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SUPREME COURT

A

DIRECTOR OF MINES

v.

MANGANEX LIMITED

B

[SUPREME COURT, 1976 (Kermode J.), 4th February]

Appellate Jurisdiction

C

Mining—prospecting licence—renewal at discretion of Director of Mines—whether Mining Appeals Board entitled to override proper exercise by the Director of his discretion—Mining Ordinance (Cap. 125) ss.10, 21—Mining Regulations regs. 27, 30(1) (a).

Appeal—statutory discretion—principles to be considered—whether arbitrators on appeal entitled to override discretion properly exercised and substitute their own opinions—Minings Ordinance (Cap. 125) ss.10, 21—Mining Regulations regs. 27, 30 (1) (a)—Income Tax Act 1974 s.69(9).

D

Provided that the Director of Mines exercised his discretion as to whether to renew a prospecting licence in a proper and reasonable manner, the Mining Appeals Board could not simply ignore his decision and itself consider independently the merits of the application. This would result in the Board substituting its own personal opinion.

The court considered at length the established principles relating to the exercise of a statutory discretion.

E

Cases referred to:

Dudley Corporation and Dudley (Earl of)'s Trustees, In re (1881) 8 Q.B.D. 86.

Hicks v. British Transport Commission [1958] 2 All E.R. 39; [1958] 1 W.L.R. 493.

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223.

F

Kingley v. Hodge [1918] Tās L. R.

Appeal by Director of Mines against the decision of the Mining Appeals Board allowing the appeal of Manganex Ltd. against his decision to refuse to grant the company a renewal of its prospecting licence.

G

M. J. Scott for the appellant.

The respondent was not represented.

KERMODE J.: [4th February 1976]—

H

This is an appeal by the Director of Mines under section 10(7) of the Mining Ordinance (Cap. 125) against the decision of the Mining Appeals Board dated the 30th day of June 1975 and communicated to the Director of Mines (hereinafter referred to as the appellant) by letter dated the 2nd day of July 1975 whereby the Board allowed the appeal of Manganex Ltd. (the respondent in this appeal) against the decision of the appellant refusing to grant the respondent a renewal of prospecting licence number 991.

Notice of appeal containing eight grounds of appeal was given by notice dated the 25th day of July 1975 within the period of thirty days fixed by section 10(7) of the Mining Ordinance. A

By supplementary notice dated the 12th day of October 1975 pursuant to Order 55 section 6(1) of the Rules of the Supreme Court the appellant amended his grounds of appeal by adding a ninth ground.

The appeal was listed for hearing on the 27th day of January 1976 and listed both the respondent and the Mining Appeals Board as respondents. In my view the Board was not a respondent and the parties to this appeal are the appellant and the respondent. B

At the hearing Mr Scott appeared for the appellant and Mr Johnson for the respondent. Mr Johnson advised the court that the respondent did not oppose the appeal and was prepared in any event to surrender the prospecting licence. C

Acceptance of the surrender would have achieved one of the appellant's objects to obtain clearance of the land to enable him to grant a licence to another applicant. Surrender of a licence is however subject to the consent of the Director of Mines under section 21 of the Mining Ordinance. D

The Court was informed that the appellant was not prepared to accept the surrender and reasons were given by Mr Scott why the appeal should be heard. Mr Johnson was given leave by the court to retire from the proceedings. E

The respondent's non-opposition to the appeal was not the end of the matter and what was in issue was whether the Mining Appeals Board were correct in allowing the respondent's appeal and in effect over-ruling the appellant's refusal to exercise his discretion under regulation 27(5) of the Mining Regulations in favour of the respondent and refusing to renew the prospecting licence. F

It is not necessary in my view to list and separately consider the nine grounds of appeal in this judgment. Summarised the appellant complains that the Mining Appeals board erred in law in allowing the respondent's appeal after proper exercise by the appellant of his discretion to refuse an extension of the prospecting licence. G

A decision can be reached in this appeal by considering:—

1. the appellant's reasons for refusing the extension of the prospecting licence;
2. the Mining Appeals Board's consideration of the evidence before it and its powers and
3. the powers of this court on the evidence before it of upholding either the appellant or the decision of the Mining Appeals Board. H

Dealing with the first and second of these three aspects, the evidence before the Mining Appeals Board indicates that prospecting licence 991 expired on the 17th day of December 1974. Application for renewal was dated the 18th day of December 1974.

