IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 7 of 1980

Between:

1. LAUTOKA CITY COUNCIL
2. DIRECTOR OF TOWN AND COUNTRY PLANNING — Appellants

and

TIME INVESTMENTS LIMITED — Respondent

Mr. B. Sweetman for the First Appellant
Mr. J.R. Flower for the Second Appellant
Mr. B.C. Patel for the Respondent

Date of Hearing: 9 March 1981
Delivery of Judgment:

JUDGMENT OF THE COURT

Henry J.A.

This is an appeal against two orders made by Williams J. under an originating summons issued pursuant to Order No. 7 Rule 3 of the Supreme Court Rules. Respondent is the sub-lessee of Lot 10 DP 4379 which lot is held by first appellant (hereinafter called "the Council") on lease from the Crown. Respondent desired to build on the said land a two-storeyed concrete building comprising two shops on the ground floor and office accommodation on the first floor. Plans were lodged for approval by the Council in terms of Town Planning legislation. At this stage the various steps taken need not be set out but they will be referred to later. In due course the Council issued a building permit subject to certain conditions. The only relevant condition is No. 5 which reads:

"5. The applicant to make monetary contribution of $2,000 for the relaxation of two (2) parking places."

The said sum was duly paid "under protest" according to the claim of respondent. The originating summons sought two forms of relief, namely,

"(a) For an order that the Lautoka City Council and/or Director of Town and Country Planning had no powers to charge impose or require the Plaintiff to pay $2,000.00 in lieu of providing two additional car parking facilities.

(b) For an order that the Lautoka City Council and/or Director of Town and Country Planning refund to the Plaintiff the sum of $2,000.00 paid on the 5th day of April, 1978."

Affidavits were filed by the respondent in support and by the Council in opposition.

At the trial counsel appeared for the second appellant who had not filed an affidavit but offered oral evidence. The following order was made:

" I see no reason why the affidavits cannot remain as affidavits even if the Court ordered them to be treated as pleadings.

In my view no such order should make it necessary for the plaintiff's affidavit to be repeated in the witness box.

I think the application should be allowed and that the Director should give evidence for 2nd defendant."

Evidence was given accordingly.

No objection was taken to the form of the proceedings but it will be seen that the form of the action and the lack of pleadings clouded the issues and led to a failure to try

properly what were the true issues. The Court in its judgment:

(a) declared that neither the Council nor second appellant had power to charge impose or require respondent to pay $2,000 in lieu of providing two additional car parking facilities, and,

(b) ordered that the Council refund (sic.) to respondent the said sum of $2,000.

Costs were also awarded.

It is common ground that the state of town planning legislation at the material time was that respondent could be lawfully required to provide four parking spaces for the area of the proposed building. It has not been denied that there were negotiations carried out by the architect for respondent for the number of parking sites to be reduced to two. The evidence is that such negotiations resulted in respondent being exempted from the requirement of providing for four parking spaces upon condition that it paid the said sum of $2,000. As earlier stated respondent marked its payments as being made "under protest" but there is further evidence to be considered on this question.

Now that the building has been completed respondent claims not only the benefit of "the relaxation" referred to in condition No. 5 but also the return of the money it paid for that relaxation. It is important to analyse the claim of respondent if the affidavits filed on its behalf are treated as pleadings. The relief sought was a declaration that the condition was ultra vires the powers of appellants and that the sum of $2,000 be recovered from appellants. That respondent's claim was based solely on an allegation that the condition was ultra vires and ipso facto that it

was entitled to recover the sum of $2,000 is clear from the final letter (Exhibit G) annexed to respondent's affidavit which in part read:

> " Your letter of 27th ultimo refers.
>
> We do not think that your explanations for the 'demand' are relevant to the issue. As we see it the only issue is whether the Council has powers to levy and collect monetary contribution as that done by your Council."

