Wah in person; Shaikh Mahfutz bin Ahmad Mattar in person

Parties : Mir Hassan bin Abdul Rahman; V Shunmuganathan — Attorney-General

Administrative Law – Judicial review – Discretion of Strata Title Board to fix hearing dates – Strata Title Board fixing hearing on date after its mandate expired and after contractual deadline for obtaining Board's approval for collective sale in sale and purchase agreement – Whether Strata Title Board and its Registrar had exercised discretion illegally and/or irrationally in Wednesbury sense by fixing hearing on date beyond its mandate and was exercise in futility

Land – Strata titles – Collective sales – Discretion of Strata Title Board to fix hearing dates – Duty of Strata Title Board to act expeditiously – Strata Title Board fixing hearing on date after its mandate expired and after contractual deadline for obtaining Board's approval for collective sale in sale and purchase agreement – Whether Strata Title Board had to make final order or determination within six months from date constituted – Section 92(9) Building Maintenance and Strata Management Act 2004 (Act 47 of 2004) – Regulation 20 Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005)

5 September 2008

Tan Lee Meng J:

1 The applicants, the authorized representatives of the sale committee of Tampines Court, applied for judicial review of the decision of the Strata Title Board ("STB") to resume the hearing of their application ("STB No 2 of 2008") for approval of the *en bloc* sale of Tampines Court on 7 August 2008. I quashed the STB's decision and ordered the STB to resume the said hearing on Monday, 21 July 2008. The reasons for my decision are stated below.

Background

2 Tampines Court is a privatized HUDC estate comprising 560 housing units. The residents appointed a sale committee for the purpose of a collective sale agreement dated 5 May 2006. According to the sale committee, subsidiary proprietors holding 82.14% of the share values of Tampines Court had signed the collective sale agreement and committed themselves to the *en bloc* sale.

3 On 25 March 2007, the sale committee and Orchard Mall Pte Ltd ("the purchaser") concluded a sale and purchase agreement ("the S & PA") for the collective sale and purchase of Tampines Court for the sum of $395 million plus a sum of $10 million to cater for subsidiary proprietors whose share of the sale proceeds from the *en bloc* sale is insufficient to pay off the encumbrances on their properties. Under the S & PA, the STB's approval of the *en bloc* sale must be obtained by 25 July

2008 "unless the parties hereto mutually agree in writing to extend the time for the obtaining of the STB order."

4 The sale committee could have applied for the STB's approval of the *en bloc* sale much earlier but it wanted to do so only after the decision of the STB in the *Gillman Heights* case, which also involved the *en bloc* sale of a privatized HUDC estate. According to the sale committee, two important issues in the *Gillman Heights* case, which was heard by the STB in the latter half of 2007, were relevant to its application to the STB for approval of the *en bloc* sale. The first issue concerned the application of s 84A of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed)) ("LTSA") to a privatized HUDC estate. The second issue concerned the minimum percentage of share values required to approve the *en bloc* sale of a privatized HUDC estate before it can be sold. The STB delivered its decision in the *Gillman Heights* case on 21 December 2007 and on 7 January 2008, the sale committee applied for the STB's approval of the *en bloc* sale of Tampines Court.

5 On 1 February 2008, the STB was constituted to hear STB No 2 of 2008. The parties were invited to resolve their differences through mediation. However, the first mediation hearing on 29 February 2008, the second mediation hearing on 10 April 2008 and the third mediation hearing on 10 June 2008 did not result in an agreement between those who wanted to sell their housing units and those who did not.

6 Following the failure of the mediation efforts, the hearing of STB No 2 of 2008 was fixed for 16 to 18 June 2008. The hearing was not completed by 18 June 2008. According to the sale committee, only one of its witnesses had not been cross-examined and he had filed a very short affidavit. The STB decided that the hearing would resume on 7 August 2008.

7 At this juncture, two points must be noted. First, the STB is required by s 92(9) of the Building Maintenance and Strata Management Act 2004 (Act No 47 of 2004) ("the Act") to make a final order or determination with respect to the application for the *en bloc* sale by 1 August 2008 unless that date has been extended by the Minister. Secondly, as the contractual deadline in the S & PA for the obtaining of the STB's approval of the *en bloc* sale is 25 July 2008, a hearing on 7 August 2008 would be academic unless the purchaser agreed to extend the deadline.