Regulation 27 of the Mining Regulations deals with issue of and renewal of prospecting licences. Prospecting licence 991 had expired before application for renewal was made by the respondent but the application was made within 14 days after expiry of the licence. Under subsection 5 of regulation 27 the appellant as Director of Mines had a discretion to extend the licence.

A In considering the application the appellant could quite properly consider whether the respondent had complied with the provisions of the Mining Ordinance and whether the conditions of the licence had been observed and performed by the respondent to the appellant's satisfaction. Due performance by an applicant for renewal of a licence of the provisions of the Ordinance and conditions of the licence to the satisfaction of the Director of Mines is required under subsection 4 of regulation 27 and if the Director is satisfied on payment of prescribed fees within a stated period a renewal is mandatory although the Director has a discretion as to the period of renewal.

B The discretion of the Director in subsection 5 is a wide one and is expressly not limited in any way by subsection 4. Notwithstanding breaches by an applicant the Director may grant an extension, as the appellant had done in respect of a prior application by the respondent.

C The Mining Appeals Board found as a fact that the respondent failed to comply with the conditions of its licence in 1974. There is also ample evidence in the record of the proceedings to indicate that the respondent had not complied with the condition set out in regulation 30(1) (a) and had been in breach of this condition from sometime in 1972 up to the date of its application for renewal. The appellant, despite prior breaches by the respondent, was prepared to renew the licence on condition that the respondent, put up a substantial bond for due performance and if it submitted a better work programme, which the respondent was not prepared to do.

D The appellant refused to renew the licence due to the appellant's past failures to comply with the conditions of the licence and in particular its failure in 1974 to carry out work incurring expenditure of upto \$68,000.00, a figure which the respondent had itself suggested in a prior application for renewal and was an express condition of the prior renewal. The Board in considering the appeal by the respondent stated at page 3 of its decision:—

E “We consider that looking at section 10 of the Mining Ordinance as a whole, it is the function of the Mining Appeals Board to consider whether the decision of the Director of Mines was fair and reasonable having regard to all the evidence before us.”

F The Board in my view correctly stated its function. At pages 4 and 5 the Board stated as follows:—

G “We are of the opinion having regard to all evidence that has been placed before us that the appellant company should be given an extension of the Prospecting Licence until 30th June 1976 with a condition that they faithfully follow the programme of works as outlined by them in their letter dated 30th December 1974 to the Director of Mines. We also hold that the appellant company should give a bond for the sum of \$5,000 for due compliance with this undertaking. Our decision is based mainly on the following reasons:—

H (1) Whilst we are satisfied that the company failed to comply with the conditions of their licence in 1974, the company has given satisfactory explanation as to why the amount specified was not spent and why it failed to carry out its programme of works. Furthermore, it is clear from the evidence from both sides that the figure of \$68,000 was in fact fixed by the Director of Mines from the programme of works which the appellant company had submitted.

- (2) The company has spent a large sum of money over the years on this prospecting licence. The company intends to make a final effort to decide on the viability of this venture, and we feel that it would be unfair and unreasonable in view of the extent of the large expenditure already incurred by them so far to refuse a final opportunity. A
- (3) The appellant company must have by now collected considerable information and data on this licence, all of which is not likely to be available to any future prospector. We consider that it is in the national interest that an opportunity should be given to the company which has done so much work on the land to arrive at a definite conclusion on the viability of the venture. Any new prospector would, in all probability, have to make a fresh beginning and would not have all the information which the appellant company possesses in respect of this licence, the subject matter of this appeal. B

For these reasons, the appeal is allowed upon the terms hereinbefore set out." C

It is to be noted that the conditions suggested by the Board were virtually identical with the conditions the appellant had sought to impose and which the respondent was not prepared to accept. Mr Scott argued (inter alia) before the Board and before this court that the Board could not legally override the proper exercise by the appellant of his discretion. This is the main issue in this appeal.