Respondent acted upon the permit and completed its building. The action was not commenced until January 1979 apparently after the building was erected. It no longer required a declaration as to the validity of the permit. The sole remedy sought was the recovery of money. True one of the matters which required proof was the invalidity of the condition but proof of that alone would not enable respondent to succeed. A separate declaration was unnecessary. If respondent were genuine in its desire to test the validity of the condition by way of a declaration under an originating summons it had ample time to do so earlier. The permit was granted in June 1977 but was not uplifted until May 1978. The action was not commenced until January 1979, presumably after the building had been completed because it was stated in the letter of April 5, 1978 that it was intended to start work immediately. The action at the time it was commenced was clearly solely one for money had and received in respect of which one element was proof of invalidity. Such an action ought to be commenced by way of writ of summons (as counsel for respondent conceded) with proper pleadings. If this had been done the issues would have been clear and could have been properly tried. Instead a number of irrelevant matters were argued and decided whilst one of the main issues was never determined. However, counsel, and the Supreme Court, failed to perceive what was the proper form of action, so this Court must, as far as it can, attempt

to resolve the issues on proper legal principles as if the proceedings had been regularly instituted.

The issues which were before the Court are succinctly stated by Glass J.A. in a similar case, namely Rockdale Municipal Council v. Tandel Corporation Pty. Ltd. Vol. 34 L.G.R.A. 196, 203 where it is said:

> "The constituents of an action for debt in the circumstances with which his Honour was concerned have been formulated by the High Court (Mason v. The State of New South Wales; March v. Shire of Serpentine-Jarrahdale). To succeed in the action it was necessary for the plaintiff to prove (a) that it had made the payment as a result of coercion, (b) that the demand was made without lawful justification."

In the same case Moffitt P. said at p. 197:

> "Whether there was coercion can only be determined by relating the conduct of the person said to be coerced to the precise acts found to be an invalid exercise of power. Therefore it now becomes necessary to determine not only whether the Council had power to impose the condition in question, but also to redetermine whether the respondent made the payment as a result of coercion. As was pointed out in Lloyd v. Robinson, a finding that a condition to an approval is invalid does not necessarily mean that the approval will stand freed from the void condition or that the Council is bound to give a fresh approval subject to no other condition than that declared invalid. By way of illustration, in a case where a somewhat similar condition was imposed by a Council, Holland J. found the consequence of invalidity of the condition was that the development consent itself was void (Greek Australia Finance Corporation Pty. Ltd. v. The Council of the City of Sydney (1974) 29 L.G.R.A. 130)."

The learned president went on to say (and these words are apposite in the present case) that:

> " In the present case a possible view is that the payment was made not by reason of oppression, but in order, at all costs, to retain and act upon the consent to the development, the consent being considered doubtfully vulnerable if the condition were challenged prior to being acted upon."

We turn first to the question of coercion. This should have been pleaded and proved by respondent. The burden of proof appears to have been cast on appellants which again shows the importance of insisting upon the correct form of action. "Co-ercion" is a legal expression. Its meaning has been discussed in many cases but the issue in this case, disregarding any question of the onus of proof, may be summed up by the claim of appellants that respondent voluntarily entered into an arrangement for the payment of a sum of $2,000 whereby it gained valuable letting space by a relaxation of valid parking requirements. It should be noted that there is no evidence, and no submissions were made, that this was not a fair, equitable and beneficial bargain for respondent. The proper inference is that it was.

The first affidavit of respondent merely stated that the inception of the transaction was that the plans were approved by the Council on or about June 27, 1977 and by the Director on May 3, 1977 and that the Council orally informed respondent and its architect that a sum of $2,000 was payable before the plan could be released. The architect, who clearly was the agent of respondent, did not give evidence and his absence was never explained. In a letter from the Town Clerk to respondent's solicitor dated July 27, 1978 and exhibited to respondent's first affidavit (Exhibit F) as part of its case the following passage appears:

> " The plans for the proposed shop and office developments by the Time Investment Ltd., on Lot 10 DP. 4379 was approved by the Director, Town and Country Planning under the provisions of the Town Planning Ordinance, Cap. 109 subject to the conditions listed below:-

1. Four (4) car parking spaces are to be provided on the site with loading and unloading bay to the satisfaction of the City Council.

