

HONG KONG / JUDGMENT

FINE TOWER ASSOCIATES LTD v. TOWN PLANNING BOARD

COURT

Court of Appeal

DECIDED

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bjbj cacv 356/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 356 of 2006 (on appeal from high court Constitutional & administrative law list NO. 61 of 2006) BETWEEN FINE TOWER ASSOCIATES LIMITED Applicant/Appellant and TOWN PLANNING BOARD Respondent/Respondent Before: Hon Ma CJHC, Stock JA and Chung J in Court Date of Hearing: 10 July 2007 Date of Judgment: 27 July 2007 J U D G M E N T Hon Stock JA: The issue The question in this case is whether the effect of an outline zoning plan that sets apart a zone for a specified use which is inconsistent with the use permitted by conditions of grant or exchange to an owner of property within the zone, amounts to a deprivation of that owner s property, entitling him therefore to compensation. The facts On the waterfront at Quarry Bay, there lie two lots of land in the ownership of the appellant, Fine Tower Associates Limited (Fine Tower). The lots are numbered 8590 and 8723. The lots were granted to Fine Tower s predecessor-in-title, China Oil Co Ltd, in 1985 and 1989 subject to conditions of exchange. In 1993 Fine Tower purchased the lots from China Oil for the sum of HK\$150million. It was a provision of the Conditions of Exchange in the case of each lot that: the Grantee shall not use the lot or any part thereof for any purpose other than for industrial and /or godown purposes including the bulk storage and distribution of petroleum products and other petrochemical fluids (emphasis added); and a further provision in each case that no part of any structure erected on the lot shall exceed a height of 85.34 metres. In the case of Lot 8723, there was a requirement that upon initial development the grantee was to construct an oil depot. Failure of the grantee to observe any of these conditions conferred on the Government the right of re-entry. At the time of the acquisition of the lots by Fine Tower, the prevailing draft Quarry Bay Outline Zoning Plan (OZP) designated the area as Industrial and Government, Institution or Community zones. It follows that the zoning designation and the use permitted by the Conditions of Exchange did not then clash. The two lots have never been used by Fine Tower for the purposes envisaged by the Conditions of Exchange. For much of the time, the company has, upon payment of a forbearance fee, and waivers, used the area or part of it as a car park. Plans were submitted for construction of an oil depot but the plans were rejected. Thereafter Fine Tower or its holding company proposed use of the area for a number of different purposes, each of which would have required modification of

the uses permitted by the Conditions. In 2000 Fine Tower's holding company, Concord Properties (Holdings) Ltd, sought an amendment to the Quarry Bay OZP to Comprehensive Development Area (CDA) to enable development of a tourism and recreation area on the waterfront which would include re-created old Hong Kong buildings. In 2001 that proposal was withdrawn and a revised scheme was tendered that envisaged the use of Fine Tower's lots and adjacent Government land for hotel and retail facilities. The proposal was not accepted because the suggested CDA zoning was considered inappropriate for leisure and tourism development. What, however, was agreeable to the Management Planning Committee of the Board was the concept of a leisure and tourism-related development with a promenade, and the zoning appropriate for such a development concept, to include the area of the two lots, was Open Space) and Other Specified Uses , with an annotation Cultural and /or Commercial, Leisure and Tourism Related Uses (1) OU(1)). In accordance with this concept the Town Planning Board, on 4 April 2003, exhibited the Draft Quarry Bay Outline Zoning Plan No S/H21/18 according to which 44% of the lots would be rezoned as Open Space and 55% Other Specified Use with the annotation to which we have referred. There was imposed by the Plan a height restriction of 35 metres for the area on which development was to be permitted; a height considerably lower than that requested by Fine Tower. Objection was submitted by Fine Tower to the draft OZP, accompanied by a proposal for changes to it for Other Purposes classification with height restrictions of 85 and 50 metres respectively for the two lots. The objections advanced included a contention that the rezoning of the lots by the Draft OZP would, if adopted, eliminate Fine Tower from using the lots for the only purpose for which they had been granted, that use of the lots for the or purposes now proposed by Draft OZP would entitle the Government to re-enter the lots and that, accordingly, the Draft Plan, if implemented, was to effect a de facto resumption of the lots without compensation, contrary to art. 105 of the Basic Law. A meeting was held on 5 September 2003 by the Board to consider the objections and on 26 September 2003, after the receipt of legal advice, the Board decided against the objections and to make no amendments to the Draft OZP. That is the decision in respect of which an application was made by Fine Tower for leave to apply for judicial review. By that application Fine Tower sought an order of certiorari to quash the decision, a declaration that it contravened arts. 6 and 105 of the Basic Law and an order that the Board reconsider the matter in accordance with the findings of the Court. Leave was given and the review was successful before Hartmann J because of infringement of procedural fairness. The Board reconsidered the matter but came to the same conclusion and the decision was challenged afresh before Reyes J who, by a judgment dated 8 September 2006, dismissed the application for judicial review. This is the appeal from that judgment. The argument Art. 105 of the Basic Law provides, in its first clause, that: The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for unlawful deprivation of their property. Art. 6, which adds nothing to the argument, requires the Region to protect the right of private ownership in accordance with law. It is not suggested that the power of the Town Planning Board conferred by the Town Planning Ordinance, Cap 131, to make provision for zones to be set apart for specified uses even where the use prescribed by a zoning is inconsistent with the use permitted by a grant to the owner of land within that zone is, for that reason,