Section 10 of the Mining Ordinance created the Board. Apart from the powers specified in subsections (4) and (6) the section is silent as to any other powers conferred on the Board. Subsection (3) permits a person aggrieved by any decision of the Director to appeal to the Board. The provision of a right of appeal must carry with it a corresponding obligation or power by the Board to hear the appeal and subsection (7) referring to the decision of the Board indicates that the Board is empowered to make a decision on the hearing of the appeal. D

It is clear from the wording of subsection (3) referring to "any decision of the Director" that a decision arrived at by the Director in exercise of a discretion conferred on him by the Ordinance or failure to exercise his discretion is appealable. E

It must also be assumed that the legislature in not spelling out the Board's powers in more detail intended that the full scope of the Board's powers should not be detailed but conversely there is nothing in section 10 which expressly or by inference empowers the Board to ignore established legal principles when hearing an appeal. F

The mandatory requirement that one member of the Board shall be a barrister and solicitor indicates clearly that in hearing an appeal the Board should be guided by such legal principles. G

In considering the exercise of powers of the Board the objects of the Ordinance must be considered and in this case where the powers are exercised for a public purpose section 10 must be construed more liberally than would be the case of powers given to a private corporation for objects of gain. *The Dudley Corporation* (1881) 8 Q.B.D. 86, 93, C.A.). The objects of section 10 of the Ordinance are to set up an Appeals Board to hear and determine appeals by any person aggrieved by any decision of the Director of Mines. It must be inferred that the Board has powers either to give or recommend redress to such grievance if section 10 is to have any operative effect in righting grievances. H

A The extent of such inferred powers is what is in issue here. The duty to hear an appeal from any decision of the Director includes an appeal from a decision involving an exercise of the Director's discretion or failure to exercise it. Being of the view that the Board has power to hear an appeal on a matter involving the exercise of or failure to exercise a discretion by the Director specifically provided by regulation 27(5) the next question to resolve is whether the Board has a discretion to ignore the Director's decision and itself consider the merits of the respondent's application for renewal or whether it should confine itself to the question whether the Director acted properly in refusing to exercise his discretion.

B Section 10 of the Mining Ordinance does not specifically provide a discretion for the Board or power to substitute its own discretion for the discretion of the Director such as is specifically provided by section 69(9) of the Income Tax Act 1974 which reads:—

C "69(9) Appeals to the Board shall be by way of rehearing. Notwithstanding that the Board may consider that the Commissioner has made no error in law and acted on no wrong principle in exercising his discretion, the Board may substitute its own discretion for the discretion of the Commissioner. For the purpose of exercising its powers the Board shall have all the powers which the Commissioner has in making assessments, determinations and decisions, including decisions on objections, under the provisions of this Act."

D Its duty under section 10 is, I consider, to determine whether the Director acted properly in refusing to renew the licence to the respondent. The Director has a discretion specifically conferred on him by law either to renew or refuse the renewal. If the facts adduced by the respondent indicated the Director had not acted properly then there is no doubt in my mind the Board was empowered to so decide and allow the appeal. As to the effect of such a decision I cannot read into section 10 a power by E the Board to grant a renewal of the licence which by law is vested in the Director. There would in my view have to be an express power. In practice I have no doubt a Director would follow the opinion or recommendation of the Board. In this instance the Board expressed its opinion that the licence should be renewed on F terms. While the Board clearly understood its function namely, as it stated in its decision "to consider whether the decision of the Director of Mines was fair and reasonable" it appears to me from a perusal of its decision that it lost sight of this function and substituted its own views on the merits of the respondent's application thus ignoring well established principles when considering the exercise of a statutory discretion.

Before considering the legal principles which the Board should have considered the main facts should first be stated.

G There was no dispute that until the end of the first quarter of 1972 there was active prospecting by the respondent but from that date onward there was a continued breach of the condition of the licence implied by regulation 30(1) (a) which provides:—

H "(a) that the holder will vigorously and continuously prosecute prospecting operations on the land the subject thereof to the satisfaction of the Director.....".