2. If two car parking spaces cannot be provided on site (development plans showed provision for only two spaces) the Council is to make request to the applicant for monetary contribution for these two spaces.

The applicants, Time Investment Ltd's, Architects agreed that they could only provide two car parking spaces on site to the satisfaction of the Council against the total of 4 car parking spaces necessary calculated on the basis of one car space per 1500 sq. ft. of gross floor area of the proposed development of shop and offices. They were not prepared to reduce the size of the building to the extent to permit provision of 4 car parking spaces as required by the Town Planning General Provisions. Exemption was sought and requested in respect of 2 parking spaces which could not be accommodated on site and in lieu of this exemption it was agreed that monetary contribution will be made.

In the light of the above agreement, building permit was issued including a condition that 'the applicants to make a monetary contribution of $2,000 for the relaxation of two (2) car parking spaces.'"

The only reply to this letter was the passage in respondent's letter of August 8, 1978 (Exhibit H) which has been earlier set out.

We turn next to the question of demand and payment under protest. The effect of making a payment under protest is dealt with at length by the High Court of Australia in Mason v. New South Wales 102 C.L.R. 108. At p. 144 Windeyer J. said:

"The plaintiffs protests do provide some evidence that their payments were not voluntary; but they do not prove that they were compelled by duress or coercion."

The sum of $2,000 was included in a cheque for $2,100 which was sent by respondent under cover of a letter dated April 5, 1978 (Exhibit B) which read as follows:

> " We refer to the above Company's building plans which have been approved by the Council and Town Planning Board and to the Council's demand for $2000.00.
>
> We enclose our cheque for $2,100.00 being $2,000.00 as per your demand and $100.00 for deposit on plans but would like to state that the $2,000.00 is paid to you under protest as we need the plans to commence building works immediately. We would like to look into the question, whether the Council has the necessary authority to demand and receive the said sum hence we reserve our right to claim for the refund."

The letter of the Town Clerk earlier referred to (Exhibit F), also contains the following passage in reply to respondent's letter:

> " I must once again repeat that there is no question of 'demand' for monetary contribution for relaxing car parking requirement; it is the applicants who request such relaxation by making such contribution. And the applicants usually deal through their Architects who submit the development proposals as has been the case in respect of the Time Investment Ltd's building applications."

As a result of the claim by respondent the Town Clerk filed an affidavit which ought to be quoted in full in respect of the relevant paragraphs. They are:

> "10. Upon receiving from the Plaintiff's Solicitors Messrs Stuart, Reddy & Co. the letter dated 5th April 1978 annexed as exhibit 'B' to the said Affidavit I telephoned the Plaintiff's Solicitors and spoke to Mr. B.C. Patel of that firm.

11. In my conversation with Mr. Patel I explained that the words 'demand' and 'protest' used in his said letter were inappropriate and the payment of any monetary contribution was entirely at the discretion of the Plaintiff and that it did not need to pay any amount of money to the Council if it was not seeking relaxation in respect of two car park spaces otherwise required by the Director as a condition of his approval of the Plaintiff's proposed development.

12. I pointed out to Mr. Patel that it was open to the Plaintiff to amend its plans and provide a total of four car parking spaces on the site but that if the Plaintiff did not wish to reduce the size of its building to provide for four car parking spaces the other alternative was open to it.

13. Mr. Patel intimated to me on the telephone that the Plaintiff did not wish to reduce the size of its building but desired to proceed with the building as planned and provide only two car parking spaces.

14. The Plaintiff's Architects had originally shown four car parking spaces on the Site Plan presented to the Council in support of the Application for Development Permission but later amended the Plan by reducing the number of car park spaces from four to two and sought relaxation in respect of such reduction.

15. The Council intimated that it was prepared to grant this relaxation upon the Plaintiff making a voluntary contribution to the Council's Car Park Fund in a sum equivalent to $1,000 for each car park space that the Plaintiff sought to eliminate from its development."

