ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 50
(21 September 2000)

Michael Richard Hugh Powell
v.
Asian Development Bank

Mark Fernando, President
Martti Koskenniemi
Thio Su Mien

The Applicant's Claim

1. The Applicant claims that the administrative decision of 29 July 1998 by the Respondent to recover rental subsidies paid to the Applicant during 1989-1998, amounting to US$153,444.00, on the ground that the Applicant had not been entitled to such subsidies, constituted a breach of the Bank's relevant regulations. The Applicant seeks the reversal of that decision and the reimbursement of the amount (US$3,068.33) recovered from his salary of September 1998.

Facts

2. The Applicant joined the Bank on 28 November 1985 as an audit specialist and worked in that capacity and as a financial analyst until his resignation from the Bank on 1 October 1998. Soon after he entered the Bank's service, he moved into a house in the neighborhood of Manila for which, however, he claimed no rental subsidy. On 16 August 1988, his spouse, Mrs. Powell, bought a property in Ayala Alabang on which they constructed a house.

3. On 25 January 1989, that property was allegedly sold by Mrs. Powell to a Filipino citizen, whom the Tribunal will refer to as Mr. E., who had been looking for an investment opportunity in the area. According to the Deed of Sale produced by the Applicant, the property was sold for the sum of six million pesos (P6,000,000.00). The transaction was accompanied by a side agreement dated the same day under which Mrs. Powell agreed to lease the property from Mr. E. and which provided for a buy-back option to Mrs. Powell "at fair market value" if she should cease to lease the property or if Mr. Powell left the Bank. According to the Applicant, the lease agreement (which was not produced before the Tribunal) was initially for five years, expiring in February 1994. It was, however, renewed from February 1993 onwards for three successive two-year periods expiring in February 1999. According to the side agreement, the purchase price of the property was eight million pesos (P8,000,000.00).

4. From the time of the sale and lease of the property in February 1989 until 1998, Mr. Powell received rental subsidies from the Bank totaling US$153,444.00.

5. In the course of a random audit in early 1998, the Bank's Office of the General Auditor (OGA) discovered a Certificate of Title for the said property in the name of Mrs. Powell. According to the Bank's Administrative Order ("A.O.") No. 3.07, covering rental subsidy and effective from 1 November 1993:

> the subsidy will be payable only if a staff member or spouse does not own residential property, i.e. dwelling house, apartment, condominium or the like, within reasonable commuting distance from the Headquarters of the Bank. (Section 3.1)

6. In other words, the Bank's regulations did not entitle a staff member to receive rental subsidy in case the staff member lived or had the opportunity to live in a property owned by the staff member's spouse.

7. In response to a request for clarification made by the OGA in February 1998, the Applicant explained the 1989 arrangement between his wife and Mr. E. as being a sale of the property with a buy-back option and a lease to Mrs. Powell. The property, he claimed in communications to the Bank in February and June 1998, was not owned by his wife but by Mr. E. who had bought it for investment purposes. This was why there was no registration of sale at the Land Registration Office. In a letter of 11 June 1998 addressed to the Bank, he also stated that the Deed of Sale between his wife and Mr. E. would only be notarized sometime in the future, if the Powells chose not to exercise the repurchase option. The Applicant could not, however, produce the Deed of Sale, which he said, was with Mr. E. In response to a request from the Applicant for a copy of the document, Mr. E. initially stated that he considered it to be "private information" and would not hand it over.