Under proviso (1) of the section 30 it was open to the respondent to apply to the Director for suspension in whole or in part of any of the obligations imposed by the regulations.

It is common ground that no such application was made by the respondent to the Director and had the difficulties faced by the respondent been placed before the Director suspension of the conditions might have been granted. A

In December 1973 the respondent applied for a renewal of the licence and submitted a proposed work programme involving an expenditure of \$68,000.00. The Director approved the renewal conditionally on a sum of \$68,000.00 being spent on a works programme. The respondent in 1974 spent \$7,517.00 prospecting and, if work done by another company is taken into account, the total expenditure on the licensed area was close to \$15,000.00 a sum far short of the \$68,000.00. B

The respondent did not seek suspension of the conditions of the licence in 1974 but when applying in December 1974 for a renewal again submitted a work programme indicating an estimated expenditure of \$60,000.00. The Director although dissatisfied with the respondent's past failures would have favourably considered a further renewal if he could have been satisfied that the respondent intended expenditure of up to \$60,000.00. C

The respondent was unable to so satisfy the Director. The evidence given by the respondent before the Board indicated clearly that the respondent was not prepared to spend the whole of the \$60,000.00 itself but sought participation by another company to spread the risk. Evidence indicated prior failures by the respondent to interest other parties in a joint venture and there was no evidence before the Board of any firm prospect of so interesting another party during the term of any further renewal of the licence. D

These were the basic facts within the knowledge of the Director when considering the last application for a renewal and were facts laid before the Board.

Being of the opinion that the Board is empowered under section 10 of the Mining Ordinance to determine whether the exercise by the Director was proper in the circumstances it is now necessary to state how the law considers the exercise of a statutory discretion. E

Maxwell on Interpretation of Statutes 12th Edition at pages 146 to 152 deals with the question of statutory discretion. It must be exercised and the exercise must be reasonable. *Maxwell* at page 148 quoting from decided cases states:—

“When”, said Lord Halsbury L.C., “it is said that something is to be done within the discretion of the authorities...that something is to be done according to the rules of reason and justice, not according to private opinion; Rook's Case, according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.” F

Further down on page 148 when dealing with the question of reasonableness he states:— G

“But a decision can be called unreasonable only if it is “proved to be unreasonable in the sense that the Court considers it to be a decision that no reasonable body could have come to. *It is not what the Court considers unreasonable, a different thing altogether.*” H

Did the evidence before the Board indicate that no reasonable body could come to the decision the appellant came to or was the Board's decision its personal view obtained from the facts laid before it?

A The Board having heard the evidence and considered the submissions were of the view that the respondent had given a satisfactory explanation for failing to carry out its programme of works.

It considered also it was unfair and unreasonable in view of the extent of the large expenditure already incurred by the respondent to refuse the respondent "a final opportunity", and allowed the appeal.

B It is from this decision that the appellant appeals to this court.

The appeal to this court is under Order 55 rule 3 by way of rehearing and the court under rule 7 has very wide powers. The first ground of appeal is as follows:—

C "The Mining Appeals board (hereinafter referred to as "The Board") erred in law and in that it purported to substitute its own opinion for the opinion of the Director of Mines arrived at in the exercise of a statutory discretion conferred upon him by section 26(5) of the Mining Ordinance and Regulation 27(5) of the Mining Regulations."

D This is the main ground of appeal. The other eight grounds are not in my view relevant. If the Board was empowered to ignore the appellant's exercise of his discretion and was itself invested with a discretionary power to consider the application for renewal these further grounds would have to be considered. In my view section 10 in this instance empowered the Board only to consider whether the appellant had properly exercised his discretion.

E A discretion specifically provided by the legislature in regulation 27(5) of the Mining Regulations to be exercised by a person holding the position held by the appellant, an expert in his field, is not to be lightly disregarded. Had the legislature intended the Board to come to a decision by ignoring the appellant's decision and giving the Board a discretion of its own to renew a licence such a power would have to be specifically provided as was provided for example in section 69(9) of the Income Tax Act 1974 to which I have already referred.

