Privy Council Appeal No. 35 of 1975

Gladys Sarah Becker – – – – – – – *Appellant*

v.

The Corporation of the City of Marion and Another – *Respondents*

FROM

THE SUPREME COURT OF SOUTH AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MARCH 1976

Present at the Hearing:

LORD DIPLOCK

LORD SIMON OF GLAISDALE

LORD KILBRANDON

LORD EDMUND-DAVIES

LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD EDMUND-DAVIES]

The plaintiff appeals by special leave granted by Order in Council from the Order of the Full Court of the Supreme Court of South Australia, dated 23rd December 1974, refusing her leave to appeal from a judgment of that Court delivered on 29th August 1974. The plaintiff also sought special leave of this Board to appeal from the substantive judgment, but that matter was ordered to be adjourned until after this Board had disposed of the appeal against the refusal of leave. Adopting a similar course, their Lordships propose to consider first, the matter of whether the plaintiff is entitled to appeal as of right to this Board, and thereafter to deal with the substantive judgment.

I. Introduction

The plaintiff is the registered proprietor of some 67 acres of land, in two allotments, within the boundaries of the City of Marion in what is known as Hills Face Zone. She wanted to subdivide the two allotments into a substantial number of plots as a preliminary to selling them off as residential building sites. Before she could do this she had first to comply with the provisions of the Planning and Development Act, 1966, as amended, and with the Control of Land Subdivision Regulations, 1967, and it is necessary to give an outline of what this involved.

Section 44 of the 1966 Act prohibits the sale of any land, other than allotments (defined by section 5), without the approval of the Director of Planning. Section 45 prevents the Registrar-General from accepting any plan of subdivision of the land unless it has first been approved by the

Director and the council within whose area the land is situated. The Act specifies the grounds upon which they may refuse approval. Under the Regulations, an applicant for approval of a plan of subdivision must first submit a " proposal plan " to the Director (Reg. 5), who then forwards a copy of it to various authorities, including the council or councils within whose area the land lies (Reg. 6). The latter are directed to examine the proposal plan and report on it to the Director within two months or such extended time as he may allow (Reg. 7 (1)). The council's report has to state whether it approves or withholds approval of the plan, or approves it only subject to specified conditions (Reg. 7 (2)). If it decides to withhold approval it must state its reasons for so deciding (Reg. 7 (3)), but, by Reg. 7 (4)—

> " Where a council has failed to comply with the provisions of subregulations (1) or (2) that council shall be deemed to have reported to the Director that it has decided to refuse approval ".

If the council concerned has reported its decision to the Director, he has to decide whether he should refuse approval to the proposal plan or approve it, either conditionally or unconditionally (Reg. 8). If the council has reported to the Director that it has decided to refuse approval, he has to notify the applicant of that fact and of the reason for that refusal, and, at the same time, he has to intimate whether he, in his turn, should decide to refuse approval (giving his reasons therefor) or to approve it (subject to the applicant's obtaining the council's approval) (Reg. 9 (1)). If both the council and the Director have approved, he notifies the applicant of those facts by means of what is called Letter Form A, a specimen of which appears in a Schedule to the Regulations (Reg. 9 (3)).

If Letter Form A is sent to the applicant, the next stage is that he submits an " outer boundary tracing " to the Director and he in his turn obtains a report thereon from the Registrar-General of Deeds. Reg. 12 (2) provides that

> " . . . the Director may, after a consideration of the report, notify the applicant in writing that he refuses to accept or that he accepts the *final plan* for consideration "

but this must be a mistake and for " final plan " one should read " outer boundary tracing ". That this is so is confirmed by Reg. 13, which provides that,

> " On receiving notifications of approval of the proposal plan and acceptance of the outer boundary tracing, the applicant may . . . submit to the Director a final plan for deposit . . . ".

The Director has then to examine the final plan and if, in his opinion, it does not differ materially from the proposal plan as approved and incorporates any alterations specified as conditions in Letter Form A, he is to forward the final plan to the Registrar-General of Deeds, and copies thereof to the council concerned and to certain others (Reg. 15). The Registrar-General has then to satisfy himself that the survey of the land comprised in the final plan appears to be adequate and accurate, and, if he is satisfied of these matters, he reports accordingly to the Director (Reg. 16). If, in its turn, the council concerned informs the Director that the final plan meets its requirements, and if the Director is also satisfied that any conditions specified in the Letter Form A and all other requirements have been complied with, he is to certify his approval on the plan (Reg. 17). Finally, if the Registrar-General of Deeds is satisfied that there is no reason why the final plan should not be deposited, he is to number and accept it (Reg. 18).