8. After correspondence between the Applicant and the Bank, the Director, Budget, Personnel and Management Systems Department (BPMSD), decided on 29 July 1998 that the Applicant's explanation regarding the ownership of the property had not been satisfactory. The Applicant had not been able to produce a Bank statement in support of his assertion that the purchase price had been paid by Mr. E. to Mrs. Powell. Instead of a Deed of Sale, the Applicant had been able to produce only a "letter of intent" by Mr. E. of 25 January 1989 to purchase the house from Mrs. Powell, which stated that a Deed of Sale would not be "negotiated" unless he takes possession of the property. Accordingly, the correspondence showed, according to the Director, BPMSD, "that Mr. E. had no intention of actually purchasing, owning or possessing the Property"; that the house was actually owned by Mrs. Powell, as evidenced by the relevant Certificate of Title; that the Applicant had therefore not been entitled to the rental subsidies he had collected during 1989-1998, which amounted US$153,444.00; and that action would be taken to recover this sum.

The Appeals Procedure

9. On 9 September 1998, the Applicant made a request for the review of the decision by Director, BPMSD on the ground of misinterpretation of the relevant evidence. In this connection he also produced a copy of the "Deed of Absolute Sale" (which had previously been unavailable) between Mrs. Powell and Mr. E. Although the Applicant had earlier explained that the instrument would only be notarized later, the Deed of Sale bore on its face an attorney's notarization and the date 25 January 1989. The Deed of Sale stated the purchase price to be P6,000,000 (and not P8,000,000 as stated in the side agreement). In support of his request, Mr. Powell relied particularly on this document as well as the argument that the non-performance of a "formality", such as the annotation of the sale in the Certificate of Title, did not affect the fact of the ownership. The issuance of title, the Applicant claimed, had been delayed in consideration of the possibility that Mrs. Powell might subsequently exercise her right to repurchase the property. Throughout the pleadings the Applicant also stressed that the arrangement with Mr. E. contained a "significant financial element." Its form was dictated by the wish to avoid capital gains tax which would have been due on the completion of a transaction as

well as administrative costs that would have been incurred in connection with the issuance of title in Mr. E.'s name.

10. The administrative review was not granted. The Director, BPMSD, stated that, according to Philippine law, an unregistered Deed of Sale remains ineffective against third parties - such as the Bank - and that the documents and the Applicant's explanations showed that no delivery was intended as between Mrs. Powell and Mr. E. The facts that no capital gains taxes were paid "contrary to law" and that the Powells continued to pay real estate taxes on the property demonstrated that they were still the owners. According to the Director, the arrangements seemed to have been "deliberately conceptualized and entered into in order to circumvent the Bank's policy on payment of rental subsidies."

11. On 25 November 1998, Mr. Powell filed his application with the Appeals Committee, repeating his earlier claims about the misinterpretation of the evidence and submitting two more documents intended to show that there had been a continuing business relationship between Mr. E. and the Urban Bank of the Philippines ("Urban Bank") over the property that, according to him, demonstrated that at least the Urban Bank regarded Mr. E. as the owner. These were a letter of 26 January 1989 from Mr. E. to Urban Bank, informing the Urban Bank that Mr. E. would be responsible for the liquidation of the mortgages of the property, and a letter of 1 March 1996 from Urban Bank to Mr. E. enclosing the original title deed and notice of cancellation of mortgage. Neither of the two documents could, however, be authenticated. In connection with the appeals procedure the Urban Bank said that it had "no records of both documents allegedly sent to, and received by, Urban Bank." In fact, the Urban Bank had "not found any record supporting any business relationship" with Mr. E.

12. On 7 September 1999, the Appeals Committee recommended the dismissal of the appeal, which the President did. The Applicant filed his Application to the Tribunal on 13 January 2000.

The Request for Preliminary Measures

13. In his Application, Mr. Powell requests two preliminary measures, to wit:

i. an oral hearing of certain officials of the Urban Bank, and

ii. production of a letter from Urban Bank as well as Bank statements reflecting rental payment.

14. It appears from the correspondence with Urban Bank, however, that Urban Bank did not have any record of any business relations with Mr. E. The Applicant has not provided reasons for the Tribunal to believe that interviewing these witnesses would result in the disclosure of any new information or document. The Urban Bank has already indicated that it is not in possession of such material, and an order for production would be futile. As for (ii), if Mr. Powell was in possession of any other relevant letter from Urban Bank, or any bank statement reflecting rental payment, he could have produced it himself.

