

[1997] 1 HKC 22

ATTORNEY-GENERAL v LAM MEI CHAI

COURT OF APPEAL -- MAGISTRACY APPEAL NO 719 OF 1996

MORTIMER, MAYO JJA AND SEARS J

5 DECEMBER 1996

Town Planning - Unauthorised development - Enforcement notice - Whether managers of tso and t'ong land were 'owners' of land - Buildings Ordinance (Cap 123) s 2(1) - Town Planning Ordinance (Cap 131) s 23(1)

Words and Phrases - 'Owners' - Buildings Ordinance (Cap 123) s 2(1) - Town Planning Ordinance (Cap 131) s 23(1)

The respondent was the manager of a tso which was registered owner of various parcels of land. In July 1993, the Director of Planning served an enforcement notice on the respondent pursuant to s 23(1) of the Town Planning Ordinance (Cap 131) asking that unauthorised development be discontinued. The enforcement notice was not complied with and in April 1994 an information was laid against the respondent alleging his failure to comply with the notice. The respondent pleaded not guilty and the magistrate ruled there was no case to answer as the manager of the tso was not 'owner' of the land within the definition of the Buildings Ordinance (Cap 123). The magistrate held that the manager only administered the land and had no legal title to the land. On appeal, the respondent argued that s 1A of the Town Planning Ordinance adopted the same definition of 'land owner' as 'owner' in s 2(1) of the Buildings Ordinance.

Held, allowing the appeal:

- (1) There was no reason why either the Town Planning Ordinance or the Buildings Ordinance should include provisions contained in a separate ordinance. The correct approach was to consider the provisions of each Ordinance separately and then determine whether the respondent could be held liable for any failure to comply with the enforcement notice (at 25B).
- (2) Section 15 of the New Territories Ordinance (Cap 97) provided that a tso manager was vested with the duties and responsibilities incidental to the ownership of the land. This was consistent with the manager assuming the responsibilities referred to in s 23(1) of the Town Planning Ordinance (at 25C-H).

- (3) From s 2 of the Buildings Ordinance it was also clear that the definition of 'owner' included the person entitled to receive the rents and profits of the land. This alone also was conclusive in determining the appeal. The magistrate was not correct in holding that the respondent was not an owner under the legislation (at 25I-26A).

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Legislation referred to

Buildings Ordinance (Cap 123) s 2(1)

New Territories Ordinance (Cap 97) s 15

Town Planning Ordinance (Cap 131) ss 1A, 23(1), (6)

Appeal from: This was an appeal by way of case stated by the Attorney General from a decision by magistrate Ernest Lim that the managers of tso and t'ong land were not 'owners' of land and an enforcement notice could not be served on them pursuant to s 23 of the Town Planning Ordinance (Cap 131). The facts appear sufficiently in the following judgment.

YM Liu (Crown Prosecutor) for the appellant.

Keith Oderberg and Simon Chui (Augustine CY Tong & Co) for the respondent.

Mayo JA

The magistrate Mr Ernest Lim has on the application of the Attorney General stated a case where the question of law referred to is framed as follows:

WHETHER I was correct in holding that the managers of tso and t'ong land were not 'owners' within the definition in the Buildings Ordinance (Cap 123) and thus an enforcement notice could not be served to them pursuant to s 23 of the Town Planning Ordinance (Cap 131).

The facts are as follows.

1. The respondent was at all relevant times the manager of the Lam Chung Hon Tso which in turn was the registered owner of various parcels of land coming within the Pat Heung Interim Development Planning Scheme.
2. On 14 July 1993 the Director of Planning served an Enforcement Notice upon the respondent pursuant to s 23(1) of the Town Planning Ordinance (Cap 131).

Section 23(1) provides:

23. Enforcement on land within a development permission area
 - (1) Where there is or was unauthorized development, the Authority may, in a notice served on one or more of a land owner, an occupier or a person who is responsible for the unauthorized development -

- (a) specify the matters that constitute or constituted the unauthorized development; and
- (b) specify a date by which if the unauthorized development has not been discontinued, the Authority requires -
 - (i) it to be discontinued; or
 - (ii) permission for the development to be obtained under section 16.

It is pertinent to add that s 23(6) provides that non compliance with an enforcement notice is an offence.

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3. It would appear that the enforcement notice was not complied with and as on 14 April 1994 an information was laid against the respondent alleging his failure to comply with the notice.

