Summary of Judgment

Sime Darby Motor Services Ltd ("Applicant") v Director of Lands ("Respondent")
CACV 408/2022, [2024] HKCA 207

Decision	**:**	**Respondent's appeal allowed**
Date of Hearing	**:**	**17 November 2023**
Date of Judgment/Decision	**:**	**8 March 2024**

Background

1. This is the Respondent's appeal before the Court of Appeal (**"CA"**) against the Judgment of the Court of First Instance (**"CFI"**) dated 14 September 2022, allowing the judicial review lodged by the Applicant (a member of the Sime Darby Motor Group (HK) Limited) to challenge the decision of the Respondent made on 21 February 2020 ("**Decision**") in refusing to process the Applicant's in-situ land exchange application ("**Land Exchange Application**") of the Applicant's land ("**Subject Lots**"). The refusal was made on the ground of the Government's policy of not entertaining non-small house land exchange applications within village environ boundaries ("**Policy**") for the purpose of preserving land for small house development.

2. In its Judgment, the CFI held, *inter alia*, that:-

   (a) the Decision was amenable to judicial review, as the Policy concerned the Government's role as a protector of public interests in various aspects: (1) the implementation of the Small House Policy; (2) the efficient use of limited land resources in Hong Kong; and (3) the consequential promotion of Hong Kong's economic development;

   (b) the Decision was *Wednesbury* unreasonable;

   (c) the Respondent had unlawfully fettered his discretion by blindly and mechanically applying the Policy; and

   (d) the Government's decision to rezone the majority of the Subject Lots from "Industrial" use to that of "Government, Institution or Community" had given rise to the Applicant's legitimate expectation that the Government's planning intention in respect of the Subject Lots would be in accordance with the latest Outline Zoning Plan in force, and such legitimate expectation had been frustrated.

3. The CFI thus granted an order of *certiorari* to bring up and quash the Decision; and an order of *mandamus* directing that the Applicant's Land Exchange Application be remitted to the District Lands Office for reconsideration and decision.

Department of Justice's Summary of the CA's rulings

(full text of the judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=158646&QS=%2B%7C%28CACV%2C408%2F2022%29&TP=JU)

4. The CA held that the Decision was not amenable to judicial review. The principles established in a long line of authorities in Hong Kong were discussed. It was held that the fact that the Government had a policy to guide its decisions in relation to particular land matters and that the decision was made pursuant to the policy did not in itself meant that there was a sufficient public element to move the decision into the public law domain. Although the Decision was made pursuant to the Respondent's "VE Guideline" which served to preserve land within village environs for small house development, it did not follow that any matter concerned or associated with the Small House Policy or its implementation was amenable to judicial review: §§51, 60.

5. In this case, the Decision concerned what could be done on the Subject Lots. The Government was acting no differently from a private landlord of a large estate, in deciding what should be the long-term user and building restrictions for laying out the planned potential usage of land. The Applicant's suggestion that the proper inquiry was whether the Decision was in the nature of the Government exercising its powers as a protector of public interests, and "that alone" would render the Decision susceptible to judicial review was rejected. *Kwok Cheuk Kin v Director of Lands (No. 2)* [2021] HKCFA 38 and *Koon Ping Leung v Director of Lands* [2012] 2 HKC 329 distinguished: §§43, 44, 54, 55, 60.

6. Notwithstanding its ruling on the issue of amenability, the CA went on to also consider the Applicant's grounds of judicial review raised at the court below and held all in favour of the Government.

7. On the ground that the Decision was *Wednesbury* unreasonable, the CA emphasized that generally a Government lessee has no right to a land exchange, and a purchaser of land can have no more than an expectancy that the lease restrictions may be relaxed by the Government after his purchase. That expectancy may in some cases be diminished by the circumstances or by Government's practices and policies. The fact that a purchaser finds himself unable to obtain a land exchange or lease modification because of Government practices or policies does not necessarily mean those practices or policies are irrational: §68.

8. The Applicant's contention that the Respondent had unlawfully fettered his discretion by blindly and mechanically applying the VE Guideline was also rejected. The CA accepted the Respondent's submissions that the VE Guideline expressly contains a built-in provision for the consideration of merits of individual case as exception. The VE Guideline, as formulated, does not preclude the

Director from departing from the general policy or from taking into account circumstances relevant to the particular case. On evidence, the Respondent had engaged with the Applicant in relation to the special justifications it put forward but in the end did not approve the land exchange. There was no basis to suggest that the Respondent had failed to consider relevant factors: §§74, 75, 80.

9. The Applicant's complaint of frustration of its legitimate expectation also failed. The CA held that no representation could be read into a zoning decision by the Town Planning Board that the Respondent would consider applications for lease modification or land exchange in accordance with the zoning or planning intentions under the relevant Outline Zoning Plan. The town planning regime is separate and distinct from the leasehold system of land ownership. As accepted in *Anderson Asphalt Ltd v Secretary for Justice* [2009] 3 HKLRD 215, a statutory plan could not regulate how the Government's contractual powers as landlord should be exercised. In dealing with applications for lease modification, the Government pays attention to the relevant approved plan in that it would not entertain an application unless the intended development accords with the use permitted under the approved plan. To suggest that an applicable approved plan would give rise to an expectation in favour of an application for lease modification would subvert the established principle on the Government's discretion in relation to lease modification: §§83, 85.

Disposition

10. The Respondent's appeal was allowed. The orders below were set aside. The Respondent was awarded costs of the appeal and below with a certificate for two counsel.

Civil Division
Department of Justice
March 2024