15. Therefore, the Tribunal refuses the preliminary requests.

The Merits

16. Mr. Powell requests the overturning of the decision by Director, BPMSD of 29 July 1998 concerning the recovery of US$153,444.00 from his salary as well as the return of the sum of

US $3,068.33 already deducted from his September 1998 salary. He makes two distinct arguments:

i. Primarily, that he was entitled to rental subsidy because his wife had in 1989 sold the house to Mr.E.; and

ii. Alternatively, that he would anyway be entitled to rental subsidy for the period 1989/1993 because Bank regulations on this matter (prior to 1 November 1993) did not exclude from the rental subsidy scheme a staff member whose spouse owned the relevant property.

The Nature of the 1989 Transaction

17. The Respondent has claimed that the transaction concluded between Mrs. Powell and Mr. E. in 1989 did not amount to a valid sale but was a "fraudulent scheme set up to circumvent the Bank's policies, regulations and procedures on rental subsidy." The Applicant and the Respondent have argued at length about the requirements, under Philippine law, of a valid transfer of title in real estate, upon which however the Tribunal need not rule.

18. It appears from the documents submitted to the Tribunal that the arrangement between the Applicant's wife and Mr. E. in several respects deviated from a normal sale of property. These facts - on which there is no disagreement - include the following:

i. The Certificate of Title continued to be in the name of Mrs. Powell and no sale was annotated in it. The sale was never registered with the Registry of Deeds;

ii. The capital gains tax that was due on the transaction was never paid;

iii. The Powells continued to pay real estate taxes that were payable by the owner of the property;

iv. Mrs. Powell mortgaged the property in 1992, that is, after the alleged sale.

These facts demonstrate that the arrangement was made so as to avoid the costs that a fully executed transaction would have entailed. Nor does the Applicant deny this. In his communication of 11 June 1998 to the Bank, for instance, he notes that the sale was not registered in order to delay taxes on the transaction. In fact, in that communication he also notes that the Deed of Sale "will be notarized if we do not exercise the repurchase option." But as he then produced the Deed of Sale three months later on 9 September 1998, that instrument purported to be notarized apparently at the time of the original transaction in 1989. The Powells continued to live in the property as owners in every respect - apart from the fact that they had concluded an "invisible" arrangement under which they had sold the property to Mr. E. in 1989. But, apart from the "sale" having never been inscribed in the Certificate of Title, there were other peculiarities:

i. there was no evidence to show that Mr. E. had actually made any payment for the purchase of the property, and indeed it is unclear whether the price was P6,000,000, as inscribed in the Deed of Sale or P8,000,000 as claimed by the Applicant;

ii. there were a number of inconsistencies in the Applicant's account of the transaction. Thus, in his letter of 11 February 1998 to the OGA he expressed his surprise at the fact that the Deed of Sale had not been registered at the Land Registration Office although such non-registration was explained by him in his letter of 11 June 1998 as an essential aspect of the plan to avoid the costs of a fully executed transaction. Again, in the latter letter he observed that the Deed of Sale was not notarized for the same reason. However, when he then produced that instrument three months later it purported to have been notarized at the time of the alleged sale. In his letter of 11 June 1998 the Applicant also stated that it was the intention to "finalize the sale" only if the Powells would not exercise their repurchase option - that is to say, sometime in the future.