8 The Deputy President of the STB asked the applicants' solicitors, Phang & Co, to seek an extension of the deadline from the purchaser. He also gave instructions that the Minister's consent be sought for an extension of the 1 August 2008 deadline for the STB to make known its decision on STB No 2 of 2008. To date, no ministerial approval for the extension desired by the STB has been obtained.

9 On 26 June 2008, Phang & Co wrote to the purchaser to extend the deadline on 25 July 2008 for obtaining the STB's approval for the *en bloc* sale. On 27 June 2008, the purchaser replied that it was not minded to extend the said deadline.

10 In view of the purchaser's stand, the applicants applied on 30 June 2008 for the hearing date to be brought forward. On 11 July 2008, the STB's Registrar dismissed the sale committee's application.

11 On 14 July 2008, the applicants filed an Originating Summons for leave to apply for judicial review. Leave was granted on 16 July 2008.

The hearing of the application for judicial review

12 As the STB and its Registrar have a discretion to fix hearing dates, the issue before the court

was whether the STB and its Registrar had exercised their discretion illegally and/or irrationally in the *Wednesbury* sense when deciding that the hearing of STB No 2 of 2008 would resume on 7 August 2008.

13 The applicants contended that the STB's decision to resume the hearing of their application for approval of the *en boc* sale of Tampines Court on 7 August 2008 should be quashed for two reasons. First, the decision is illegal because the STB is required by law to complete the hearing of the application for approval of the *en bloc* sale by 1 August 2008. Secondly, bearing in mind that the STB had around six months to consider the application and the deadline for obtaining the STB's approval of the *en bloc* sale is 25 July 2008, the decision to resume the hearing of the application on 7 August 2008 is unreasonable or irrational in the *Wednesbury* sense.

Illegality

14 One of the most traversed grounds for judicial review is illegality. In *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1985] AC 374 ("the *GCHQ* case"), Lord Diplock explained at p 410 that a decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. This aspect of illegality covers a situation where an act is done without legal authority.

15 Admittedly, r 20 of the Building Maintenance and Strata Management (Strata Titles Boards) Regulations 2005 (S 195/2005) confers on the STB and its Registrar a wide discretion to fix the dates for hearing a case. It provides as follows:

> A Board may, *in its discretion*, adjourn a mediation session, direction hearing or arbitration hearing *on any ground* and may fix a time for a further mediation session or hearing.
>
> [emphasis added]

16 Dates of hearings of the STB are, without more, not the concern of the courts. Whether a hearing is scheduled for June, July or August is usually an administrative matter for the STB to consider. Even so, r 20 must be viewed in the context of s 92(9) of the Act, which provides as follows:

> A Board *shall* carry out its work *expeditiously* and *shall* make a final order or determination *within 6 months* from the date it is constituted or within such extension of time as may be granted by the Minister.
>
> [emphasis added]

17 As the deadline for the STB's final order or determination in the present case is 1 August 2008, and no ministerial extension of the deadline had been sought or given on the day the date of the resumed hearing was fixed, the STB had no authority to hear the application after 1 August 2008. In this context, it is worth noting that in *Administrative Law* (Butterworths, 8th Ed, 1995), David Foulkes stated at p 198 as follows:

> The *essence of the ultra vires doctrine…* is that a person or body acting under statutory power can only do those things the statute authorizes him or it to do; an act will be ultra vires if the person or body doing it did not have the statutory power to do it.
>
> [original emphasis in italics]

18 In regard to procedural *ultra vires*, the following comments of MP Jain in *Administrative Law of Malaysia and Singapore* (Malayan Law Journal, 3rd Ed, 1997) at p 434 are relevant:

> A statute may lay down some procedural norms for the exercise of a discretionary power. The procedural norms may be characterized by the courts either as directory or mandatory. Mandatory rules are vital and go to the root of the matter. *If norms are characterized as mandatory (as distinguished from directory), then the non-observance of these norms vitiates the discretionary act and it is declared as ultra vires…. Usually the following procedural norms are regarded by the courts as mandatory …. (vii) a requirement that a decision be taken within a prescribed period.*
>
> [emphasis added]