The charge was couched in the following manner:

That you being the manager of Lam Chung Hon Tso which is the owner of Lots 43 and 55RP in DD 111, Pat Heung in the period between 15 October 1993 and 27 January 1994 at Lots 42(Part), 43(Part), 51RP(Part), 52RP(Part), 53RP(Part), 54RP, 55RP(Part), 56RP(Part), 58, 59, 60, 62RP in DD111 and adjoining government land, Pat Heung, New Territories failed to comply with a notice issued on 14 July 1993 issued by the Director of Planning pursuant to section 23(1) of the Town Planning Ordinance (Cap 131) contrary to section 23(6) of the [said] Ordinance.

4. The respondent appeared before the magistrate on 17 August 1996 and pleaded not guilty to the charge. At the conclusion of the prosecution case a submission of no case was made.

After hearing submissions the magistrate ruled that there was indeed no case to answer.

Paragraphs 15 and 16 of the magistrate's case stated read:

15. Having heard arguments from both parties, I was of the opinion that:
- (1) the definition of the word 'owner' under the Buildings Ordinance included any person who was the legal or beneficial owner of the properties;
 - (2) the Crown could re-enter or forfeit any tso land should there be no appointment of managers within 5 months under section 15 of the New Territories Ordinance; and
 - (3) therefore, the managers only administered the land with whom no legal title to the land was vested.
16. I thus ruled that managers of tso lands were not 'owners' within the definition of the Buildings Ordinance. The respondent therefore had no case to answer and I acquitted him.

Mr Oderberg who appeared for the respondent argued that s 1A of the Town Planning Ordinance (Cap 131) adopted the same definition of 'land owner' as the definition of 'owner' in s 2(1) of the Buildings Ordinance (Cap 123).

'owner' includes any person holding premises direct from the Crown whether under lease, licence or otherwise, any mortgagee in possession and any person receiving the rent of any premises, solely or

with another, on his own behalf or that of any person, or who would receive the same if such premises were let to a tenant, and where such owner as above defined cannot be found or ascertained or is absent from the Colony or is under disability, the agent of such owner.

The definition did not refer to the New Territories Ordinance (Cap 97) and in particular did not include s 15 which provided for managers of a t'ong.

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The result of this was that managers of a t'ong could not be deemed to be included within the description of 'a land owner' in s 23(1) of Cap 131.

The magistrate accepted as a fact that the respondent was one of the managers of the Lam Chung Hon Tso which was the registered owner of the land the subject of the enforcement notice.

We can see no reason why either the Town Planning Ordinance or the Buildings Ordinance should include provisions which are contained in a separate Ordinance and that the correct approach to adopt is to consider the provisions of each of these Ordinances separately and then determine whether the respondent can be held liable for any failure to comply with an enforcement notice.

Section 15 of the New Territories Ordinance (Cap 97) reads as follows:

15. Registration of manager of 't'ong', etc

Whenever any land is held from the Crown under lease or other grant, agreement or licence in the name of a clan, family or t'ong, such clan, family or t'ong shall appoint a manager to represent it. Every such appointment shall be reported at the appropriate New Territories District Office of the City and New Territories Administration, and the Secretary for Home Affairs on receiving such proof as he may require of such appointment shall, if he approves thereof, register the name of the said manager who shall after giving such notices as may be prescribed, have full power to dispose of or in any way deal with the said land as if he were sole owner thereof, subject to the consent of the Secretary for Home Affairs, and shall be personally liable for the payment of all rents and charges and for the observance of all covenants and conditions in respect of the said land. Every instrument relating to land held by a clan, family or t'ong, which is executed or signed by the registered manager thereof in the presence of the Secretary for Home Affairs and is attested by him, shall be as effectual for all purposes as if it had been executed or signed by all the members of the said clan, family or t'ong. The Secretary for Home Affairs may on good cause shown cancel the appointment of any manager and select and register a new manager in his place. If the members of any clan, family or t'ong holding land do not within 3 months after the acquisition of the land make and prove the appointment of a manager, or within 3 months after any change of manager prove the appointment of a new manager, it shall be lawful for the Crown to re-enter upon the land held by such clan, family or t'ong, which shall thereupon become forfeited. Such re-entry shall be effected by the registration of a memorial thereof in the appropriate New Territories Land Registry.

This section contemplates that a manager is vested with the duties and responsibilities incidental to the ownership of land and the section is consistent with the manager assuming the responsibilities referred to s 23(1) aforesaid.

If this were not enough it is also clear from s 2 of Cap 123 that the definition of 'owner' includes the person entitled to receive the rents and profits of the land. This of itself would be conclusive in determining the result of this appeal.

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The result of this is that the question posed by the magistrate in para 17 of his case stated must be answered in the negative. He was not correct in holding that the respondent was not an owner under the legislation.

We are advised that the Attorney General does not wish to proceed with the prosecution below and accordingly no order needs to be made to that effect.

Reported by Lindy Course