19. It is implicit in the opinions expressed by counsel on both sides that in the Philippines (as indeed in most other legal systems), the registration of a sale of real property performs a number of functions, among them providing notice to third parties about the ownership of real estate. Third parties are entitled to rely on the information included in the public register. This Tribunal has held that the Bank has a "duty of caution" when it examines the evidence put forward by a staff member as the basis for a claim of entitlement. As the Tribunal pointed out, the Bank might even "be held responsible for not having exercised due diligence in case it recognizes a fabricated certificate" (R. Chan, Decision No. 20 [1997], II ADBAT Reports 139, 153, para. 58). Although the Bank cannot make pronouncements on disputed questions of legal status under Philippine or other national law, it must nonetheless be reasonably assured that it administers staff entitlements on the basis of correct information. The Tribunal holds that it was not unreasonable for the Bank to rely on the information provided in the public register on the ownership of the property, that is to say, on the information provided in the Certificate of Title.

20. The Applicant claims that the 1989 transaction between his wife and Mr. E. was a valid sale and that the complicated arrangement between the parties was left "invisible" in order to avoid the various transaction costs that a fully executed sale would have entailed. Moreover, it kept open the option that as soon as the Powells wished it, they were in a position to claim the property as their own, again without having to incur transaction costs. The "invisibility" of the transaction was, in fact, so great that in his communications to the Bank the Applicant himself sometimes characterized it as a less than fully executed sale while expressing conflicting views about its details (such as whether or not it was supposed to be registered or notarized and what the purchase price had been). For the purposes of administering the right to rental subsidy, the Bank was not acting unreasonably in regarding Mrs. Powell as the owner of the property.

21. Consequently, the Applicant had no entitlement for rental subsidy from 1993 onwards, that is to say, from the time when the entitlement was expressly excluded for situations where the property was owned by the staff member's spouse.

The Period 1989-1993

22. The Applicant also makes a secondary argument according to which, even if his wife is deemed to have been the owner of the property, he would nevertheless have been entitled to rental subsidy for the period 1989-1993. He contends that it was only after November 1993 that the Bank's relevant regulations expressly excluded a staff member from the scope of the rental subsidy if his or her spouse owned residential property.

23. It is true that A.O. 3.07 became effective only on 1 November 1993. That A.O. replaced A.O. 3.13 of 1990 which, in turn, replaced Administrative Circular No. C-7 of 1975. Neither of the latter excluded rental subsidy where a property was owned by the staff member's spouse. The

Bank has in this connection argued that although the 1975 circular and the 1990 A.O. did not expressly exclude rental subsidy where a staff member was living in the property of the staff member's spouse, its "underlying policy" nonetheless was the same. The policy was laid down in a memorandum of 1975 from the Director of Administration to all professional staff in connection with the first rental subsidy scheme. According to that policy:

> The rental subsidy scheme provides assistance, on a selective basis, to professional staff members who are unavoidably paying an excessive portion of their salary in rent for suitable housing. It does not absolve professional staff members from responsibility for exercising normal prudence and care in the choice and cost of their housing, not does it afford relief from excessive housing costs without some sacrifice from the professional staff. The assistance provided herein is a temporary measure effective for a period of one year. (emphasis added)

The Tribunal observes that it was a pre-condition to the payment of rental subsidy that a staff member should have actually paid rent for his housing. Therefore, it is unnecessary for the Tribunal to decide the further question whether the policy did or did not exclude a staff member whose spouse owned property from the rental subsidy scheme. The Applicant adduced no evidence whatsoever before the Bank that the Powells had concluded a rental arrangement between themselves, or that payments of rent had actually been made by the Applicant to his spouse. It was not unreasonable for the Bank, once it concluded that Mrs. Powell was the owner, to regard payments made to Mr. E. as having been made on some other account and not by way of rent.

24. Although the argument was not raised by the parties, the Tribunal has considered whether the payments, if any, made to Mr. E. could equitably be deemed to be rental payments made to Mrs. Powell. But having regard to the fact that the Applicant contributed, perhaps substantially, to the construction of the house, and in the absence of any evidence whatsoever of a rental relationship between the Powells, the Tribunal considers that it would be unreal to deem the Applicant as having paid rent to his own spouse.

Decision:

25. For these reasons, the Tribunal unanimously decides to dismiss the Application.