Town, NZ Law Reports

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IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M.212/84

[redacted]

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IN THE MATTER of an Appeal pursuant to Section 162 of the Town and Country Planning Act 1977

AND

IN THE MATTER of the Local Government Act 1974

BETWEEN WELLINGTON CITY COUNCIL a Local Body under the Local Government Act 1974

Appellant

AND VICTORIA STREET PARKING CENTRE LIMITED a company having its registered office at Wellington

Respondent

Hearing 26 September 1984

Counsel P C Mitchell for Appellant
R J B Fowler for Respondent

Judgment 29 October 1984

JUDGMENT OF DAVISON C.J.

This is an appeal from a decision of the Planning Tribunal given on 17 April 1984 in which it found that the respondent ("Victoria") is not liable to pay to the appellant ("the City Council") a reserves contribution but to pay only a development levy in relation to the development of a car parking building.

THE FACTS

Riddiford Holdings Ltd as trustee entered into a contract to purchase the leasehold of 2437 sq.m. of land bounded by Victoria Street, Willeston Street and Jervois Quay Wellington; that land is comprised in one Certificate of Title. Victoria was incorporated in

July 1982 with an authorised capital of $9,285,000 and with the intentions that it should take over the benefit of the contract to purchase the leasehold interest and that it should cause a car parking building to be constructed on the land. The parking building was planned to have 14 levels, a service station to occupy the ground level fronting Jervois Quay. In due course Victoria made an issue of shares and invited subscriptions from the public. In the prospectus it was stated that the issue was being made "to provide investors with an opportunity to purchase a permanent car park in the Europa Car Park". It was further stated that applications must be for whole groups of shares, representing the right to occupy car parks and/or service station areas. The prospectus further discloses the intention upon final completion of the building to prepare and deposit a unit title plan so that each owner of shares receives a unit title for their respective car parks and for service station areas; and it records that upon deposit of the plan Victoria will be dissolved and that thereafter management of the building will be by a committee of the body corporate established by the Unit Titles Act 1972. The shares were duly subscribed, the building erected and the unit plan prepared.

Victoria submitted the unit title plan to the City Council for the certificate required by s 5(1)(g) Unit Titles Act 1972 and for the approval of certain rights of way under s 348 Local Government Act 1974.

The City Council then required payment of a "reserves contribution" of $272,211.

The power to require a "reserves contribution" arises only if what Victoria is doing amounts to the subdivision of the land. Victoria brought an appeal against the requirement that it pay $272,211, contending that what it is doing is not a subdivision of the land. But it concedes that what it is doing is subject to a "development levy"; the levy would amount to a much lesser sum.

THE APPEAL

The City Council claims that the Tribunal erred in law in concluding that Victoria had not effected a subdivision of its land.

The issue is - Was there a "subdivision"?

DECISION

The starting point is the definition of "subdivision" in s 271 of the Local Government Act 1974. Subs (1)(a) is relevant to this appeal:

> s271 (1) For the purposes of this Act land shall be deemed to be subdivided, if (being a continuous area of land)-
>
> (a) Being land subject to the Land Transfer Act 1952 and comprised in one certificate of title, the owner thereof, by way of sale, disposes of any specified part thereof less than the whole, or advertises or offers for sale any such part, or makes application to a District Land Registrar for the issue of a certificate of title for any part thereof less than the whole. "

"Sale" is defined in s 270 as:

> " 'Sale' includes exchange, gift, devise, or other disposition affecting the fee simple, and lease for any term (including the term or terms of any renewals to which the lessee is entitled) of not less than 14 years; and also includes any disposition affecting the leasehold interest under any such lease; but does not include the granting of a conservation covenant under section 77 of the Reserves Act 1977. "

The Tribunal held:

> " The division (of the building) into units is not for the purposes of sale of units. "

Mr Mitchell submitted, however, that one must look at the several transactions by which persons make

application for shares in Victoria entitling them to a car park and later receive a unit title to that car park and regard them as one transaction which amounts in substance to a sale. He instanced the steps in the transaction as follows:

(a) The Riddiford Company wished to build a carparking building and then market the individual carparks.

(b) For this purpose it promoted a new company (the respondent) and transferred the land to it.

(c) It (the respondent) then entered into a contract for the construction of the building and issued the prospectus.

(d) Subscribers paid for the shares and received a carpark. In turn the company paid the builders and the promoters.

(e) The end result is that money and property have changed hands. At the commencement of the transaction land was owned by a newly formed company; at the end of the transaction the land is owned in small individual unit titles by a large number of persons and companies.

Mr Mitchell's submission was "not that the transactions are in fact one transaction but that the effect of the transactions as a whole, is what determines the substance of the transactions. The appellant can thus concede that there is no element of purchase and sale as those words are normally understood in respect of the share subscription; and it can also concede that the respondent's eventual resolution to convert its land to unit titles is not of itself a sale to its member. What

it does say is that the effect of the transaction is to dispose of an interest in land held by the respondent at the commencement to persons who subscribed for its shares.