F If this appeal was an appeal from findings of fact by the Board this court would not lightly interfere with such findings. However if the findings are rather inferences from the proved and admitted facts rather than findings of fact and this court is of the opinion that the inferences are the wrong ones this court is in as good a position as the Board to draw inferences. This principle is to be applied in such cases as was stated by Parker L.J. in *Hicks v. British Transport Commission* [1958] 2 All E.R. 39 at page 50. This appeal is by way of rehearing and the court is in a position to evaluate the undisputed facts and draw inferences therefrom. A long line of cases has established the principles on which an appellate court considers the exercise of statutory powers. I have already referred to these principles when referring to *Maxwell on Interpretation of Statutes*.

G I will only refer to one case *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 and the following extracts from the judgment of Lord Greene M.R. at pages 229 to 231.

H "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general discretion of the things that must not be done. For instance, a person

entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting "unreasonably".

"I think Mr Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind."

"The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."

Can it be said applying these principles stated above that the appellant on the fact before the Board acted unreasonably or unfairly as the Board found? I would think not but I will refer again to these principles after examining the reasons given by the Board.

The Board considered the respondent had given satisfactory explanations as to why it had not incurred the expenditure specified. The main reason for not incurring the expenditure specified was the respondent's efforts to interest other parties to enter into a joint venture in order to spread the financial risk. Reports during the period in question were pessimistic and the respondent was apparently not prepared to shoulder the whole burden of spending its own money in carrying out the work required of it, notwithstanding the express conditions of its licence unless it could interest another person in sharing the risk. In a Tasmanian case *Kingley v. Hodge* [1918] Tas. L.R. dealing with a covenant to spend money on a mining lease it was stated:—

"The abortive attempts of the lessee to obtain capital to develop the property, it is true, may evidence bona fides, but efforts of this character have never availed to save a lease where aliunde there has been clear proof of substantial failure on the part of the lessee to fulfil his contractual obligations."

In that case the Mining Board held that no reasonable cause had been shown for the breach.

In the respondent's case there were breaches over quite a long period of time and on my consideration of the explanation given by the respondent I would not hold that such explanation was a reasonable one and particularly where the regulations gave the respondent an opportunity, which it did not take, of obtaining relief from the conditions imposed. I cannot find in the evidence any reasonable or legitimate excuse for the continued breach.

So far as the large sum expended by the respondent is concerned such expenditure was incurred in the main before the first quarter in 1972. After that date the expenditure was negligible in relation to the ceiling figure of \$60,000.00 which in two successive years the respondent in its own applications stated it would be spending. I do not consider it would be unfair or unreasonable to refuse a renewal in the cir-

A cumstances then pertaining, b. cause the respondent had already spent a lot of money. The Board's opinion that it would be unfair or unreasonable not to give the respondent a last chance, would appear to stem from feelings of sympathy and not from an objective consideration of the facts presented to it.

B As for the Board's observations set out in the third reason given by it the Board could well be correct that all information collected by the respondent might not be available to another prospector. If reports required under the Mining Regulations were properly furnished the appellant would be in possession of a considerable amount of information, although not necessarily all such information, and in the interest of the nation he could make such information available to other prospectors. It is also in the national interest that an area with potential mineral wealth should be vigorously prospected and if a prospector fails and continues to fail to abide by the conditions of his licence it is reasonable that the area should be given to someone prepared to properly prospect the area.

C It still falls to this court to consider whether the appellant properly exercised his discretion.

D Applying the principles referred to earlier I can find no evidence that the appellant did not exercise his discretion in a proper and reasonable manner. If anything the evidence indicates considerable latitude on the part of the appellant which he was legally entitled to grant.

I would allow the appeal and set aside the decision of the Mining Appeals Board. The result will be that the licence expired on the 17th day of December 1974.

As Mr Scott indicated he was not seeking costs there will be no order as to costs. Appeal is allowed with no order as to costs.

E *Appeal allowed. Decision of Board set aside.*