Respondent filed an affidavit in reply and the relevant paragraph is:

"2. THAT the sum of $2,000.00 paid by the Plaintiff to the First Defendant was not a voluntary contribution by the Plaintiff. The Plaintiff did not want to pay any sum but had to do so as it

> needed the plans in April 1978 to commence building works and such plans were not being released by the First Defendant until that sum was paid. The Plaintiff paid the said sum under protest by their letter of 5th April 1978 and the First Defendant was aware at all material times that the said sum was so paid."

The assertion that respondent "did not want to pay any sum" is less than a frank statement of the position. Moreover, it is not a denial of the matters earlier set out. It is a fair inference from all the circumstances that respondent desired to complete the building in accordance with part of the terms of the relaxation contained in condition No. 5 and then to attack the rest of the condition in the hope of recovering the money paid. Respondent's motive has become very clear from its later actions.

We are of the clear opinion that the true position is that the payment was made voluntarily after free discussion with the architect as to what was fair compensation for the purpose of substituting other parking facilities for those which the respondent would otherwise have been called upon to provide at its own expense and with the resulting loss of income producing space. We further find that, in accordance with the evidence of the Town Clerk, the money was not paid under protest.

The above finding is sufficient to set aside the judgment in the Court below but the learned judge has held that the condition imposed was invalid. By section 17 of the Town Planning Act (Cap. 109) (hereinafter called "the Act") the Lautoka City Council was a local authority charged with the preparation and submission to the Director of Town Planning a town planning scheme in respect of all land in its area. It is common ground that section 6 of the Act applied to the development proposed by respondent. Section 6 in its relevant parts provides:

"6.(1) Subject to the provisions of this section the permission of the local authority shall be required in respect of any development of land carried out within a town planning area during the period before a scheme affecting such area has been finally approved.

.....

(3) The local authority shall not grant or refuse permission under this section without the prior consent of the Director and the Director may approve such grant or refusal either unconditionally or subject to conditions and may prohibit such grant or refusal.

(4) In dealing with applications for permission to develop land under this section, the local authority and the Director shall have regard to the matters set out in the First Schedule to this Act, to provisions proposed to be included in a scheme and to any other material considerations."

It is also common ground that the Town Planning Act - General Provisions (1970) (Exhibit 1) apply. Clause 28 reads:

"28. Car parking space shall be provided at the rate of one car space per unit or 1500 sq. ft. of gross floor area (and fraction thereof) whichever provides the greater number of car spaces provided that with the prior approval of the Town Planning Board a Local Authority may reduce this ratio if in any instance it is satisfied that other satisfactory off-site car parking facilities are or will be available in the vicinity."

There is no express provision enabling the requirement of payment money in lieu of providing the prescribed number of parking spaces in ths event of exemption being granted. This was expressly provided for in the General Provisions 1979 which came into force on September 19, 1979 but they do not apply.

The provisions of the First Schedule to the Act which require notice are:

> "21. Power of a local authority to make agreements with owners and of owners to make agreements with one another.
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> 22. Co-operation of a local authority and the owners of land and co-operation between owners of land.
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> 23. The recovery of expenses incurred in giving effect to the scheme.
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> 24. The carrying out and completion of the scheme generally; and particularly the time and manner in which, and the persons and authorities by whom or by which the scheme, or any part thereof, shall be carried out and completed and its observance ensured.
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> 25. Any matter with respect to which under this Act an agreement relating to a scheme may be made.
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> 26. Limitation of time for the operation of the scheme.
>
> 27. Any matter necessary or incidental to town planning or housing.
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> The mention of particular matters in this schedule shall not be held to prejudice or affect the generality of any other matter."

The powers of the Director and the Council are very wide but the question arises, whether in the particular circumstances of the present case, the Director and the Council were entitled to do two things, namely, (a) grant exemption in respect of two spaces, and, (b) add a condition to such grant of exemption that a sum of $2,000 be paid into the particular fund and used for the purposes named. It is to be emphasised that this Court is concerned solely with the facts of the present case. And, it is further to be noted that the Director, through the Council, did not seek to impose and did not impose any conditions upon respondent. It was the agent of respondent who sought exemption and voluntarily accepted the burden of making the payment in return for the benefit it was seeking.