unconstitutional. Nor is it suggested that the zoning now proposed does other than advance legitimate public interests. The argument is rather that such a step deprives the owner of all economically viable present use of the lots, so that for practical purposes it constitutes a taking of the property and, that being so, compensation is payable. Yet in reaching its decision to reject Fine Tower's amendments to the Draft OZP and to categorise the future zoning as it did, the Board rejected the submission that the effect would be a de facto deprivation of property. It is the rejection by the Board of that argument that is said to render unlawful the decision to make no amendment to the Draft OZP. Mr Dykes SC for Fine Tower says that use of property is an essential attribute of ownership and so much is evident if it were not otherwise obvious from art. 105 itself with its express reference to . It is only through use of a property that the owner can derive from it income and other benefits. If there arises a state-imposed limitation on the use of land that precludes its use for the only purpose permitted by the terms of contract under which the owner holds that land, it must follow that what the owner holds is mere legal title with no economically viable use. A deprivation of land, according to established principle, is not effected solely by a formal expropriation or by a physical invasion of all or part of the land but also by an act that nullifies any meaningful economic benefit in the property. It is no answer, says Mr Dykes, to point to the possibility of lease modification such as would ensure that the uses permitted by the lease and the zoning requirements coincide, for there rests upon the Government, acting in its private capacity of landlord, no obligation to modify the lease and no power in a third party, in this case the Town Planning Board, to require a modification. To look to the possibility of a modification is to speculate and to have regard not to a right but, at best, to a hope, a hope that, he says, has no compensable value. And even if there were a modification, the development area has by reason of the OZP, with its limited area for development and its height restriction, been reduced to a mere 8000 square metres, as opposed to the present 37161 square metres, thereby denuding the lots of their economic value in the hands of Fine Tower. The respondent, through Mr Jat SC, submits that deprivation in art. 105 is used in the sense of expropriation, a point supported he _ (u e version, which in the event of discrepancy between the English and Chinese versions must prevail , is of no consequence for it is correctly conceded that it is to the reality rather than to the form to which the courts will look to see whether there has been expropriation, and that if the effect of regulation is to denude a property of all meaningful economic value, deprivation in the sense intended by art. 105 has occurred even though through no formal act by that name. The law What we are concerned with in this case is a restriction on the use of property. It can safely be postulated as a general proposition that regulatory restriction on use, imposed in the public interest, that does not amount to a taking or deprivation of the property, gives no right to compensation: see *Grape Bay Ltd v Attorney-General of Bermuda* . But it is well established that action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances nonetheless properly be described as deprivation, in which case there is a right to compensation. To ascertain whether there has been a deprivation, the court looks to the substance of the matter rather than to the form: In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the [European] Convention [on Human Rights] is intended to guarantee rights that are

"practical and effective", it has to be ascertained whether that situation amounted to a de facto expropriation *Sporrong and Lonnroth v Sweden* See also *Grape Bay* above . Absent a formal expropriation, the question whether there has been a de facto deprivation of property is perforce case specific, a question of fact and degree: The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. *Pennsylvania Coal Co v Mahon* The question begged by that rule when will a regulation or other governmental act be seen as going too far has been discussed most particularly by the European Court of Human Rights, in the context of art. 1 of Protocol no 1 of the European Convention on Human Rights and, in the United States, in the context of the Fifth Amendment . The United States approach is encapsulated in *Lucas v South Carolina Coastal Council* In 70 odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engag[e] in essentially ad hoc, factual inquiries, *Penn Central Transportation Co v New York City*, 438 US 104 . We have, however, described at least two discrete categories of regulatory action as compensable without a case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins* [447 US] at 260. We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. Surely, at least, in the extraordinary circumstance where no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life." *Penn Central Transportation Co.*, 438 US, at 124 in a manner that secures an "average reciprocity of advantage" to everyone concerned [*Mahon*] 260 US, at 415. And the functional basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" [*Mahon*] at 413

