

Privy Council Appeal No. 45 of 1993

(1) Silver Mountain Investments Limited and
(2) Bennage Limited *Appellants*

v.

(1) The Attorney General and
(2) Land Development Corporation *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
11TH MAY 1994

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD ACKNER
LORD BROWNE-WILKINSON
LORD MUSTILL
LORD NOLAN

[Delivered by Lord Jauncey of Tullichettle]

This appeal raises the issue of whether a decision of the Governor in Council and the order consequential thereupon to resume four properties owned by the appellants were null and void. The properties in question are situated in Central Hong Kong and are within the area of a Land Development Corporation Scheme.

In order to understand the statutory procedures involved in resumption of land for the purposes of a Land Development Corporation Scheme it is necessary to look at three Ordinances, namely, the Town Planning Ordinance, the Land Development Corporation Ordinance and the Crown Lands Resumption Ordinance.

Town Planning Ordinance

The Town Planning Board ("the TPB"), which is appointed by the Governor, has the duty *inter alia* of preparing draft plans for the layout of areas in Hong Kong (section 3(1)). Those draft plans may make provision for comprehensive development areas (section 4(1)(f)). In relation to comprehensive area plans the Board may, by a note on the plan, prohibit the undertaking of any building

work except with permission granted by reference to a master plan submitted by an applicant to the Board at its request and for its approval. Where such a master plan is submitted it must be deposited in the Land Office for public inspection (section 4A). Draft plans require to be exhibited, advertised and gazetted (section 5) and a person affected may submit written objections within two months thereafter (section 6(1)). The Board is then empowered to give preliminary consideration to the objections in the absence of the objector (section 6(3)) and if it does not give effect to these objections the Board must consider the written statement at a meeting at which the objector or his representative is entitled to be present and be heard (section 6(6)). After consideration of all objections the Board must submit the draft plan to the Governor in Council for approval together with a schedule of the objections which have not been withdrawn (section 8). Thereafter the Governor may approve or refuse it and, if approved, the plan must be exhibited for public inspection and gazetted (section 9(1) and (5)). Approved plans are to be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them (section 13).

Although the procedures are different to those prevailing under planning legislation in the United Kingdom anyone objecting to a draft plan has the opportunity not only of submitting written representations thereon but, if necessary, of presenting oral objections at a meeting of the TPB.

Land Development Corporation Ordinance

The Land Development Corporation ("the LDC") was set up in 1988 by this Ordinance. Its purposes included the improvement of the standard of housing and the environment in Hong Kong by undertaking and promoting urban renewal (section 4(a)). The Corporation was given wide powers for these purposes including power to lease, purchase or otherwise acquire land and to exercise any of the powers either alone or in association with any other person or persons (section 5(1), (2)(a) and (r)). Part IV of the Ordinance which consists of sections 13 and 14 is headed "Development of Land". Section 13(1) empowers the Corporation with the approval of the Secretary for Planning, Environment and Lands ("the Secretary") to prepare development schemes for any area within which the Corporation may acquire property. Section 13(2) provides *inter alia*:-

"A scheme referred to in subsection (1) may contain such matters as the Corporation considers relevant and shall -

- (a) comprise a plan which may contain any thing that a draft plan may contain under section 3 or 4 of the Town Planning Ordinance (Cap. 131);

- (b) set out how the Corporation intends that the scheme will be implemented, including whether implementation will be by the Corporation alone or the Corporation in association with another person and in relation to land within the boundaries of the scheme, what portion of the land is owned or leased by the Corporation and what arrangements have been made or are contemplated by the Corporation for the acquisition of any land not so owned or leased;
- (c) contain an assessment by the Corporation as to the likely effect of the implementation of the scheme. ..."

Section 13(3) provides that a plan prepared under subsection (2)(a) may prohibit any development not compatible with a development scheme. Section 14(1) provides that the Secretary may at the request of the Corporation submit any plan prepared under section 13(2)(a) to the TPB for approval. If the TPB approve the plan it is to be deemed to be a draft plan for the purposes of the Town Planning Ordinance and is thereafter exhibited and gazetted in accordance with the provisions thereof (section 14(3)). Such a deemed draft plan from its date of exhibition replaces any draft or approved plan under the Town Planning Ordinance which relates to the area of the deemed draft plan (section 14(4)).

