

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

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| AIK SAN REALTY LIMITED | |
| TUNG HING SHING REALTY LIMITED | Appellants |
| YAU SUN DEVELOPMENT COMPANY LIMITED | (Plaintiffs) |

AND

| | |
|------------------|-------------|
| ATTORNEY GENERAL | Respondent |
| | (Defendant) |

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CASE FOR THE RESPONDENT

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1. This is an appeal by leave of the Court of Appeal of Hong Kong, leave having been granted by order dated the 17th day of July 1981, to appeal against a decision of the Court of Appeal of Hong Kong (Huggins, Leonard and Li J.J.A.) whereby the Appellants' appeal was dismissed and judgment entered for the Respondent. The appeal was against the judgment of Liu J. delivered on the 23rd day of December 1980 in the Supreme Court of Hong Kong (High Court) dismissing the Appellants' originating summons.

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2. The declarations sought by the Appellants were: p. 5 l.33

(a) A declaration that upon the true construction of Regulation 16 of the Building (Planning) Regulations, the Plaintiffs' proposed building on the aforesaid site (other than Section F thereof) will not abut, front or project over Jardine's Crescent.

(b) A declaration that the Building Authority's decision dated 25th January 1980 rejecting the Plaintiffs' building plans on the ground that the street shadow area had been exceeded under Building (Planning) Regulation 16 was accordingly invalid.

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(c) A declaration that the Plaintiffs' said building plans are deemed under Section 15(1) of the Buildings Ordinance to have been approved by the Building Authority.

- P. 53 1.1 3. The Appellants acquired by purchase Sections F, C, D, E and G of Inland Lot No. 457 by five separate assignments. Sections D, E and G were transferred by virtue of Indentures dated the 23rd day of May 1978 and Sections F and C by virtue of Indentures dated the 5th day of November 1979. The first and second plaintiffs purchased Sections D, E and G. The third plaintiff purchased Sections C and E. Each of these lots had frontages on two streets, Jardine's Crescent and Yun Ping Road. 10
- p. 46 1.1
p. 36 1.21 4. Sections C, D, E and G were subdivided by Deeds Poll. The effect of such was to create two areas of land. Firstly, a strip thirteen inches wide and 180 feet long running along Jardine's Crescent described as Subsections 1 of Section C, 1 of Section D, 1 and 2 of Section E and 1 of Section G. Secondly, the large remaining portions of those Sections, which, together with Section F, comprise the site in respect of which building plans have been refused. 20
- p. 36 1.24
p. 38 1.11 5. The narrow strip of land (described in paragraph 4 above) was sold to Mentor Estates Limited. The declared intention of Mentor Estates Limited is to construct on its land an advertising sign board some 180 feet long and 18 feet high. The land sub-divided off and sold to Mentor Estates Limited represents only 1.301 per centum of the land held by the Appellants.
- p. 8 1.16
- p. 81 1.1 6. The Appellants submitted building plans to the Building Authority for a structure covering the whole of the site comprising one lower ground floor, one upper ground floor, twenty-five floors above, and two roof floors. In substance, a structure rising 27 storeys reaching 255 feet above the Jardine's Crescent level, and 26 storeys above the Yun Ping Road level. The proposed building will extend approximately 237 feet above the top of the proposed advertising sign board along Jardine's Crescent. 30
- p. 89 1.1 7. The Building Authority refused his consent to the building plans pursuant to the Building Ordinance Chapter 123 of the Laws of Hong Kong on the grounds (inter alia) that "the street shadow area over Jardine's Crescent had been exceeded, Building (Planning) Regulation 16. Your calculations should be based upon the overall frontage of the building. The alienated portion is not considered to affect the application of this regulation". 40
8. The dispute between the parties is as to the proper interpretation of Regulation 16 of the Building

(Planning) Regulations.

9. Regulation 16 provides as follows :-

- (1) Where a building abuts, fronts or projects over a street, the height of such building shall be determined by reference to the street shadow area thereof.
- (2) Subject to paragraph (3), the street shadow area of a building shall not exceed the area obtained by applying the formula -

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$$\frac{F \times W}{2}$$

in which -

F is the length of the frontage of the building; and

W is the width of the street upon or over which the building abuts, fronts or projects.

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- (3) Where a building abuts, fronts or projects over 2 streets forming a corner, the maximum street shadow areas of the building permitted under paragraph (2) may be increased -

- (a) by adding wholly in respect of one side of the building or partly one side and partly the other, an area obtained by applying the formula -

$$\frac{W1 \times W2}{4}$$

in which -

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W1 and W2 are the widths of the 2 streets, respectively, forming the corner; or

- (b) where the two streets are not of equal width, by adding wholly in respect of the side of the building abutting, fronting or projecting over the narrower of the 2 streets, an area obtained by applying the formula -

$$7 (WW-WN)$$

in which -

WW and WN are the widths of the wider and

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the narrower, respectively, of the 2 streets forming the corner.

(4) For the purposes of this regulation -

"corner" means an intersection of 2 streets where the angle of intersection of lines drawn along the centre of such streets is less than 140° measured on the side nearer to the building;

"frontage" in relation to a building, means that boundary of a site upon which the building is erected which abuts or fronts a street and includes any service lane or other opening within such boundary;

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"street" means a street or service lane at least 4.5 m wide;

"street shadow area" in relation to a building means an area on the surface of a street contained by -

(a) a line formed by the projection from every part of the side of the building abutting, fronting or projecting over such street of planes at an angle of 76° from the horizontal from the highest point on such building or on any projection therefrom of a permanent nature, from which such planes could be drawn uninterrupted by any other part of that building;

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(b) a line formed by the frontage of the building; and

(c) lines drawn from each extremity of the frontage of the building at right angles to the centre line of the street.

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10. Section 19 of the Interpretation and General Clauses Ordinance Chapter 1 provides as follows :-

"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

11. The Appellants contended :

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p. 11 1.24

(a) that the proposed building would not itself abut or front Jardine's Crescent.

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- (b) that such part of the side of the building as abuts the alienated strip of land neither abuts nor fronts the street. Jardine's Crescent. p. 23 1.1
- (c) that Regulation 16(1) has no application to that portion of the building the frontage of which does not abut or front Jardine's Crescent. p. 27 1.30
p. 31 1.4
- (d) that the word "fronts" connotes touching or actual contiguity as does the word "abut", the words having much the same meaning.
- 10 (e) that Regulation 16 controls only those buildings where the site (as distinct from the building) is contiguous with a street.
12. The Respondent contended :
- (a) that whereas the word "abuts" may contemplate actual contiguity, the word "fronts" does not.
- (b) that the proposed building abuts or fronts Jardine's Crescent from each of the extremities of that side.
- 20 (c) that the proposed building is one integral structure and that as a significant part does abut Jardine's Crescent Regulation 16 does apply to the whole of the length of the side of the building along Jardine's Crescent.
- (d) that even if five sixths of the building be held to abut the alienated strip, such part fronts Jardine's Crescent. p. 23 1.5 & 6
- (e) that Regulation 16 applies to any and every building abutting or fronting a street, whether the site on which the building is to be erected is in whole or in part contiguous.
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13. In the judgment of the High Court Liu J. held :
- (a) Our Regulation 16 was introduced with a view to conserving the desired quantity of accessible sunlight on street level by limiting building height. It is inherently tied to shadow casting. It matters not whether there is absolute land contiguity. A building not having physical contiguity with the street may cast on it an equally unwanted shadow, and even a building one row behind, given sufficient height, may cast a shadow just as objectionable. p. 12 1.35
- 40 (b) That a section of consequence of the building will abut upon Jardine's Crescent. That portion p. 14.1.1

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actually touching Jardine's Crescent will provide a rear entrance and a pair of exits for the second staircase. In my view, the plaintiffs' proposed building will abut upon that street.

p. 14 1.30

(c) That the building can be said to be both abutting and fronting Jardine's Crescent.

p. 14 1.44

(d) The whole length of the rear side of the plaintiffs' proposed building (1/6 actually contiguous and 5/6 behind a thirteen inches strip) will front Jardine's Crescent for determining the permitted street shadow area under Regulation 16(2).

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14. The Appellants appealed on the grounds that Liu J. has erred in law as follows -

p. 19 1.1

"in finding that the proposed building on the plaintiffs' site known as Nos. 16-26 Yun Ping Road did for the purpose of Regulation 16 of the Building (Planning) Regulations abut and/or front Jardine's Crescent and that its entire site boundary along the said Jardine's Crescent must be included for calculating the street shadow area."

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p. 20 1.1

and upon the further grounds as follows :-

(1) That the learned judge misconstrued the term "fronts" in Regulation 16 of the Building (Planning) Regulations.

(2) That the learned judge wrongly held that physical contiguity is not essential for "fronting".

(3) That the learned judge wrongly held that the Plaintiffs' proposed building will "front" onto Jardine's Crescent.

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(4) That the learned judge wrongly held that in calculating street shadow area for the purposes of Regulation 16 the whole length of the rear side of the Plaintiffs' proposed building will "front" Jardine's Crescent. The Plaintiffs say that if (which is denied) the proposed building "fronts" Jardine's Crescent at all, it only does so to the extent of the boundary of the site of No. 16 Jardine's Crescent, and that any street shadow area should be calculated accordingly.

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15. The Court of Appeal dismissed the appeal. The reasons given by the learned Justices of Appeal were as

follows :-

- (a) It is accepted that the site upon which the Appellants proposed to build does "abut on a street", albeit not at all points. (Huggins V-P) p. 21 1.32
- (b) I can conceive of no reason why it should have been thought appropriate to ignore the shadow from that part of the building which abuts the alienated land when the street shadow area is calculated. (Huggins V-P) p. 23 1.16
- 10 (c) I would have thought his [the learned Judge's] interpretation of Regulation 16, taken on its own, best achieved the intention of the Governor-in-Council. (Huggins V-P) p. 24 1.18
- (d) It is immaterial that only part of the boundary abuts or fronts the street. (Huggins V-P) p. 24 1.32
- (e) As with the "sides" of the building, I do not think one can treat the part of the boundary which abuts the street and the part which abuts the inner side of the alienated land as different boundaries : together they form the north-eastern boundary. (Huggins V-P) p. 24 1.38
- 20 (f) I think that [Reg. 16(4)] (c) clearly recognised that the "frontage" shall have two and only two extremities, one at each end of the boundary which abuts or fronts the street. (Leonard JA) p. 28 1.14
- (g) But that does not end the matter for the proposed building in an entity. If completed that entity will abut Jardine's Crescent, it will also abut the severed strip and it will abut Yun Ping Road. (Leonard JA) p. 28 1.30
- 30 (h) It is a single boundary - the boundary to the North East of the site. It abuts and fronts on Jardine's Crescent. (Leonard JA) p. 28 1.38
- (i) Reference to the shadow area diagram at p. 90 shows that the planner has not computed the street shadow area with regard to the boundary's extremities but has computed the area with reference to one extremity and a point which is not at the other extremity. (Leonard JA) p. 28 1.39
- 40 (j) The meaning of the words "abut" and "front" are clearcut enough. It is also abundantly clear that at least 1/6th of the proposed building abuts and fronts Jardine's Crescent. p. 31 1.14

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That is so because 1/6th of the building constitutes an integral part of the building. If it abuts, then the whole building (in one unit) can be said to be a building which abuts the street. For example, if a person puts one of his feet on to the street it is futile to argue that he has not entered the street simply because his whole body has not gone on the street. For this reason I am of the opinion that the building is one which abuts on Jardine's Crescent. As such it is a building to which paragraph 1 of Regulation 16 applies. The height of the whole building is to be determined by reference to the street shadow area. (Li JA)

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p. 32 1.4

- (k) For this reason the highest point is from the roof top of the whole building - not just from one part of the building. (Li JA)

16. The Respondent submits that this appeal should be dismissed with costs for the following amongst other REASONS

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- (a) The Courts below have correctly held that in this legislative context the proposed building abuts Jardine's Crescent.
- (b) In this legislative context "front" means any face of a building; "to front" means to present a face or aspect to a street, and the Courts below have correctly held that the proposed building will front Jardine's Crescent.
- (c) That although cases on unrelated legislation dealing with the exacting of contributions towards street improvements may not be of great assistance in the interpretation of the words "front" or "abut" in this legislation, nevertheless some guidance can be obtained from the judgment of Mathew J. in *Lightbound v. Higher Bebington Local Board* (1885) 14 QBD 849 at page 851 -

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"It was argued for the appellant that these words mean the same thing, and imply every case absolute contiguity with the street of the land sought to be charged. I am not satisfied that that contention is well founded. The cases shew, and particularly the case of Wakefield Local Board v. Lee (1 Ex. D. 336) shews, that absolute contiguity with the street is not necessary in order to impose liability upon owners in

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respect of these expenses. If the cottages had any direct access to the street, I am not prepared to say that the case would not come within the provisions of s.150."

- 10 (d) Further, the Respondent respectfully adopts the approach of Fuad J. in the High Court of Hong Kong in the case of Mightystream Limited v. Attorney General (M.P. No. 586 of 1981) where in considering for the purposes of Regulation 19 of the Building (Planning) Regulations whether a site abutted a street although separated by a nullah he said

20 "that in any given case it must be a question of fact, depending on the facts and the application of any rules which may have been laid down in the cases (slightly to paraphrase the words of Lord Esher, M.R. in Lightbound at p. 580) whether a site abuts a street in the ordinary meaning of the word abut, in the absence of a definition. I think, too, that the court must approach the problem in a practical and common sense way, bearing in mind that it is for the authority seeking to restrict the owner's user of the land to satisfy the court that his contention cannot be right. Clearly every slight obstruction or intervention between a site and a street could not be said to prevent the former from abutting the latter. It will be a question of degree."

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On appeal the Court of Appeal of Hong Kong (Civil Appeal No. 122 of 1981) expressly approved this statement.

- 40 (e) That as a significant part of the proposed building is intended to have actual contiguity with Jardine's Crescent, (providing access to a transformer room and ingress and egress for the public to and from the whole building) the building will as a whole abut Jardine's Crescent, and front on Jardine's Crescent, and as such is a building to which Regulation 16 will apply.
- (f) That the Courts below have correctly held that the proposed building will be one integral structure and that it will cast shadow onto or over Jardine's Crescent along the whole of the North-East side.
- (g) That the North-East boundary is a single boundary the length of which is taken from the South-East and North-West extremities thereof.

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- (h) The Courts below have correctly held that street shadow calculations are required to be made having regard to the full width of the building on the Jardine's Crescent side.
- (i) That the line referred to in Regulation 16(4)(b) is the line formed by the North Eastern boundary drawn from its extremities.
- (j) That the lines formed by the planes referred to in Regulation 16(4)(a) are to be drawn from every part of the side of the building abutting or fronting Jardine's Crescent namely the North Eastern side from the highest point of each and every part.
- (k) That the decisions of the Courts below properly reflect the intention of the legislature.
- (l) That the Courts below were correct in dismissing the declarations sought by the Appellants.

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N.T. KAPLAN

N.L. STRAWBRIDGE

IN THE PRIVY COUNCIL

No. 48 of 1981

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B E T W E E N :

AIK SAN REALTY LIMITED
TUNG HING SHING REALTY LIMITED
YAU SUN DEVELOPMENT COMPANY LIMITED

Appellants
(Plaintiffs)

AND

ATTORNEY GENERAL

Respondent
(Defendant)

CASE FOR THE RESPONDENT

MACFARLANES
Dowgate Hill House,
London,
EC4R 2SY

Solicitors for the Respondent