- does not apply to the relatively rare situations where the government has deprived a land owner of all economically beneficial uses. On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave

his property economically idle, he has suffered a taking. (Each emphasis is original). Whether there has been a taking requires essentially ad hoc, factual inquiries and in the Penn Central case we see reference to investment-backed expectations as one relevant consideration: the Court decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. In its reference to distinct investment-backed expectations the Court no doubt had in mind reasonable investment-backed expectations, and that is the phrase used by the Court in *Anthony Palazzolo v Rhode Island*. That has a relevance in this case to which I shall return. The approach applied by the European Court to the question is essentially the same as that applied by the United States Supreme Court, and it has been summarised in Mulcahy (ed.), *Human Rights and Civil Practice* thus: A de facto expropriation of this kind can only occur where there has been so substantial an interference with the ownership and use of the possession concerned that it effectively equates to the total extinction of ownership notwithstanding the fact that the owner retains legal title. Deprivation may thus occur if the owner is deprived of all meaningful use of his property. However, any form of provisional or temporary loss of rights is very unlikely to constitute deprivation. Equally, interferences which do not affect the value of the possession at all, or which affect its value to a severe degree but not so as to render it worthless, are also unlikely to be considered deprivations. A finding of de facto expropriation is accordingly, and is likely to remain, extremely rare." In his judgment, Reyes J helpfully summarised the facts and effect of *Sporrong*, a passage from which is cited at [REF _Ref172370404 \r \h] above, as he did with illustrative decisions from other jurisdictions. In *Sporrong*, the Court, by a majority held that there had been no deprivation of property despite the existence of expropriation permits granted to the city council by the government though the land was not in the event formally expropriated and prohibitions on construction. No applications, save one for a minor work, had been made by the owners of the affected estate for exemption from the prohibition. The Court noted that although the right to peaceful enjoyment of the property had been contravened, and the right of property lost some of its substance, it did not disappear. The applicants remained in ownership and retained the right to dispose of their properties. They could continue to use their property and although the possibility of selling was rendered more difficult, it subsisted nonetheless and several dozen sales had been effected. In *Pine Valley Developments Limited v Ireland* the first applicant had purchased land and in doing so had relied on a grant of planning permission for industrial warehouse and office development. An application was made by Pine Valley for planning permission but this was refused on the basis that the site was zoned for agricultural development in order to preserve a green belt. A court challenge resulted in a declaration that the outline planning permission had been ultra vires. As a result the land could not be developed and its value was substantially reduced. The contention was that by reason of that declaration, denuding the planning permission of its utility, there was constituted a deprivation of possession within the meaning of the first paragraph of art. 1 of Protocol No

1. In rejecting that contention, the Court said There was no formal expropriation of the property in question, neither, in the Court's view, can it be said that there was a de facto deprivation. The impugned measure was basically designed to ensure that the land was used in conformity with the relevant planning laws and title remained vested in [the second applicant who had purchased the land from Pine Valley], whose powers to take decisions concerning the property were unaffected. Again, the land was not left without any meaningful alternative use, for it could have been farmed or leased. Finally, although the value of the site was substantially reduced, it was not rendered worthless, as is evidenced by the fact that it was subsequently sold in the open market. The theme thus sounded in the jurisprudence of the United States and by the European Court, that de facto deprivation for the purpose of establishing a right to compensation, contemplates the removal of any meaningful use, of all economically viable use, has been echoed by the Court of Appeal in England in Regina (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs as well as by the Privy Council in La Compagnie Sucriere de Bel Ombre Ltd v Government of Mauritius and in Grape Bay. This case It follows that it is incumbent on Fine Tower in the present case, if it is to succeed in its challenge, to establish the burden being on the party that makes the assertion that by reason of the outline zoning plan it has lost all meaningful use of the two lots, or in the words of Agins, has been denied economically viable use of its land, which amounts to the same thing. I am satisfied that Fine Tower does not begin to establish that it has lost economically viable use its land. It would be facile to suggest and it is not suggested that it cannot sell its land. As Reyes J remarked: Dykes accepts that Fine Tower s lots retained value. That value may possibly be less than what it was before the draft OZP was issue. But the lots have been and continue to be marketable. No evidence has been filed on behalf of Fine Tower as to the present market value of these lots. In so far as it is said that the question of modification it is purely speculative, that is not so. It is the uncontradicted testimony of a senior estate surveyor in the District Lands Office at Hong Kong East that it is the prevailing Government policy to modify old lease conditions in order to allow redevelopment of lots complying with the applicable town planning requirements. More than that, he adds that in the present case the Lands Department is prepared to process the lease modification in respect of the lots by way of land exchange on a foot for foot site area basis in accordance with the land exchange policy so as to facilitate the implementation of the planned OU [Other Uses] use and layout if an application for that were received. In any event, it is also idle for Fine Tower to contend or imply that it has now been forced into a position to put these lots on the market or that the uses permitted it under the outline zoning plan present no use which is of interest to the company itself. The history of this case belies any such suggestion. The company has itself proposed uses entirely inconsistent with the uses permitted by the Conditions of Exchange. All that has happened is that there are details, albeit significant details, which transpire not to be to its liking, namely, the inclusion of a large area of open space and a height restriction significantly lower than that proposed by Fine Tower. It would remain open to Fine Tower to develop upon 55% of the lots and who is to say that such a development, even with the height restriction imposed, for the new purposes permitted, would not be even more

valuable than the purposes permitted by the Conditions of Exchange, purposes which all these years have not been put into effect by Fine Tower. It is also inappropriate to isolate the open space and to say that it has no value, for value is to be judged by the use to which the lots as a whole may usefully be committed and, depending on the nature of a development, open space can be put to creative use as an adjunct to the rest. It can readily be seen therefore why it is that to erect any hope of success in this legal challenge, Mr Dykes is driven to freezing time, requiring the court to ignore the prospect indeed, in this case, the virtual certainty of a lease modification. That, he says, is what we have to do, for we have to concentrate on the present conundrum, the deprivation of present use, which he says is faced by his client. In support of this proposition he asserts that the hope or expectation of obtaining a modification of the terms of a lease is, as a matter of law, not a compensable interest. For this assertion, he relies on the judgment of the Court of Final Appeal in *Director of Lands v Yin Shuen Enterprises Ltd*, in which it was held that the probability or expectancy of obtaining a modification of the user covenant in a lease was to be ignored for the purpose of an assessment of compensation on land resumption. The problem with Mr Dyke's contention is that it ignores the context of that judgment. That was a decision made in the light of a specific statutory provision, namely, section 12(c) of the Land Resumption Ordinance, Cap 124, which subsection provides that [n]o compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance by the Government or by any person, of any licence, permission, lease or permit whatsoever. Most particularly, Lord Millett explained that: In the absence of s 12(c), therefore, compensation for the subject lands would be based in the first instance on their value subject to the restrictions in the relevant lease. But regard would also have to be paid not only to the likelihood or otherwise of the Government granting a modification of the terms of the lease, without which the development potential of the lands could not be realised, but also to the costs of obtaining such modification, including the payment of any premium which the government might demand as the price of modification. The test for present purposes is unencumbered by such a statutory provision. It requires one to ask whether, despite the newly imposed restriction on use, the owner nonetheless enjoys an interest that is economically viable, and if it has a meaningful market value then he clearly does. In *Yin Shuen Enterprises*, Lord Millett remarked that: Purchasers are often willing to pay more for land than its intrinsic value would justify. Thus the land may be used for an illegal or non-conforming purpose. In a free market purchasers may be willing to buy such land in the hope or expectation that the current use will continue to be tolerated. Adapting those sentiments to the present situation and assuming an inappropriate assumption, as it happens that the only uses of interest to Fine Tower are those specified in the lease, there can be little question but that purchasers would be willing to acquire these lots in the expectation that the conditions of the lease will be modified. The ramifications of the proposition advanced by Mr Dykes, if correct, would be alarming and, in the context of this particular case, bizarre. They would be alarming because it would open the floodgates to compensation each time a new outline zoning plan was promulgated that sat inconsistently with uses permitted in a lease; and this would be so regardless of the public interest