Part V of the Ordinance is headed "Resumption of Land" and section 15(1) empowers the LDC to request the Secretary to recommend to the Governor in Council the resumption of land under the Crown Lands Resumption Ordinance in the circumstances specified in subsection (2). These circumstances are *inter alia*:-

"(2) ...

- (a) that the Corporation has been unable to acquire any land within the area of a plan which is deemed to be a draft plan by virtue of section 14(3) of this Ordinance;"

Section 15(3) provides *inter alia* that the Secretary shall not make a recommendation in pursuance of subsection (2)(a):-

"(3) ...

- (b) unless he is satisfied that the Corporation has taken all reasonable steps to otherwise acquire the land including negotiating for the purchase thereof on terms that are fair and reasonable."

Section 15(6) is in the following terms:-

"A resumption in pursuance of a recommendation by the Secretary under this section shall be deemed to

be a resumption for a public purpose within the meaning of the Crown Lands Resumption Ordinance (Cap. 124)."

The provisions of section 15 are of particular importance in this appeal.

Crown Lands Resumption Ordinance

Section 3 provides:-

"Whenever the Governor in Council decides that the resumption of any land is required for a public purpose, the Governor may order the resumption thereof under this Ordinance."

Facts

The four properties in question which together form an "L" shaped block are 116-118 Des Voeux Road, Central (property 1), 41 Tung Man Street (property 2), 42-44 Hing Lung Street (property 3), and 39 Tung Man Street (property 4). Plans for redevelopment of properties 1, 2 and 3 were approved on 18th January 1986 but nothing was done to implement those plans before the events hereinafter mentioned. On 17th March 1988 the LDC wrote to the Secretary requesting approval under section 13(1) of the Land Development Corporation Ordinance of a development scheme for an area which included the four properties. Approval for the preparation of this scheme was given by the Secretary on 17th September 1988. In the meantime the TPB had prepared a draft plan under section 4(1) of the Town Planning Ordinance designating the area of the development scheme as a comprehensive development area. This draft plan was published and the appellants objected by letter of 2nd June 1988 which sought to have the properties 1, 2 and 3 excluded from the comprehensive development area for the reason that the appellants intended themselves to redevelop these properties together with property 4 for the purchase of which they were then negotiating. The TPB decided at a meeting on 23rd September 1988 not to give effect to the objections and thereafter representatives of the appellants were heard at a meeting of the Board on 13th October 1989 in accordance with section 6(6) of the Town Planning Ordinance. On that occasion the following offer was made on behalf of the appellants:-

"... that in the event that members of the Board feel that access frontage from Des Voeux Road Central as suggested above is not wide enough, my clients are prepared to dedicate part of the ground floor of its proposed new building to pedestrian use."

The Board reached the following decision:-

"72. Members agreed that the objection site being relatively small and of an irregular shape, the inclusion of the site for comprehensive redevelopment would be

more desirable and decided not to amend the zoning to meet the objection."

No further action was taken by the Board in relation to the comprehensive development area plan.

In the meantime, however, the LDC had been proceeding with preparation of their development scheme and on 2nd October 1989 they requested the Secretary in terms of section 14(1) of the Land Development Corporation Ordinance to submit the scheme plan to the Town Planning Board which duly approved it on 9th February 1990. The scheme plan included notes of which number (v) stated that any development not compatible with the LDC scheme for the area was prohibited by virtue of section 13(3) of the Land Development Corporation Ordinance. There was also submitted to the TPB with the plan and notes an explanatory statement which did not form part of the plan but which contained *inter alia* the statement as to implementation of the scheme required by section 13(2)(b) of the Land Development Corporation Ordinance. Paragraph 6.2 stated:-

"It is intended that the development will be implemented as a single project under a joint venture between the Land Development Corporation and an experienced local development company with the necessary capability."