Legislation for town planning in Fiji follows the pattern of legislation in other parts of the Commonwealth. The powers given to effect town planning schemes are similar although not always identical. The problems which arise are the same. General principles on the particular problem posed in the present case have been laid down by the Courts and these principles are applicable to Fiji legislation. The High Court of Australia in Allen Commercial Constructions Pty. Ltd. v. North Sydney Municipal Council (1970) 20 L.G.R.A. 208 Walsh J. said in a judgment in which Barwick C.J., Menzies and Windeyer JJ. agreed:

> " In accordance with a well-recognized rule, s. 40(1) ought to be understood (quite apart from the limitation contained in its opening words) not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in Fawcett Properties Ltd. v. Buckingham County Council (/1961/ A.C. 636, 684) as being 'the implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of the Ordinance, and not from some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained."
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> " In Woolworths Properties Pty Ltd v. Ku-ring-gai Municipal Council (supra) the condition in question required the developer to provide on the site a specified number of car-parking spaces or, in lieu thereof, a contribution of $5,000 'towards the enlargement, extension or improvement of car-parking facilities in the vicinity'. Both branches of this condition were attacked as being ultra vires. As to the power to

impose conditions generally Else-Mitchell J. said:

' It cannot be doubted that in the field of town planning a wide discretion must be permitted to a responsible authority to determine what conditions may properly be imposed under provisions such as those which are relevant to the development under consideration in this case. Precise delimitation of the power to impose conditions is undesirable, if not impossible, and one cannot perhaps do more than say that the conditions must be relevant to the subject matter 'or reasonably capable of being regarded as relevant to the implementation of planning policy' (Bryson Industries Ltd v. Sydney City Council; cf. Hall & Co. v. Shoreham Urban District Council). But, as I have said, to define or to delimit the power in the light of the subject matter or of planning principles gives the responsible authority a wide charter indeed for the subject matter of a planning scheme extends to the use and development of land and buildings in relation not only to other land and buildings but in relation also to the community facilities which exist in a local government area, whether they are provided by the local council, some public authority or otherwise.'

On the basis of this statement of principle his Honour held that a condition requiring the provision on the site of parking spaces was clearly within power and then went on to say:

' The question whether a responsible authority is entitled under the County of Cumberland Planning Scheme Ordinance to require payment of money towards the provision by a council of a facility which the developer could be required to provide as a condition of a consent to use land or erect buildings was debated before me at some length and reliance was placed by the respondent council upon the decision in Ex parte Australian Property Units Management (No.2) Ltd;

Re Baulkham Hills Shire Council and particularly the judgment of Sugerman J., with which I should express my respectful concurrence. But I do not read the judgment in that case as holding that a developer can be required by an exercise of the discretion of a local authority to contribute to the provision by that authority of a facility which will be open to general public use and not capable of identification with the proposed development or restricted in some fashion to use in conjunction with that development. It may well be that a question of fact or degree must arise in each case as to whether a public facility is so placed or regulated that it can be so identified or restricted, but in the present case I should not wish to say more than that any power to require a contribution of money towards the provision of parking space, whether by the imposition of a condition or otherwise, cannot in my view be exercised unless the facilities, actual or proposed, are so situated, and defined in such a fashion, as to enable a decision to be reached that they are capable of being identified with or restricted to use in connection with the proposed development.'"

(The underlining is supplied as emphasis.)

In Greek Australian Finance Corporation Pty. Ltd. v. Sydney City Council (1974) 29 L.G.R.A. 130 the following facts are stated in the head note:

" Clause 32 of the City of Sydney Planning Scheme Ordinance requires the defendant council, in respect of any application for consent to erect a building to take into consideration, inter alia, the adequacy of the proposed means of entrance to and egress from the site and of the provision for loading, unloading and parking of vehicles on the site. The council is also required to take into account existing and future amenity of the neighbourhood, the circumstances

> . of the case, the public interest and the provisions of the scheme. By cl. 37 the council is entitled, in granting a consent, to attach conditions.
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> The plaintiff desired to remodel and extend an existing industrial and commercial building and use it for different commercial purposes. Application was made to the council for its consent and consent was granted subject to a condition requiring monetary contribution to be paid to the council towards the provision of public offstreet car parking. This was done pursuant to a policy adopted by the council and arising from consideration of the City of Sydney Strategic Plan. That plan provided for a basic floor space ratio of buildings with bonuses for certain eventualities, one of which was a contribution towards car parking. The application would not have been recommended for approval but for indication made by architects on behalf of the applicant that a monetary contribution would be made."