legitimacy of the measure proposed. They would be bizarre in this case because any acceptance of the earlier proposals put forward by Fine Tower or its holding company for fresh uses, if accepted by the Town Planning Board, would have entitled Fine Tower to compensation because it had been deprived of the only use permitted under the lease. Art. 105 of the Basic Law does not sit alone. It is to be read in conjunction with art. 7 which provides that: the Government of the Hong Kong Special Administrative Region shall be responsible for [the] management, use and development [of land and natural resources within the Region]. There can be no expectation upon the purchase of land that the use permitted by the lease will forever after match the use permitted by town planning regulation. It is an incident of ownership that the uses permitted by the authorities may change. Land is purchased with that knowledge, actual or imputed. The value of these lots upon acquisition were enjoyed under the limitation that is implied by this knowledge: see *Pennsylvania Coal v Mahon*. The approach which we are invited to adopt ignores this reality. So if we talk of investment-backed expectations, such expectations are always qualified by that knowledge. It is to be remembered that a mere restriction on use, falling short of de facto deprivation, is not compensable: if it were otherwise the financial consequences would be such as to cripple the legislature's freedom to introduce socially beneficial legislation: *Trailer and Marina (Leven) above*. See also *Grape Bay Ltd v A-G of Bermuda* and *La Compagnie Sucriere, above*. In so far as reliance is placed upon the fact that Fine Tower will be required to pay a premium for the modification, a sum that is unquantified, no evidence has been adduced of any inquiry made as to the likely amount of that premium. Since the possibility of a modification is an incident of purchase of land, it follows that the possibility of having to pay a premium in the future is but part of that incident and, not surprisingly, it is not suggested that any such sum will materially affect the economic viability of the property. It is said by Mr Dykes that the consequence of holding that the prospect of lease modification is a relevant consideration is alarming. It would mean, he says, that in all cases of regulatory change of use inconsistent with use permitted by the lease, no-one could ever successfully assert deprivation of property. With respect, that is not logical. It all depends on the facts, and on the uses permitted by the supervening regulation. Some examples are given in *Lucas* of regulations that would leave the owner of the land without economically beneficial or productive options for its use, for example, where the requirement is to leave the land substantially in its natural state. That is far from the present facts.

Conclusion

The reality in this case is that Fine Tower seeks compensation for a limitation on use that, in its detail, does not suit it. There is no challenge to the validity of the statutory powers invoked nor is it suggested that the outline zoning plan is somehow disproportionate to the public benefit which it seeks to achieve. The argument that in determining whether there remains in the hands of Fine Tower any meaningful economic use, the court should ignore the possibility in this case, the virtual certainty of lease modification is an argument which, for the reasons I have provided, I reject. Both in the hands of Fine Tower and in the assessments of prospective purchasers, these

lots have meaningful use, use that is self-evidently economically viable. The facts of this case are remote from any that would justify a finding of deprivation of property. I would dismiss this appeal and make a costs order nisi in favour of the respondent. Hon Chung J: I agree. Hon Ma CJHC: For the reasons given by Stock JA, I too would dismiss the appeal. Accordingly, it is ordered that the appeal be dismissed and we also make an order nisi that the costs of this appeal be to the respondent to be paid by the appellant, such costs to be taxed if not agreed. (Geoffrey Ma) Chief Judge, High Court (Frank Stock) Justice of Appeal (Andrew Chung) Judge of the Court of First Instance Mr Philip Dykes SC and Mr K Chong instructed by Messrs Chui & Lau for the Applicant/Appellant Mr Jat Sew-Tong SC and Mr Abraham Chan instructed by the Department of Justice for the Respondent/Respondent See sections 3 and 4 of the Ordinance. CACV 261 of 2005, 25 January 2007, unreported. HKSAR v Ma Wai Kwan David [1997] HKLRD 761 at 773.

[2000] 1 WLR 574 at 583 C F. (1983) 5 EHRR 35, para [63]. at page 583G. 260 US 393 at 415 (1922); per Holmes Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. No person shall be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation. 505 US 1003 at 1015 to 1019 (1992). Penn Central Transportation Company v New York City 438 US 104, 124 (1978). 438 US at 124. 533 US 606 at 634 (2001). para 16. 72. paras 33 to 72 judgment in HCAL 61 of 2006, 8 September 2006, unreported. para 63.

(1991) 14 EHRR 319. para 56.

[2005] 1 WLR 1267.

[1995] 3 LRC 494. see Lucas, above, at footnote 6. para 71. Affirmation of Chiang Chui Wan, 26 July 2006, paras 15 and 17.

[2003] 2 HKC 490. page 500, para [18]. page 498, para [14]. page 413. page 1278, para[46]. [2000] 1 WLR 574, at 583. page 504g. 505 US, at 1018. 1udk 1udk H; < ni? ,|QI jFen 6cq~,|QI & 6" Flora-template-ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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