Although the explanatory statement was not part of the plan which required the statutory approval of the TPB it was available to the public and was undoubtedly part of the LDC's development scheme prepared for the purposes of section 13 of the Land Development Corporation Ordinance. As a result of such approval the scheme plan became a draft plan for the purposes of the Town Planning Ordinance and was duly exhibited and gazetted. It thereby replaced the comprehensive development area plan by virtue of section 14(4) of the Land Development Corporation Ordinance.

On 31st May 1990 solicitors acting for the appellants submitted written objections to the scheme plan upon the grounds *inter alia* that the development scheme could be implemented without the inclusion of the four properties within the plan. These objections contained no offer to dedicate part of the ground floor of the proposed new building at 116-118 Des Voeux Road to pedestrian access. The objections having been rejected by the TPB on preliminary consideration were further considered at a meeting of the Board on 23rd November 1990 at which representatives of the appellants were present. The oral submissions made on behalf of the appellants raised no matter which had not been raised in the written objections. However, some members of the Board raised the question of access to the scheme from Des Voeux Road as recorded in the following passage from the minutes of the meeting:-

"29. In reply to the Members' enquiries, Mr. M.C.T. Ma gave the following explanation:-

- (a) the objection site provided the only link to Des Voeux Road from the LDC scheme. In order to enhance the viability of the market in the scheme, it was essential to open up the proposed development to the Des Voeux Road Central for pedestrian access. To achieve this without involving excessive land resumption, the principle of acquiring just enough land for the purpose had been adopted, and the objection site had been selected on the basis of this principle;
- (b) to make use of the two openings at Wing On Street and Tung Man Street was not sufficient as they were both too narrow and could not accommodate the proposed escalator link connecting the market and the landscaped deck. Moreover, the retention of the two streets for access purpose would not be desirable from traffic management and public security points of view as they would become blind alleys; and
- (c) the option of having a building on the objection site while maintaining a public pedestrian walkway under the building at ground level had also been found out to be undesirable as it would conceal the market and would greatly reduce its attractiveness."

The decision of the Board was recorded in the following two paragraphs:-

"31. Members generally agreed that it would enhance the integrity and viability of the proposed comprehensive redevelopment scheme by providing a sufficiently wide frontage onto Des Voeux Road Central and that the choice of the objection site appeared the most logical against the need to minimise land resumption which would not only be costly, but would cause excessive and unnecessary disruption to the public. As such, on grounds as previously decided in the Board's preliminary consideration of the objection, it was decided not to amend the scheme Plan to meet the objection.

32. Some members expressed at the same time the view that the LDC could explore further the feasibility of accommodating development proposals of the objector in the LDC Scheme. While it was noted that such consideration, being not a planning consideration, was not within the context of an objection consideration, it was agreed that this view be conveyed to LDC."

The ground of decision on the preliminary consideration of the objection was that "exclusion of the subject objection site from the scheme plan would affect the integrity of the

proposed LDC scheme". Notification of rejection of the objection was given to the appellants by letter of 1st June 1991. Four days previously the Governor in Council had approved the draft scheme plan under section 9 of the Town Planning Ordinance.

On 7th September 1990 the Town Planning Board approved a master layout plan for the scheme prepared by the LDC subject to conditions and on 26th March 1991 this layout plan, incorporating the conditions imposed by the Board, was forwarded to it by the LDC for deposit in the Land Office in accordance with section 4A(3) of the Town Planning Ordinance, which deposit took place on 16th September 1991.

While these events had been taking place the LDC had been attempting to acquire all the properties within the scheme by agreement. An initial offer was made to the appellants on 31st May 1989. A revised offer was made on 4th May 1990 and an increased offer on 18th May 1990. A further increased offer was made on 30th September 1991 by letter which stated that if it was not accepted the LDC would have no alternative but to ask the Government to resume the land. A fifth increased offer was made on 6th March 1992. The appellants refused all five offers. On 2nd April 1992 the Secretary, at the request of the LDC, recommended to the Governor in Council under section 15 of the Land Development Corporation Ordinance the resumption of the four properties. Resumption was approved by the Governor in Council on 14th April 1992 under section 3 of the Crown Lands Resumption Ordinance.