19 Finally, reference may be made to *The King v Commonwealth Court of Conciliation Arbitration* [1949] 80 CLR 164, where Latham CJ said at 169 as follows:

> If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, *has failed to comply with some requirement essential to its valid or effectual performance*, he may be commanded by the writ to execute his function according to law *de novo*, at any rate if a sufficient demand or request to do so has been made upon him.
>
> [emphasis added]

20 As the STB acted *ultra vires* by fixing the resumed hearing of STB No 2 of 2008 on 7 August 2008, when its mandate to hear the application in question would have expired by that date, its decision must be quashed.

Wednesday unreasonableness

21 The second string in the applicants' bow for quashing the STB's decision to resume its hearing of the application for approval of the *en bloc* sale of Tampines Court on 7 August 2008 relates to *Wednesbury* unreasonableness. In the *GCHQ* case ([14] *supra*), Lord Diplock explained as follows:

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

22 In support of their assertion that the STB's decision on the date for the resumed hearing ought to be reviewed, the applicants urged the court to take into account the purpose of s 84A of the LTSA and the fact that any order made by the STB at a hearing on 7 August 2008 would be an exercise in futility because the hearing would be after the contractual deadline for the obtaining of the STB's approval for the *en bloc* sale. The applicants also submitted that the timelines set by the STB for the hearing of STB No 2 of 2008 created a legitimate expectation that it would hear the case and come to a decision before 25 July 2008. They referred to the *GCHQ* case ([14] *supra*), where Lord Diplock pointed out that a "legitimate expectation" has consequences to which effect will be given in public law.

23 Counsel for the 1st to 60th respondents in STB No 2 of 2008, Mr N Sreenivasan, retorted that the deadline in the S & PA is not the concern of the STB. His clients blamed the sale committee for the predicament it found itself in and asserted that the sale committee should have applied for the STB's approval of the *en bloc* sale earlier instead of awaiting the outcome of the *Gillman Heights* case.*Heights Heights* It was also pointed out that the hearing of STB No 2 of 2008 was delayed because the applicants had applied to amend the S & PA. A similar line of argument was advanced by Mdm Ng Poh Wah, one of the subsidiary proprietors who opposed the *en bloc* sale of Tampines Court.

24 The STB's views must of course be considered. The STB informed the court that it did not object to the orders sought by the applicants. More importantly, the STB intimated that it was able to resume the hearing of STB No 2 of 2008 within the prescribed time limit of six months if it was ordered to do so by the court.

25 It must be borne in mind that the LTSA is intended to facilitate *en bloc* sales: see *Ng Swee Lang v Samuel Bernard Sassoon* [2008] 1 SLR 522, at [49], [59] and [109]; endorsed on appeal by the Court of Appeal (see [2008] 2 SLR 597 at [36] – [37]). Furthermore, s 92(9) of the Act requires the STB to act expeditiously. Of course, each case must be decided on its own facts and applicants who file an application so late in the day that it is unrealistic or impossible to expect the STB to complete the hearing before the deadline fixed for completion of an *en bloc* sale must take the consequences of their own delay. However, different considerations may arise in exceptional circumstances such as those in the present case, where the STB's own deadline of six months to make a final order or determination with respect to the application for the *en bloc* sale is just a few days after the deadline under the S & PA for obtaining the STB's approval for the *en bloc* sale and the STB is in a position to complete the hearing before the latter deadline.

26 Whether or not it was wise for the sale committee to await the STB's decision in the *Gillman Heights* case before applying for the requisite approval of the *en bloc* sale of Tampines Court, the STB's decision to schedule the resumed hearing on 7 August 2008, which is beyond its mandate and is an exercise in futility, was, in the circumstances of this case, unreasonable in the *Wednesbury* sense.

Conclusion

27 For the reasons stated, the decision of the STB to resume the hearing of the application for approval of the *en bloc* sale on 7 August 2008 was quashed and the STB was ordered to resume the said hearing on Monday, 21 July 2008.

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