Bray J. appears correct in expressing the view that

> " . . . this scheme of things contemplates that any real contest about the acceptability of the *subdivision* should be fought out at the proposal plan stage ".

If at that stage either the Director or the council refuses approval, the applicant may appeal to the Planning Appeal Board (sections 26 and 27). But if neither approval nor refusal is signified, the planning machinery grinds to a halt and the applicant's plans are frustrated until he can get the machinery moving again. And that is what Lady Becker sought to do here, as appears from the facts of the case, to which their Lordships now turn.

On 29th September 1970 she lodged a proposal plan of subdivision of her land at the Hills Face Zone with the Director of Planning (" Director ") for his approval. In compliance with Reg. 6, he then forwarded it to the Council of the City of Marion (" the Council ") for their decision in accordance with Reg. 7. The Council did not give a decision in accordance with Reg. 7 (1), and it was therefore to be deemed that it had reported to the Director that it had decided to refuse approval of the proposal plan (Reg. 7 (4)). There followed an appeal by the plaintiff to the Planning Appeal Board, who on 27th July 1972, gave a decision in her favour, and therefrom an appeal by the Council to the Land and Valuation Division of the Supreme Court of South Australia who gave a decision in the respondents' favour, and finally an appeal by the plaintiff to the Full Court. The upshot of all this was that on 12th December 1973 the Full Court held that it still remained for the Council to consider the proposal plan and approve it or refuse its approval. Accordingly, on 19th December 1973 the plaintiff's solicitors requested the Council to make a decision one way or the other regarding approval of the proposal plan. On 1st March 1974 the Council's solicitor replied that it was prevented from examining the proposal plan by reason of its non-compliance with the provisions of section 45b of the Act, an amendment which had been assented to as late as 1st December 1972 and which is in the following terms:

> " (1) No plan shall be lodged or deposited with or accepted by the Director or a council if it purports to create an allotment—
>
> (*a*) that has no frontage to a public road of 100 metres or more;
>
> (*b*) that has an area of less than 4 hectares, where that allotment or part thereof lies within the prescribed locality known as the Hills Face Zone . . . ".

On March 11th 1974 the Crown Solicitor wrote on the Director's behalf to the plaintiff's solicitor, and stated that in his opinion section 45b prevented the Director also from accepting a *final* plan in the form proposed by the plaintiff. Thereupon the plaintiff's solicitors issued an Originating Summons under Order 54A, Rule 2, claiming three declarations. The first was—

> " A declaration that upon the proper interpretation of the Act and the Regulations the plaintiff is entitled to require the Corporation to examine the said proposal plan and to forward a report thereon to the Director in accordance with the provisions of Regulation 7 of the Regulations ".

The plaintiff secondly sought a declaration regarding her right to submit an outer boundary tracing under Reg. 12, and, thirdly, a similar declaration in relation to the submission of a final plan (Reg. 13). But these further declarations were sought only on the assumption that certain

events (which had not yet happened and which, indeed, might never happen) would eventuate. Of such future events the most important to this appeal was the approval by the Council of the proposal plan.

When the matter came before the Full Court in August 1974, whereas Hogarth J. concluded that the new section 45b did not, in all the circumstances of the case, prevent the Council from giving approval to the proposal plan, Mitchell and Wells JJ. held that the plaintiff was not entitled to require the Council to examine it or report thereon to the Director, and made the following order:

> " That upon the proper interpretation of the Planning and Development Act 1967 (as amended) . . . . and the Control of Land Subdivision Regulations 1967 (as amended) . . . the plaintiff is not entitled to require the Corporation to examine the plaintiff's proposal plan of subdivision lodged with the Director on the 29th day of September 1970 and to forward a report thereon to the Director in accordance with the provisions of Regulation 7 of the Regulations ".

Regarding the second and third declarations sought by the plaintiff, the Full Court was unanimous in holding that it would be inappropriate to deal with these, the majority saying that, in the light of their decision regarding the first declaration sought, the conditions which needed to be fulfilled before they arose for consideration could never be satisfied.

II. The Right to Appeal

At this stage of their judgment their Lordships are concerned to enquire solely whether the plaintiff is entitled as of right to appeal to Her Majesty in Council against that decision. The matter is regulated by Rule 2 of the Order in Council of 15th February 1909, which provides that:

> " Subject to the provisions of these Rules, an Appeal shall be—
>
> (*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; . . . ".