Holland J. reviewed (inter alia) the authorities we have cited above. The learned judge said at p. 141:

> " I must say that if the matter had been free of authority I would, with great respect to Else-Mitchell J., have been inclined to accept the submissions made on behalf of the council, that the imposition of a condition requiring from a developer, who did not propose to provide any parking space, a contribution towards the provision by the council of parking stations in the city area in accordance with the policies and codes which have been adopted by the council in the present case was within the powers conferred by the legislation."

This passage referred to earlier passages in his judgment namely at pp. 138, 139:

" In Jumal Developments Pty Ltd v. Parramatta City Council (supra) the question was whether so far as the scope of the power to impose conditions was concerned there was any distinction between a condition which required the applicant in that case to contribute part of his land for road widening purposes to facilitate traffic in the area in which development was to take place and a condition requiring a contribution of money for the same purposes, the latter having been held in the earlier cases to be ultra vires. Else-Mitchell J., in upholding the condition, said:

' It is, moreover, not to the point to say that because a levy of money cannot be imposed there is no power to require the dedication of land. The levy of money as a condition of the exercise of a statutory discretion has always been regarded as suspect because it need not necessarily be related to the lawful exercise of the power conferred so that it assumes the character of an exaction or tax (cf. The Commonwealth v. Colonial Combing, Spinning and Weaving Co Ltd; Attorney-General v. Wilts United Dairies Ltd; Ex parte Australian Property Units Management No.(2) Ltd; Re Baulkham Hills Shire Council. (Emphasis added.) But the same cannot be said of the imposition of conditions which relate to the use, enjoyment, or occupation of the very land in respect of which the statutory discretion is exercised, provided that those conditions are imposed reasonably and bona fide for the purpose for which the statutory prohibition which may be relaxed by that exercise has been imposed....'

In Granville Developments Pty Ltd v. Holroyd Municipal Council, Else-Mitchell J. affirmed the views he had expressed in the above cases as to the power of a council to require a contribution of money at large to provide facilities of a public nature."

Holland J. again referred to the exaction of a money payment in lieu of facilities to be provided by a developer at p. 205 where he said:

> " It will be seen that the learned judge's (Else-Mitchell J.) views have moved by perceptible degrees from the position first adopted by him in Woolworths Properties Pty Ltd v. Ku-ring-gai Municipal Council (supra) that contributions could not be levied except for facilities restricted to use in connexion with the proposed development. In Gillott v. Hornsby Shire Council (supra) money could be exacted for facilities which mainly served the development. In Jumal Developments Pty. Ltd. v. Parramatta City Council (supra) the validity of a contribution so framed as to be related to the power to approve the development was conceded and in Granville Developments Pty Ltd v. Holroyd Municipal Council (supra) the previous decisions are explained as prohibiting only the payment of a sum of money at large."

In the application of these principles which Holland J. was discussing it is important to note the factual situation which the learned judge was called on to consider. At pp. 135, 136:

> " The council presently proposes to construct a series of additional public parking stations on the perimeter of the central business district of the City. Since 5th March, 1973, it has been proceeding with a proposal to erect a parking station on land bounded by Sussex Street, James Street and South Street, Sydney, in respect of which feasibility studies and preliminary design drawings have already been completed for the construction of a station with a capacity of 300 vehicles. In February 1974 the council purchased for $1,350,000 a property at 261/277 Kent Street for the purpose of building a parking station on that site and is currently negotiating to purchase a property in Elizabeth Bay Road with a view to using that also for the construction of a parking station with a capacity of 400 vehicles. The closest

of those presently proposed is a substantial walking distance from the subject site and the others could not be considered as within any reasonable walking distance from it."