I do not think it is proper to so wrap up a series of events into one parcel and call it a sale. In this case for there to be a "sale" in terms of the definition in s 270 there must be either a disposition of the fee simple or a lease for a term of not less than 14 years. But what has happened here is that a person applied for shares in a company. On allotment of those shares that person by virtue of his ownership of the shares became entitled to the occupation of one car park or unit in the building on a 99 year lease. Such was not a sale made of the fee simple by the owner of the land within the definition of sale in s 270. It did, however, involve a lease for not less than 14 years which is included in the definition of sale, but a sale by way of lease is specifically excluded from resulting in a subdivision by s 271(4)(a) and s 271(4)(b)(i) which provide:

> s271(4) " Notwithstanding anything in this section, land shall not be deemed to be subdivided for the purposes of this Part of this Act by reason solely of the fact that -
>
> (a) The owner or owners grant or advertise or offer a lease of any part of a building on or to be erected on the land; or
>
> (b) The owner or owners -
>
> (i) Grant or advertise or offer a company lease or cross lease in respect of the land.
>
> (ii) ...
>
> being a lease of a building or part of a building or, as the case may be, units intended to be used solely or principally for residential or commercial or industrial purposes, or any 2 or more such purposes. "

From the point of time when the shares are allotted and the lease is granted the Company as the owner of the building has no further control over the disposal of the car parks or units. Nothing done thereafter by the shareholders of the company by resolution, and nothing arising by way of operation of law, can thereafter make the allotment of shares and the grant of a lease a transaction amounting to a sale of the type resulting in a subdivision as defined in s 271 of the Act by the owner of the land.

Once the Company resolves to deposit a unit plan then by virtue of the provisions of the Unit Titles Act 1972 on deposit of that plan the shareholders become owners of the relevant units and the Company is dissolved by statute. Under that procedure there is no sale or disposal of any land.

I agree with the Tribunal when it said:

> " I do not accept that the course of events from the formation of the company to the deposit of the plan constitutes one transaction. Notwithstanding the phrases used in the prospectus, what the subscribers obtained was a parcel of shares in Victoria and the right to occupy certain space. The shareholders of the company are a different body of persons from the promoters. It required a unanimous resolution of the shareholders (or an order of the Court) to commence the process which converts their rights into direct interest in land. I hold that the conversion of those rights is not a disposition of the shareholders 'rights'; the rights do not pass into the hands of others, they are changed into a different form. "

Furthermore, the division of land into units under the Unit Titles Act 1972 is expressly excluded from being a subdivision of land: see s 271(4)(b)(ii) Local Government Act 1974:

s 271(4) " Notwithstanding anything in this section, land shall not be deemed to be subdivided for the purposes of this Part of this Act by reason solely of the fact that -

(b) The owner or owners -

(ii) Divide the land into units under the Unit Titles Act 1972. "

Mr Mitchell further submitted that if the transactions effected by Victoria did not amount to a sale such as to make the dealings with the land a subdivision then the company did in terms of s 271(1)(a) of the Act "advertise or offer for sale" a specified part of the land less than the whole and thus create a subdivision.

Reference was made to statements in the prospectus:

p.2: " This issue is being made to provide investors with an opportunity to purchase a permanent car park in the Europa Parking Centre which will be created by the Company on a site bounded by Victoria Street, Willeston Street and Jervois Quay within easy walking distance of central Wellington.

p.7 Victoria Street Parking Centre Limited was incorporated on 28th July 1982. The company provides an opportunity to purchase shares entitling the owner to a permanent car park in the Europa Parking Centre to be erected in Victoria Street, Wellington.

p.11 The purchase of prime city real estate is usually beyond the financial abilities of the individual because of the capital investment required.

By participation in this issue, the subscriber is able to buy central city real estate. "

The mere use of the terms "sale" and "purchase" in those contexts does not however constitute a transaction a "sale" unless the constituent elements of the transaction do so.

Victoria did not advertise or offer for sale part of its land. It merely offered to receive applications for shares in the Company and on allotment of those shares, the shareholders became entitled to occupy permanent car parks in the building. They were thereafter entitled to leases of the car parks for 99 years. No matter what may have been said in the prospectus, neither the allotment of shares nor the granting of a lease for 99 years constitutes a subdivision - the lease being prevented from creating a subdivision by s 271(4)(a) and (b). Although subs (4) is qualified by the words "by reason solely of the fact", there are no other reasons why a subdivision should be created in the present case and the exclusions granted by s 271(4)(a) and (b) are effective.

The subsequent conversion of the leasehold titles into Unit Titles was effected pursuant to s 4 of the Unit Titles Act 1972 by operation of law following the deposit of the unit plan. Neither an advertising nor an offering for sale such as to create a subdivision is established in the present case.

For the foregoing reasons, which are substantially those given by the Tribunal, I am satisfied that the Tribunal decision was correct and no reserves contribution is payable by Victoria.

In the course of argument Mr Fowler submitted as an alternative basis of argument that the Lewis case (H & E Lewis Properties Ltd v Wellington City Council W60/83 Planning Tribunal, No 2 Division, 1 September 1983) was wrongly decided. I have not found it necessary to consider this argument as, in my view, it is not applicable to the circumstances of the present case.

The appeal is dismissed. Costs reserved.

R C Dawson C.J.

Solicitors for the appellant City Solicitor (Wellington)

Solicitors for the respondent Phillips, Shayle-George (Wellington)