The respondents denying that the plaintiff is entitled to appeal to this Board as of right, two questions arise: (1) Was the decision of 29th August 1974 a " final judgment "? (2) If it was, does the projected appeal therefrom " involve, directly or indirectly, . . . some claim or question to or respecting property . . . amounting to or of the value of £500 sterling or upwards "? Their Lordships proceed to consider these questions in their turn.

Question (1): Was the decision of the Full Court a final judgment? Hogarth and Mitchell JJ. held that it was, while Wells J. was " not entirely convinced of the correctness of that view ", but was prepared to assume that it was. Before the Board the Solicitor-General challenges its correctness.

It is beyond doubt that the proposal plan submitted by the plaintiff was not in accordance with the requirements of section 45b. But, as has already been observed, whereas the plan had been lodged as early as 29th September 1970, the amendment to the Act by section 45b was not assented to until December 1972. The primary question, therefore, confronting the Full Court in August 1974, and the question to be considered

at a later stage of this judgment, is: Had the Council "accepted" the plaintiff's proposal plan before the prohibition in the new section became operative? Hogarth J. said in his December 1974 judgment:

> ". . . . an answer favourable to the plaintiff on that question would not have been the end to all questions arising between her and Marion and the Director. A favourable answer would not have established her right to have the necessary approvals to the subdivision of her land which she seeks. It would have merely established that she had the right to have her original plan, A2, considered by Marion for possible approval under the provisions of section 45 of the Planning and Development Act".

On the other hand, to answer the question in the negative (as the Full Court did) rendered it impossible for the plaintiff to proceed further. Unless she can get the planning machinery moving again she has forever lost any chance she ever had of being granted permission to subdivide and dispose of her land as she is minded to do.

Such being the situation, was the decision a "final judgment"? The exact connotation of that phrase has frequently given rise to difficulty, so much so that in *Salter Rex & Co. v. Ghosh* ([1971] 2 Q.B. 597) Lord Denning M.R. said (at p. 601):

> "The question of 'final' or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way".

The House of Lords has never had to consider the matter, the Supreme Court of Judicature (Consolidation) Act 1925 section 68(2) providing that, "Any doubt which may arise as to what orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal", and it is well appreciated that some of its decisions on the point are difficult to reconcile. This fact emerges from the exhaustive review of the relevant cases by Lord Evershed M.R. in *Hunt v. Allied Bakeries Ltd.* ([1956] 3 All E.R. 513). A shorter review was conducted by Lord Kilbrandon in *Tampion v. Anderson* ((1974) 48 A.L.J.R. 11) when giving the judgment of this Board that an order staying an action as being frivolous, vexatious and an abuse of the process of the Court is an interlocutory judgment.

But that decision does not solve the problem presented by the different facts of the instant case, and there remains the difficulty, referred to by Lord Kilbrandon, arising

> "out of attempts to frame a definition of 'final' (or of 'interlocutory') which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made".

Lacking any such definition, was the judgment of August 1974 a "final judgment"? Their Lordships hold that it was. Even though, for administrative reasons, further questions were put in the Originating Summons, the negative answer to the question raised by the prayer for the first declaration produced a state of finality. Hogarth J. was correct in saying that:

> "For the purpose of *these* proceedings, I think that the order of the court was final. It *finally* determined the question whether or not the plaintiff was entitled to have her plan considered by Marion. That was the *lis*; and that was finally determined adversely to her. Whichever way the decision went, it was a final decision as between the parties, I think therefore that the judgment is a final judgment".

The matter was slightly differently put by Mitchell J. who said:

> " [Counsel for the plaintiff] . . . submitted that the only rights with which the Court was concerned were the rights claimed in the Originating Summons; that whichever way the answer to question 1 had been given the rights of the parties on *that* point would have been finally determined; and that as far as questions 2 and 3 were concerned they were separate questions which could have been the subject of separate proceedings. In my view this argument is correct. Within its narrow confines the answer to that question, whichever way it went, necessarily determined the rights of the parties sought to be determined in paragraph 1 of the Originating Summons ".

Accepting these views, and bearing in mind that the refusal of the first declaration sought made it impossible for the second and third questions raised in the Originating Summons to be considered, their Lordships hold that the decision of August 1974 *was* a " final judgment ". But, as only certain types of final judgment entitle the losing party to appeal as of right to the Board, the further question involved must now be considered.

Question (2): Does the appeal from that judgment " involve, directly or indirectly, . . . some claim or question to or respecting property . . . amounting to or of the value of £500 sterling or upwards "?

The unchallenged evidence was that the land which the plaintiff was seeking permission to subdivide exceeded that figure. But was that fact of itself sufficient to establish her right to appeal? In December 1974 all three members of the Full Court answered that question in the negative. Hogarth J. began by holding, rightly in their Lordships' view, that the appeal involved no " claim " to property. But he went on to hold that neither did it involve a *question* " respecting " property of the designated value, saying:

> " The question asked does not relate to the property. It relates to an entitlement to have a proposed plan of subdivision of the property considered by Marion. I do not think that this is a question which relates to the property, within the meaning of the Rule."

Mitchell J. expressed the view that

> " . . . it is the claim or question or the civil right which must be of the value of £500 sterling,"

and that

> " . . . the question to which an answer was sought . . . had *no* money value ".

And Wells J., having referred to the wording of the question involved in the first declaration sought, said:

> " I fail to see how, even 'indirectly ', this can be said to be a question ' respecting property ', or how, if it is, the proprietary right (or, indeed, the ' property ') is susceptible of valuation ".

As their Lordships see it, the problem presently calling for a solution is whether this appeal directly or indirectly involves a question respecting *land* of the designated value. They have considered the numerous authorities cited, some of them (such as *Oertel v. Crocker* (1947) 75 C.L.R. 261) arising under the similar, but not identical, wording of the Judiciary Act 1903–1965 of Australia. They adopt the words of Lord Tucker in *Meghji Lakhamshi & Brothers v. Furniture Workshop* ([1954] A.C. 80 at 88), when giving the judgment of the Board in relation to the similar wording of Article 3(*a*) of the Eastern African (Appeal to Privy Council) Order in Council 1951, that,

"... it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word 'indirectly' seems to require this construction".

Notwithstanding the comments made on that decision by F. B. Adams J. in *New Zealand Insurance Co. Ltd. v. Commissioner of Stamp Duties (No. 2)* ((1954) N.Z.L.R. 1011, at 1024) and of Dixon C. J. in *Ebert v. The Union Trustee Co. of Australia Ltd.* ((1957) 98 C.L.R. 172, at 175), their Lordships think it right to adopt the approach indicated by Lord Tucker to the facts of the instant case.

Thus proceeding, it is clear that the first question raised in the Originating Summons directly affected the plaintiff's chances of being permitted to subdivide for the purpose of sale her 67 acres of land in the Hills Face Zone. While not overlooking the observation of Dixon J. in *Oertel v. Crocker* (*ante* at p. 271) regarding the word "respecting" that—

"... it seems to me to be obvious that the connection must be close, immediate or proximate.",

in the opinion of their Lordships the judgment sought to be appealed from does involve the appellant's proprietary rights in her 67 acres and is therefore one "respecting ... property" of the designated value.

In the result, the preliminary points calling for consideration at this stage being disposed of in a manner favourable to the appellant, it follows that she is entitled as of right to appeal to this Board from the judgment of the Full Court delivered in August 1974.

Having formed this view, in order to avoid the necessity of remitting the case to the Supreme Court for that Court to grant leave, their Lordships agreed humbly to advise Her Majesty to grant special leave to appeal from that judgment, and an Order in Council granting such special leave was made on 19th December 1975.

III. The Appeal

It will be seen from the foregoing narrative that the question between the parties is, whether section 45b of the Act has the effect of prohibiting the Council from accepting the proposal plan, that is, the plan which has been deposited (or lodged) with the Council. If the plan had not been accepted by 1st December 1972, the date upon which the section was enacted, the Council cannot now accept it, since it does not meet the conditions set out in the section. Had the Council at that date already accepted it? The answer to that question involves two inquiries, one as to the meaning of the word "accept", and another as to the effect in law of the actions of the Council on the plan being deposited, as disclosed in the admitted record, in the context of the proper interpretation of the word "accept". It is agreed that, if the Council had accepted the plan before that date, the prohibition cannot have effect, and the Council is now under a statutory duty to examine the plan and to take the administrative steps in relation to it which the planning code enjoins. In that event the appellant would be entitled to the first declaration which she seeks.

A definition of the word "accepted" can be found at either of two extremes, neither of which their Lordships are prepared to adopt. The word could be said to be the obverse of "lodged" or "deposited", so that when an applicant deposits a plan, the recipient accepts it by his

act of reception. Their Lordships agree with the reasoning of all the learned judges which led to the rejection of this interpretation. It is, for example, possible to figure a person lodging a plan with a Council, and it being clear on the face of the plan that it related to land not within the jurisdiction of the Council. Some official would " accept " the plan in the sense of receiving it on behalf of the Council, but obviously that official, or some other of minor importance, would return it to the depositor, giving the reason, without troubling the Council, in its capacity as planning authority, to have the matter even put on its agenda, or that of any sub-committee. In no sense could the Council, the planning authority, be said to have accepted the plan.

At the other extreme—and this was a meaning contended for by the respondents—it was said that " accepted " is synonymous with " approved ". There are several reasons why this interpretation is unconvincing. First, there are too many places in the legislative provisions where both words are used in the same collocation and a different meaning for each is clearly called for. Examples are, in the Act, section 5(2) (*b*), section 45(1), and section 56 read with section 57. Other examples are given by Hogarth J. in his judgment. Their Lordships agree with the learned judge in his view that the amendment represented by section 45b must have been framed so as to operate within the scheme of the planning procedures as existing at its date, and that that scheme includes the Regulations made under the Act. It is plain from Regulations 12–15 that acceptance and approval are regarded as distinct and successive stages; the language strongly suggests that acceptance must, throughout the scheme, be interpreted as meaning " accept for consideration ", in the sense of accept as suitable for consideration. If that be so then clearly a plan in relation to which active steps of consideration have been taken cannot be other than " accepted ", even if further information, leading to further consideration, be required before the decision of approval or disapproval can be made.

Secondly, in their Lordships' view, this interpretation squares with what appears to be the policy of the legislature, in regard not only to the code as a whole, but also to the section 45b amendment. If it had been intended that the amendment was to arrest all non-conforming development, at whatever stage short of approval it had reached, then " accepted " rather than " approved " was a most inappropriate word to have used. It is approval, and nothing short of approval, which re-confers upon a proprietor those rights which planning legislation has transferred from him to the community. The use of the word " accepted ", as referable to a stage in the decision-making process short of one at which any right becomes capable of being conferred, must point to a conscious intention by the legislature not to apply the stricter criteria imposed by the amendment to applications which had reached some intermediate stage between reception and approval. The reason behind that intention is not obscure; it would be a harsh measure which applied disqualifying tests to an application, perhaps at a late stage of processing and after much expense had been incurred, which had satisfied all requirements current at the date of its submission to an early consideration by the authority. Such legislation would be in a practical sense retroactive, against which there is always a certain presumption.

This being, in their Lordships' opinion, the correct interpretation of the word " accepted ", the next question is, whether the action which the Council took in relation to the plan was indicative that they had, in the sense indicated, accepted it. Their Lordships have no doubt that it was; they find themselves in agreement with the opinion of Hogarth J., and it is therefore not necessary to go into repetitious detail. The course of

events can be followed from the affidavit of the Town Clerk, and the documents exhibited thereto. The Council received the plan on 6th November 1970. On 14th December the plan was before the By-law and Traffic Committee, which made certain recommendations thereon to the Council. At the meeting the Town Clerk gave certain advice as to the way in which the Council should deal with the plan, and in particular that " before further consideration " certain requirements as to proposed roads should be satisfied. It was also recommended that other questions " be deferred for further consideration pending further advice from the State Planning Office ". On the same day the Council adopted these recommendations. Steps were then taken by the Town Clerk, by correspondence, to obtain the further information required. Their Lordships have no doubt that this information, and perhaps still further information, was required, for the purpose of the Council's deciding not whether they should accept the plan and take it into consideration, for their action shows that that stage was by then past, but in order to come to a decision as to approval or disapproval. The application was, accordingly, at the date when the amending section 45b was passed, namely 1st December 1972, an application which was in course of being processed by the Council. So far had the processing proceeded that an appeal had, as has been pointed out, been taken against a deemed refusal of approval. Accordingly, unless " accepted " simply means " approved ",—and their Lordships have already said that in their view it does not—it is impossible to say that an application which has reached that stage of its progress through the administrative machine has not been accepted.

Their Lordships will for these reasons humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Supreme Court for that Court to make the first declaration claimed by the appellant in her Originating Summons.

The respondents must pay the appellant's costs of the appeal to their Lordships' Board (both on the question of the right of appeal and the appeal itself) and her costs of both the Originating Summons and the application for leave in the Supreme Court.

3165239—1 Dd 096176 80 3/76

In the Privy Council

GLADYS SARAH BECKER

v.

THE CORPORATION OF THE CITY OF MARION AND ANOTHER

DELIVERED BY
LORD EDMUND-DAVIES

Printed by HER MAJESTY'S STATIONERY OFFICE
1976