By letter of 15th May 1992 Mr. Chim Pui Chung, the sole beneficial owner of the two appellant companies, wrote to the Governor complaining about the LDC scheme and requesting that the four properties be excluded therefrom so that he could develop them through his own companies. The letter made no mention of any right of way over property 1. The Governor replied by letter of 30th May 1992 which included the following paragraph:-

"You also suggested that owners' participation and redevelopment by owners should be practicable. That could be the case in some instances. However, one of the reasons for setting up the Land Development Corporation was to counter the problems of haphazard piecemeal redevelopment arising from multiple land ownership, absentee owners and title problems. Moreover, owners' participation is not feasible within the terms of the existing joint venture redevelopment proposed for the Jubilee Street Scheme. This arrangement is necessary for the Corporation to obtain funds for implementation of the Scheme, with the developer providing substantial upfront payments and subsequent financial commitments, including payments for compensation and rehousing."

Solicitors acting for Mr. Chim wrote to the Governor on 1st June 1992 stating that he had offered to redevelop the properties in such a manner as to give a right of way on the ground floor from Des Voeux Road to the area of the scheme and that accordingly acquisition of his land for the purposes of the scheme was unnecessary. No answer was received to this letter but on 18th June 1992 the appellants made application for leave to apply for judicial review.

This application was based on the following grounds namely:-

- (1) that because of an offer by Mr. Chim to redevelop his properties in such a way as to provide vehicular access to the scheme LDC's application to the Secretary to recommend resumption to the Governor, because LDC had been unable to acquire land, was based on a false premise and therefore void.
- (2) Alternatively since the purposes of the approved plan could have been achieved without resumption the application was unnecessary and of no effect.
- (3) The Secretary's recommendation to the Governor in Council was *ultra vires* in that either (i) if he had made enquiries he could not have been satisfied that all reasonable steps to acquire the land had been taken, (ii) if having made enquiries of the LDC he had not been informed of Mr. Chim's proposal his recommendation was based on a false premise and therefore void, and (iii) if he had not made enquiries of the LDC he had failed to satisfy himself that all reasonable steps had been taken.
- (4) For the foregoing reasons the Governor in Council's decision was void.

Mayo J. in refusing the application rejected the argument that every possible alternative should have been considered before resumption took place. He held that Mr. Chim's offer of access was insufficiently specific to enable the LDC to consider plans based thereon and that the TPB had considered a ground floor right of way and rejected it. He also held that there was no statutory duty on the LDC to consider owner participation in the development and that it would have been quite impracticable to have entered into discussion with all the owners in the area with a view to such participation. Having held that the appellants had failed to come up with any viable alternative to the scheme plan he concluded that none of the grounds in the application had been made out. The Court of Appeal dismissed the appeal without calling upon the respondents.

Before the Board Mr. Purchas Q.C., who had not appeared in Hong Kong, argued for the appellants that since resumption involved forcible deprivation of property there were three safeguards which had to be satisfied before it could take place. These were:-

- (1) There was a precondition of objective fact under section 15(2)(a) of the Land Development Corporation Ordinance that the LDC was unable to acquire the land.
- (2) There was a further precondition under section 15(3)(b) that the Secretary had to be satisfied that the LDC had taken all reasonable steps to acquire the land, and
- (3) The discretion to be exercised respectively by the LDC, the Secretary and the Governor had to be exercised on *Wednesbury* principles by asking the right questions and obtaining the correct information to answer these questions.

The LDC, argued Mr. Purchas, had failed to consider whether the scheme could not be implemented with some sort of participation therein by the appellants or whether the access offered would not have been sufficient for this purpose. Instead it had tied its hands by entering into a contract with a single developer thereby wrongly fettering its discretion. In any event the LDC was bound to consider every alternative to resumption whether raised by the appellants or not as were also the Secretary and the Governor. The appellants' arguments necessarily involved seeking to reopen at the stage of resumption the appropriateness of the development scheme in so far as it included their properties, a matter which had already been decided against them by the TPB on two occasions. The arguments also involved challenging, by implication, if not directly, the decision of the LDC that the whole development should be undertaken by a single developer.

The appellants relied strongly on their offers of access through the ground floor of property 1. These offers were alleged to be three in number, namely:-

- (1) that made at the meeting of the TPB on 13th October 1989,
- (2) an oral offer made by Mr. Chim to Mr. Razack, Chief Executive of the LDC, in May 1991, and
- (3) the letter of 1st June 1992 to the Governor.

Mayo J. made no finding of fact in relation to the second offer as the reference to it in Mr. Chim's affidavit was completely denied by Mr. Razack in his affidavit and no application was made by the appellants to cross-examine the latter. Notwithstanding the appellants' criticism their Lordships have no doubt that the judge dealt with the matter correctly (*Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] B.C.L.C. 472 at page 476h). Accordingly the appellants can rely only upon two offers made in entirely general terms more than 2½ years apart.

The question of access was also raised by members at the meeting of the TPB on 23rd November 1990 and the appellants argued that paragraph 32 of the minutes thereof was tantamount to approval by the meeting of the feasibility of providing access at ground floor level and that this should have been considered and given effect to by the LDC. This argument takes far too much out of the paragraph. Given the views of Mr. M.C.T. Ma recorded in paragraph 29(c) of those minutes and given the fact that the appellants' development proposals before the meeting did not include the provision of access it is obvious that paragraph 32 was referring solely to the question of possible owner participation in the scheme. LDC cannot therefore be criticised for failing to reconsider the scheme in such a way as to accommodate a ground floor access running through properties to be retained by the appellants.

Reliance on the two offers of access, of which only one was made before the resumption procedure was completed, really amounted to an attack on the LDC for deciding that the whole development scheme should be carried out by it jointly with a single contractor. The reason for this decision is contained in the paragraph already quoted from the Governor's letter of 30th May 1992 and is more fully set out in the second affidavit of Mr. Razack as follows:-

"6. ...

- (1) LDC was only set up in 1988. It was only granted an interest bearing loan facility of HK\$100 million by Government. With the limited funding, the only commercially viable option for LDC for the first batch projects, including the subject scheme, was to invite a private developer as a joint venture partner who would provide substantial upfront payments and financial commitments, including payments for compensation and rehousing. As the same time, the private developer would also have to be able to carry out comprehensive redevelopment for the enhancement of the environment. Further, when LDC started on the first batch of projects, there was a great deal of uncertainty as to how long the process of planning, land assembly and the relevant procedures would take, and with such important unknowns, it was considered unwise, if not impossible, to embark on the project on the basis of owners' participation."

This evidence was not challenged. Their Lordships do not doubt that the LDC decision was entirely reasonable and they are satisfied that they did not wrongfully fetter their discretion by entering into a contract with a single developer. Once the draft development scheme plan with the four properties included therein had been approved by

the TPB and thereafter by the Governor in Council it became inevitable that the LDC would seek to acquire the properties either by negotiation or by resumption. In these circumstances the statutory procedure having been properly followed the LDC was fully justified in making application to the Secretary under section 15(1) of the Land Development Corporation Ordinance.

The appellants argued that the Secretary, when making the recommendation to the Governor in Council for resumption of the four properties, had failed properly to satisfy himself that the LDC had "taken all reasonable steps to ... acquire the land" within the meaning of section 15(3)(b) of the Land Development Corporation Ordinance. They accepted that if "the land" for the purposes of that subsection consisted of the solum and the buildings thereon this argument would fail on the facts. However land could include a lesser interest and although an owner could not be compelled to create such an interest the position was different when he offered it. Therefore the LDC could have acquired the right by acceptance of the appellants' offer and the Secretary could not be satisfied that the LDC had been unable to acquire it with the result that his exercise of judgment was open to challenge (*Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, Lord Wilberforce at page 1047C-F).

There are three answers to this argument namely:-

- (1) The land within the area of the plan referred to in section 15(2)(a) included the whole of the appellants' properties both solum and buildings thereon (section 2 of the Crown Lands Resumption Ordinance) and the land referred to in section 15(3)(b) must bear the same meaning.
- (2) Even if land in section 15 is capable of including an easement or other lesser right, a matter upon which their Lordships find it unnecessary to express an opinion, it is clear that the section is referring to land which is already in existence and not to land whose creation arises from the acquisition or resumption process. Property 1 was subject to no existing easement.
- (3) In any event when the Secretary made his recommendation to the Governor in Council to resume, nearly 2½ years had elapsed since the single offer of access had been made and there was no reason to suppose that the offer was still a live issue.

The appellants further argued that the Secretary and the Governor should both have considered afresh alternative means of carrying out the development scheme which did not involve resumption, even to the extent of applying their minds to possible alternatives which had

not been advanced by the appellants. Their Lordships have no hesitation in rejecting this argument. There is nothing in either the Land Development Corporation Ordinance or the Crown Lands Resumption Ordinance which requires such consideration. Section 15 of the Land Development Corporation Ordinance requires the Secretary to satisfy himself that the LDC has taken all reasonable steps to otherwise acquire the land and nothing more. It does not require him to reconsider the merits or mode of implementation of the scheme.

Likewise in the case of the Governor in Council there is no requirement upon him to reconsider the merits of the scheme. Section 15(6) deems a resumption recommended under section 15 to be for a public purpose. When the Governor in Council exercises a discretion under section 3 of the Crown Lands Resumption Ordinance the merits of the scheme plan are no longer in issue and the only matter which the Governor in Council has to consider is whether resumption of land within the area of the scheme plan is required in order to enable the plan to be carried out. The appellants had refused five separate offers for their properties and there was accordingly ample evidence that the LDC had failed to acquire them and that resumption was accordingly required.

The appellants also complained that they had received no warning of the commencement of the proceedings for resumption. It is correct that they received no formal warning because the statutory procedure does not require one but it would be naive to assume that they were unaware of the probability of resumption if the LDC could not acquire the property. The possibility of resumption was mentioned in the explanatory statement of March 1990 annexed to the scheme and was specifically mentioned in the LDC's letter of 30th September 1991 containing the fourth offer for the property. It is, of course, correct that the statutory procedure for resumption provides no opportunity for an individual affected thereby to object. However their Lordships consider that Mr. Griffiths Q.C., for the respondents, was correct in submitting that in cases such as the present the public interest considerations are dealt with at the earlier planning stage when plans are before the TPB and the Governor in Council for approval, and at the stage of resumption the only question is whether the LDC have or have not been able to acquire land which has already been held to be necessary for the implementation of the plan.

Although their Lordships have dealt at some length with the arguments of the appellants the decision of this Board could be summarised as follows:-

- (1) The appellants' properties were included in the area of a development scheme plan approved by the Town Planning Board after objections and by the Governor in Council and as such were land within the area of a plan for the purposes of section 15(2)(a).

- (2) These approvals were not challenged as being unlawful.
- (3) The LDC were unable to acquire the properties by negotiation after many attempts.
- (4) The Secretary was therefore entitled under section 15(3)(b) of the Land Development Corporation Ordinance to recommend resumption to the Governor in Council.
- (5) The Governor in Council could properly order resumption since reasonable steps to acquire the properties had failed.
- (6) During the process of resumption there was neither statutory nor any other duty, on the part of the LDC, the Secretary or the Governor to consider possible alternatives to resumption which had not been canvassed by the appellants.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before this Board. It only remains to mention that at the conclusion of the arguments above referred to Mr. Purchas sought leave to amend the pleadings and to adduce further evidence which had become available since the hearing before the Court of Appeal and which would, it was said, demonstrate that the resumption order was made for collateral or ulterior purposes. Their Lordships took the view that these matters, if they have merit, could more appropriately be dealt with by a fresh application for leave to apply for judicial review in the Hong Kong courts and refused the application.