The learned judge found that authority compelled him against his inclination to hold that the condition as to payment of money was ultra vires but he also held it was not severable and that it was a fundamental element which rendered the whole approval invalid.

That position can be compared with the facts of the present case. The Town Clerk's affidavit states:

"7. The amount of contribution sought by the Council as a condition of relaxation of the General Provisions approved by the Director pursuant to The Town Planning Ordinance was $2,000 and the Plaintiff was informed that if it was prepared to contribute this fund to the Council's Car Park Fund the Council would allow the Plaintiff to develop its said land with provision for two car park spaces only in lieu of the four spaces which would otherwise be required.

8. The purpose of the Car Park Fund set up by the Council is to provide funds for the construction of municipal car park areas within the City of Lautoka and the total sum contributed to this fund by developers up to the present date is $60,206.06.

9. The Council has developed a car park in close proximity to the Plaintiff's said property and the said car park was completed in or about November 1978 at a cost of approximately $38,900.00.

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24. The Council denies each and every allegation in Paragraph 17 of the said Affidavit and says that it has developed a public car parking area in close proximity to the Plaintiff's said property which said car parking area contains 55 car parking spaces. Work was commenced thereon in September 1978 and completed in

November 1978 and at its nearest point the said car park is approximately 50 feet from the boundary of the Plaintiff's Lease No. 144074."

This affidavit was contradicted by an affidavit on behalf of respondent but on reading the evidence we are of the opinion that this clear and detailed evidence, upon which the deponent was not cross-examined, ought to be accepted.

The question is one of fact and degree. The most recent case dealing with the imposition of conditions under town planning legislation appears to be Newbury D.C. v. Secretary of State [1980] 1 All E.R. 731. At p. 761 Lord Lane said:

> " Despite the breadth of the words 'subject to such conditions as they think fit', subsequent decisions have shown that to come within the ambit of the 1971 Act and therefore to be intra vires and valid a condition must fulfil the following three conditions: (1) it must be imposed for a planning purpose; (2) it must fairly and reasonably relate to the development for which permission is being given; (3) it must be reasonable, that is to say, it must be a condition which a reasonable local authority properly advised might impose."

The cases we have earlier cited are in their final analysis, but earlier applications of particular facts to these general propositions. Later on the same page his Lordship said:

> " As Lord Guest said in Chertsey Urban District Council v. Mixnam's Properties Ltd ([1964] 2 All E.R. 627 at 637; [1965] A.C. 735 at 760-761):
>
> ' There should, however, in my view be a benevolent interpretation given to the discretion exercised by a public representative body such as the appellants in carrying out the functions entrusted to them by Parliament. Courts should not be astute to find that they have acted outside the scope of their powers.' "

In our respectful opinion the condition No. 5 comes within each of the three above tests. The condition is clearly related to town planning purposes and is not imposed for any ulterior reason. The facilities outlined by the Town Clerk are, within the cases cited, so situated and are defined in such a fashion so as to enable the Director and the Council to reach a decision that such premises are capable of being identified with and related to the proposed development of respondent's land. The condition is reasonable in that the burden, properly imposed on respondent to provide four parking spaces, was relaxed in return for a reasonable contribution towards alternative parking spaces (coming within the above description) for which respondent got a corresponding benefit by the release of space which otherwise might have been properly required for the provision of parking space.

Williams J. considered whether or not the requirement for payment of $2,000 was reasonable. He decided that it was not. The learned judge did so without referring to the relevant considerations which we have just been discussing. He appears to have concluded that a readiness on the part of appellants to abandon two on-site parking spaces in return for a cash payment of itself indicated that such spaces were not essential to the reasonable development of the land or of the area in general. With respect we do not agree.

In our opinion, upon the facts of this case, condition No. 5 was a valid exercise of the power. The appeal will be allowed with costs in this Court and in the Court below and the orders made will be set aside and the originating summons will be dismissed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL