17/83

No. 17 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

ATTORNEY GENERAL — Appellant (Defendant)

- and -

FIREBIRD LTD — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

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INDEX OF REFERENCE

EXHIBITS

IN THE PRIVY COUNCIL No. 17 of 1982

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- and -

FIREBIRD LTD — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

No. 1

ORIGINATING SUMMONS

In the High Court of Hong Kong

No. 1
Originating Summons

10th June 1980

IN THE HIGH COURT

IN THE MATTER of the Buildings Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979

and

IN THE MATTER of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon.

BETWEEN

FIREBIRD LIMITED — Plaintiff

- and -

ATTORNEY GENERAL — Defendant

In the High Court of Hong Kong

No. 1
Originating Summons

10th June 1980

(continued)

TO: The Honourable the Attorney General
Attorney General's Chambers
Central Government Offices
Main Wing
Hong Kong.

Let the Defendant, within 8 days after service of this Summons on him, inclusive of the day of service, cause an appearance to be entered to this Summons, which is issued on the application of the Plaintiff, Firebird Limited, whose registered office is at 9th Floor, Baskerville House, 22 Ice House Street, Hong Kong.

By this Summons the Plaintiff claims against the Defendant:-

(1) A declaration that on the true construction of the Buildings Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations October 19, 1979, empowered* to reject the plans for building works at New Kowloon Inland Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the Plaintiff on September 8, 1979, on the ground that the site was a Class A site and not a Class C site within the meaning of regulation 2 of the Building (Planning) Regulations.

* the building authority was not an

(2) A declaration that the purported refusal by the Building Authority on October 19, 1979, of the said plans on the ground that the site was a Class A site and not a Class C site was null and void and of no effect.

(3) Such further or other relief as may be just.

(4) Costs.

If the Defendant does not enter an appearance, such judgment may be given or order made against or in relation to him as the Court may think just and expedient.

Dated the 10th day of June, 1980.

S.H. Mayo
Registrar

Note:- This Summons may not be served more than 12 months after the above date unless renewed by order of the Court.

This summons was taken out by Woo, Kwan, Lee & Lo of Connaught Centre, 26th Floor, Hong Kong, Solicitors for the said Plaintiff, whose registered office is at 9th Floor, Baskerville House, 22 Ice House Street, Hong Kong.

(Signed) WOO, KWAN LEE & LO

No. 2

JUDGES NOTES

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

Miscellaneous Proceedings 1980, No.517

IN THE MATTER of the Building Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979

and

IN THE MATTER of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon =

B E T W E E N

FIREBIRD LIMITED — Plaintiff

- and -

ATTORNEY GENERAL — Defendant

Coram: Hon. Bewley, J. in Chambers
Mr. D. Widdicombe, Q.C. & Mr. K. Bokhary (Woo, Kwan, Lee & Lo) for Plaintiff Mr. Barlow & Mr. P.T. Nunn, Senior Crown Counsel, for Defendant

Date: 9th June, 1981

JUDGE'S NOTES

Widdicombe 14-storey composite building - shops and flats. Site was class C at date of application : 3 streets. Plans were correct at time of application. Before Building Authority decided law was changed. Regulations altered. 2 of 3 streets are no longer classified as streets. Site became class A bounded by 1 street. Less plot ratio - floor space. 5338 sq. ft. lost = 495 sq. m. Application refused on grounds we were class A.

We say change is not retrospective. We say it is unfair. We were caught.

In the High Court of Hong Kong

No. 2
Judges Notes

9th June 1981

(continued)

2 declarations sought.

Affidavit of Wang Teh Huei. Regulations may have come into operation on 12/10 - date they are published - not 31/10. It matters not.

Streets of less than 4.5 m wide no longer counted as streets. Service lanes are 3.05 m. Change rendered them no longer streets.

All calculations on basis of class C site.

Building Authority letter dated 19/10. It could make a difference if regulations had already come into effect. I may have been premature when I said it did not matter. (a) is the issue.

Ordinance S. 2 'Street' very wide definition

S.14

S.15

Additional Regulations 30(3) 60 days is standard period for approval.

S.16 Grounds for refusal. (a) - (p)

(d) is one relied on.

S.38 Regulations.

(1) (c) (iii) Planning Regulations made.

(5) Publication.

S.39 (1) Application of new regulations.

S.38 No suggestion of retrospective regulations. Planning Regulations 2(1) Change of Law. 4.5 m.

Definition 'Street' very wide.
Part III
Reg. 16 Height, not affected.
Reg. 16 always has had 4.5 min. No change in law.
Reg. 20 Site coverage
Reg. 21 Plot ratio
Reg. 23 (1)(c)

6th July 1979 Trainor J. decided Cheong Ming Investment Co. Ltd. v Attorney General. Does that provision govern the classes or more limited to 23 (1)(a). Trainor held it had limited application.

When you decide class you take street without

any limitation of width Trainor says 23(1)(c) is comprehensible without reference to classes. No appeal. It is treated as correct. Instead law was changed. Gazette notification 9/10/79. CN 249/79. This alters law re Trainor J's decision to what crown contended it should be.

We made application before law was changed.

S.38 (5). Publication not dispensed with 3 weeks or not He has paid lip service to proviso but he has published it. Copy of letter to Attorney General. No reply yet reached me. I will get it.

Argument: 2 limbs

1. No retrospective operation to regulations.

2. Pursuant to Interpretation Ordinance S.23 we have accrued or vested rights which are not affected by change in law - right to have application determined according to law in operation when we made it.

1. Halsbury, 3rd edition volume 36.

paragraph 643
644

747 'Capable of having effect' S.38 is enabling power. Submit it does not authorize retrospection, therefore, regulations can only operate from date of operation - either 12/10 or 31/10. They are not operative on 8/9 - date of application. It was lawful application and correct at time it was made.

2. Interpretation Ordinance S. 23
This applies to subordinance legislation
i.e. S. 2 'any instrument'
S.17 (5) repeated
S.23 (b) previous operation or anything duly done under building planning regulations before they were altered is not affected.

(c) Any right acquired or accrued under Building Ordinance or planning regulations.

Building ordinance S. 14 - 16. Approval. Deemed to have approved. Refusal.

In the High Court of Hong Kong

No. 2
Judges Notes

9th June 1981

(continued)

Scheme - entitled to approval unless 1 or more of grounds of refusal exist as listed in S.16.

Applicant satisfying requirements is entitled to approval.

Mandemus would lie in appropriate case. They can only refused on listed grounds. Theoretical.

Halsbury, paragraph 717, Identical words in UK Act. Footnote (i).

Many cases more in supplement. Important background to general principle of accrued rights.

Hitchcock v Way 1837. Headnote. Last sentence but one of judgment.

Re Joseph Suche 1875

Heston & Isleworth Urban Council v Grout 1897

CA 311 Upholding HC

Colonial Sugar Refining Co. v. Irving 1905

372

Lewis v Hughes 1916

Another example

Hamilton Gell v White 1922

DPW v Ho Po Sang 1961

Distinguish.

919. Morris.

You did not know whether you were going to get rebuilding certificate, you only had a hope.

Compare Building Ordinance. Not a case of mere hope. Ho Po Sang was case of pure discretion by Governor in Council. Statute did not say how they were to arrive at decision. Guesswork.

Building Ordinance S. 14 - 16 give right to approval unless oneof grounds of refusal is validly cited against you. Appellant will know whether application will succeed if he does his

homework and has everything in order. Refusal must be argued in S. 16, S 15 expressly contemplates deemed approval. Whole scheme gears you to right to approval unless grounds for refusal exists.

904. Discretion in Landlord & Tenant Ordinance. Contrast Building Ordinance whether anything is spelt out.

Nalla Shanmugan 1962

Plainly intended to be retrospective. Otherwise Appellant would have been entitled to have application dealt with under law at time of application.

Application for registration as citizen is similar to Building Authority application. Certain requirements needed. Here there are grounds of refusal. Ho Po Sang was matter of discretion.

Free Lanka Insurance Co. Ltd. v Ranasinghe 1963 (1964) A.C. 541

Respondent acquired inchoate right. 550. Liability was not actually established by time law was changed. This is why it was inchoatic.

Alternatively Building Ordinance S. 39 (1)

Submit implication that legislative thought that plans put in before change of law were to be dealt with under old law.

Period of grace. Otherwise S. 39 (1) would be even wider. Application before new law must be dealt with under old law.

Barlow S. 39 (1). Deliberately decided not to include any provision dealing with old law. This does not apply. 3 arguments.

1. Cheong Ming wrongly decided, therefore law changed. Legislation did not change the law: it only clarified it. At time of application by Plaintiff they only had a class A site.

2. At time regulations made Plaintiff had no accrued rights in respect of application. He only had hope or expectation that application might be successful.

3. If Plaintiff had accrued right, Governor in

Council intended to vary mutual relationship between Plaintiff and Building Authority by terms of amendment i.e. that it should be retrospective.

Date of coming into force

S. 38 (5) 'Such' publication is 3 weeks. i.e. you may dispense with that period and also the gazette.

Interprete regulations to avoid absurdity and ambiguity.

Lai Man Yau v Attorney General 1978

Date of coming into force was 12/10. Less than 60 days after application was filed.

1. Cheong Ming

Planning regulations 16. Permissible height. This is formula to be applied.

20. Permissible site coverage.
'Depending on height of building.'

21. Do re plot ratio.
Both 20 and 21 link with 1st.
Schedule at F 28.
Calculate permissible height under regulation 16.

Then depending on class of building refer to first schedule and apply regulations 20 & 21.

20 & 21 are subject to regulation 23. 23(1) solely concerned with 19, 20, 21 & 22. In deciding whether it is class A or C any street less than 4.5 m must be ignored.

Regulation 19. Where: (a) site abuts on street less than 4.5 m or (b) does not abut on a street: (1) the height of the building on that site or of that building. (2) the site coverage of the building or any part thereof. (3) plot ratio of the building shall be determined by Building Authority.

This means either that it must be done in accordance with planning regulations. If so this regulation does not take things much further.

Alternative that Building Authority has very wide discretion.

S. 16 Building Authority must apply with regulations. Therefore, regulation 19 does not seem to take matter any further. He must have regard to Ordinance.

Has Building Authority complete discretion to determine plot ratio and site coverage? This throws net very wide. Street less than 4.5 m wide includes site in present case.

Cheong Ming Judgment

No argument up to page 4. Regulation 19. This is only 1 of 3 factors to be determined by Building Authority. Take issue with last paragraph on P. 5. Meaning in regulations can be changed as long as no attempt to override provisions of Ordinance.

Judge says restricted definition cannot be adopted in regulations.

Craies, 7th edition, 297. Interpretation. May be occasion when words are used in different sense to that in Act. Ordinance is very wide in application. 'Street' in regulations has narrower definition for purpose of those regulations only. Regulations do not purport to override ordinance, therefore, not ultra vires.

Gap in reasoning

Regulation 23. 'For the purposes of Regulations 19 - 22'. This equally affects (a) (b) & (c). (c) can be read without reference to (a) or (b). i.e. for purposes of regulations 19 - 22 a street is less than 4.5 m.

Do not understand last sentence on page 9.

Schedule 1 Height is not only factor. The other is classification of site.

Main issue in dispute is his interpretation to S.23 (1). He says (c) does not apply to regulation 19 - but only to (a). If this is what he means (c) would have been more happily incorporated in (a).

Opening words of regulation 23 (1) show it is intended that all of regulation 23 (1) should apply to regulations 19 - 22.

Building Authority is required by regulation 23 (1) (c) only to take into account streets of 4.5 m.

Suggest J. has overstated significance of

regulation 16. Height is only 1 of 2 components that Building Authority is required to take into account in accessing plot ratio and site coverage.

Regulation 19. 'Determine'. Must Building Authority follow formulae or have complete discretion? If former regulation 19 is superfluous and but is still governed by regulation 23 (1)(c). If latter, he has very wide discretion. No evidence that he has acted on mistake of principle. If not tied to formulae in regulations, he has no guidelines as to how he should exercise discretion.

Widdicombe They are unfettered. This is my experience.

Barlow Then this case comes within S. 19.

Widdicombe Building Authority interprets that as meaning abutting on 1 street only. If it abuts on 2 streets they consider regulation 19 does not apply.

Barlow Court must apply regulations. If public official has discretion and no guidelines given to him, it is only if shown that he has acted on wrong basis that his decision can be reviewed. British Oxygen. 1978 Appeal Cases.

If regulation 19 governs case, regulations 20, 21, 16 are of little assistance. Has he exercised discretion wrongly?

Gazette Notice

Explanatory note indicates amendment is declaratory of existing law - to put matter beyond further dispute.

Maxwell, 12th edition, 272

If I am right, at time plans were lodged Plaintiff was only entitled to class A classification.

If I am wrong, Building Authority should have recognized Plaintiff entitled to class C site at time of application. My learned friend says Building Authority can only refuse on 1 of listed grounds.

Clear from cases the question is whether at time of change in law Plaintiff had any accrued right. I submit Plaintiff had none until 60 day period from lodging of plans had expired without notification of refusal.

S. 15 (1). Deeming only takes effect after period has expired without notification of refusal. Regulation 30 (3) of Administration Regulations '60

days from date plans were submitted'. Appellant had no accrued rights up to period of 60 days or actual refusal. Appellant had no rights to enforce in court during this time. He could not go ahead and construct building. No cause of action in Joseph Suche case. At best he had hope and expectation. Only time he gets accrued rights is after determination of application.

Numerous matters to be considered by Building Authority. S. 16 (1), 15 (2). e.g. Building Authority might have refused under S. 16 (1) (a) (b) (2nd ground) (c) (d) etc. Expectation or hope is contingent on satisfying Building Authority on all these different counts. Only relevant accrued right is right to commence building. Amendment cannot take away that previously existed.

Building Authority must enforce law as it exists when he addresses mind to application. He has 60 days. Governor in Council may see fit under S. 39 (1) to grant period of grace. He did not see fit to do so - perhaps because he thought regulation was merely declaratory.

Publication - word 'such' must relate to 3 weeks. Otherwise it does not make sense. The regulations were published, therefore, Governor could not be purporting to dispense with publication generally.

Same as Ho Po Sang. Appellant had only hope or expectation. He had no right to do anything. If he had right to approval on date plans were lodged - 60 day period rebels against any such interpretation. Until 60 days have expired he has no right to build. No course of action. He must have claim based on right enforceable in court at time he commences proceedings. If regulation then changes right - it should not be taken to be retrospective - but he must have course of action to begin with.

Jessel M.R. - Joseph Suche case. 'Taking away right of action'.

Until application to public authority is determined one way or another - you cannot have accrued right.

Intended to take immediate effect. This must mean retrospective to date pending applications were lodged.

Hitchcock v Way

Terms of amendment clearly show it was intended to vary mutual relationship between applicants and

Building Authority.

Shanmugan

S. 17. Applicability arose directly from language - not by inference therefrom.

Also Governor's explanatory note.

If regulations did not come into effect until 30/10 - Building Authority was not justified in refusing application on those grounds. It may have been justified in doing so in the exercise of its discretion under regulation 19. Declaration is discretionary and court may refuse. There was also Director of Fire Services ground.

Adjourned to 11/6/81.

(sd.) E. de B. Bewley
Judge of the High Court.

Date: 11th June, 1981
Coram: Hon. Bewley, J. in Chambers
Court resumes: Appearances as before

Barlow Regulation 19. Planning regulations F 10.

Complete discretion by Building Authority if within this regulation. Otherwise matter must be in accordance with other regulations.

S.16

Sing Way. May - must. This decision applied to S. 16 (1)(d). If applicant does not comply with planning regulation Building Authority must refuse it.

Fire Services

Applicant had applied for approval of plans. When considering application, Building Authority must consider number of matters including site coverage, plot ratio and other matters in 16 (1) including Fire Services' approval.

If Building Authority was justified in refusing on either ground, refusal is valid in law. Fire Services' decision has not been challenged. Whole refusal must be considered.

There would be no point in making declaration in terms sought because the refusal would not be null and void because of Fire Services matter. Thus court should not exercise discretion to make declaration.

Widdicombe Common that Fire Services certificate follows. No new application is necessary. Take view that certificate is formality. I have sent for architect.

This may be left over until decision on substantive matter.

General

Crown has taken cavalier attitude to previous decision, e.g. Cheong Ming case wrongly decided.

Legislature mistaken in view of law - Craies.

Own client Building Authority wrong. He says Building Authority should have dealt with it under regulation 19. In fact, they dealt with it under regulation 20.

Draw conclusion from case founded on so many mistakes. Desperate for argument.

1. Cheong Ming

Submit correctly decided. All arguments put. Court should require a great deal of persuading that it is wrong. They did not appeal. Court must consider the matter. Draw inference from failure to appeal.

Page 5. My argument.

Classification of sites is central feature of regulations. 1st thing developer looks at. If Governor in Council had intended to limit definition of sites in significant way, he could have done so in unmistakeable terms. He would have incorporated reference to narrow streets in definition of classes - as has now been done. This is way to do it. It is spelt out. You do not expect to find such an important restriction in S. 23 (1) (c). It is tucked away. Draughtsman could not have intended such obscure point to have had such effect on central feature of regulations.

Acceptable explanation of 23 (1) (c) that does not involve altering classes. It is the one adopted by Judge - that 23 (1) (c) ties up with 23 (1) (a). (c) is linked with 'and' not 'or'.

To make 23 (1) (a) work particularly for purposes of regulation 19 you have to have restriction on width of street incorporated in it. Regulation 19 deals with cases which do not abut street or only 4.5 m. To make Building Authority authority on

height complete you have to read 23 (1) (a) with 23 (1) (c), so 23 (1) (a) is consistent regulation 19. Judge says this on page 9.

Judge accepts that for limited purposes regulations can modify meaning of street. But he sounds note of caution. Regulations must remain intra vires ordinance.

Blashill v Chambers (1885) 14 QBD 479

I do not say regulations do infringe ordinance. I cite this to support J's cautionary approach 485.

Cap. 1. S. 31. Absolute. Subsidiary legislation may limitations but general approach is that expressions should have same meaning.

Barlow said regulation 19 did not give unfettered discretion. I think this has now gone.

He says this is regulation 19 case. I disagree. Read as a whole and in context it deals only with site abutting a single street less than 4.5 m - not where there are 2 streets, 1 of which is more than 4.5 m wide - as in this case.

Building Authority themselves have not regarded it as regulation 19 case.

I am on strong ground. Look at whole of wording. It deals only with single street.

A, B and C sites are dealt with by other regulations - not regulation 19.

Crown asks court to read regulation 19 as 'where site abuts on street less than 4.5 m and on street more than 4.5 m' i.e. this case.

2. Accrued rights is real issue.

Which side of line. Have we only a hope as in Po Sang or accrued rights like Shanmugan.

Sing Way. S.16. No appeal. 287-8 'May refuse': must in most cases. Exception e.g. (g) (1) & (i) probably (l) (m).

Although there is element of discretion in some paragraphs it is quite different from open-ended discretion in Po Sang. There are no guidelines there. S.16 has circumscribed discretion, e.g. traffic danger in (h).

Therefore possible for applicant to know within

reasonable limits whether he is ok or not. He can estimate prospects, e.g. he knows no traffic danger.

Present case is example. No suggestion of discretionary provision. S. 16 and this case in particular can be distinguished from Po Sang.

Litigant does not know at time of pleadings that he will win. No right to damages. He claims right to damages.

Enough for accrued rights to operate that he claims right to damages. We have accrued right to decision on law at time of application. We have right to approval. Always element of uncertainty in accrued right cases, e.g. inchoate or contingent. Free Lanka case. 542. Not enough to say you don't know for certain that you are going to succeed. It must be more than mere hope. Provided you have got well-circumscribed statutory framework and applicant can reasonably assess his prospects that is on accrued rights side of line.

3. Retrospective operation

No attempt to answer main point - S. 38 ordinance does not authorise retrospective operation.

Miscellaneous Points

S. 39 Barlow misread it

S. 15 New point.

60 day period is itself indication that applicant should be dealt with on law at date of application. Regulations give 60 days as prescribed period. This has been selected as period with which Building Authority must decide.

If law is changed in that period - e.g. on 59th day - there is no adequate period left to Building Authority for consideration. Ordinance and regulations are founded on proposition that Building Authority needs certain time to consider application on law applying at time it was made. If rules are changed they don't get adequate time.

If legislature thought that law was that decision should be founded on law as changed, we would expect to find extension of 60 day period to deal with changed situation.

Publication. Letter from Attorney General

No assistance.

S. 38 (5) Publication in gazette - is what may be dispensed with. Safer interpretation that 3 week period should operate.

Barlow Blashill v Chambers

J's cautious approach. Only prayed in aid of this.

Singway. No issue taken with terms 16 (1) (b) is similar to 16 (1) (d) which J. said was mandatory.

In refusal Building Authority said 1 ground was 16 (1) (a) Question of entertaining further evidence were not arise.

He has refused.

Widdicombe Submit Fire Services comments - by consent. Crossing out was already on it when we got it.

Objections easily remedied. All smallish points.

We relied on practice of Building Authority not to require fresh application.

Declaration in terms sought would not be meaningless - place reliance on our belief that it is not waste of time. We have taken these proceedings and brought Counsel from England. If I am wrong, there is no harm done to crown. We think that if we win on law, Building Authority will comply with law as laid down by court. Ask court to grant declarations on basis that they will be of use to us.

Barlow Neither confirm nor deny instructions that my learned friend has received. Building Authority was entitled to refuse relief under S. 16(1) (b).

C.A.V.

(Sd). E. de B. Bewley
Judge of the High Court

Date: 8th July, 1981

Coram: Hon. Bewley, J. in Chambers

Mr. K. Bokhary (Woo, Kwan, Lee & Lo) for Plaintiff.

Mr. Kaplan, Senior Asst. Crown Solicitors &
Mr Strawbridge, C.C., for Defendant.

Judgment delivered.

Bokhary Ask for partial costs. Successful in part.

Certificate for 2 counsel.

Kaplan Also ask for 2 counsel.

Costs should follow event.

Order Costs to follow event. Certified fit for 2 counsel on both sides.

(sd.) E. de B. Bewley
Judge of the High Court

In the High Court of Hong Kong

No. 3

ORDER OF MR JUSTICE BEWLEY

No. 3
Order of
Mr Justice
Bewley

8th July 1981

M.P. No.1980, No.517

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

IN THE MATTER of the Buildings Ordinance, Cap.123, the Building (Planning) Regulations and the Building (Planning)(Amendment) Regulations, 1979

and

IN THE MATTER of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon.

B E T W E E N

FIREBIRD LIMITED — Plaintiff

- and -

ATTORNEY GENERAL — Defendant

BEFORE THE HONOURABLE MR. JUSTICE BEWLEY IN CHAMBERS

O R D E R

Upon hearing counsel for the Plaintiff and counsel for the Defendant and upon reading the affirmation of Wang Teh Huei filed herein on the 10th day of June, 1980 and the exhibits therein referred to,

And upon the Plaintiff's application for :-

(1) A declaration that on the true construction of the Buildings Ordinance, Cap.123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979, the Building Authority was not on October 19, 1979, empowered to reject the plans for building works at New Kowloon Inland Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the Plaintiff on September 8, 1979, on the ground that the site was a Class A site and not a Class C

site within the meaning of regulation 2 of the Building (Planning) Regulations.

(2) A declaration that the purported refusal by the Building Authority on October 19, 1979 of the said plans on the ground that the site was a Class A site and not a Class C site was null and void and of no effect.

(3) Such further or other relief as may be just.

(4) Costs.

IT IS ORDERED that the said application of the Plaintiff be dismissed with costs to be taxed and paid by the Plaintiff to the Defendant. Certified fit for 2 counsel on both sides.

Dated the 8th day of July, 1981.

N.J. Barnett

Registrar.

In the High Court of Hong Kong

No. 3
Order of Mr Justice Bewley

8th July 1981

(continued)

In the High Court of Hong Kong

No. 4

JUDGMENT OF MR JUSTICE BEWLEY

No. 4
Judgment of Mr Justice Bewley

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

Miscellaneous Proceedings 1980, No. 517

8th July 1981

IN THE MATTER of the Building Ordinance, Cap.123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979

and

IN THE MATTER of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon.

B E T W E E N

FIREBIRD LIMITED — Plaintiff

- and -

ATTORNEY GENERAL — Defendant

Coram: Bewley J.
Date : 8th July, 1981

J U D G M E N T

Background

The plaintiff is a development company, which intends to construct a 14-storey composite building comprising shops and flats. Plans were drawn up and submitted to the Building Authority on 8th September, 1979.

On 19th October, 1979, the application was refused on 2 grounds, namely -

"(a) The permitted plot ratio and site coverage are exceeded - Reg. 20 of Building (Planning) Regulations. In this connection, please note that the above site is a class A site within the meaning of Reg. 2(1) of the Building (Planning) Regulations as amended by the Building (Planning)(Amendment) Regulations 1979.

(b) The plans are not endorsed with or accompanied by a certificate from the Director of Fire Services - Section 16(1)(b) of the Building Ordinance."

The Building (Planning) Regulations divide building sites into 3 classes, A, B and C. At the time of the plaintiff's application, they were defined in Regulation 2(1) thus -

"class A site" means a site that sbuts on one street or on more than one street, not being a class B site or a class C site;

"class B site" means a corner site that abuts on 2 streets;

"class C site" means a corner site that abuts on 3 streets and also means an island site.

In October, 1979 Regulation 2(1) was amended by the substitution of the following definitions -

"class A site" means a site, not being a class B site or class C site, that abuts on one street not less than 4.5 m wide or on more than one such = street;

"class B site" means a corner site that abuts on 2 streets neither of which is less than 4.5 m wide;

"class C site" means a corner site that abuts on 3 streets none of which is less than 4.5 m wide.

The significance of the classification is that the percentage site coverage and plot ratio vary from class to class, the highest and, from the developer's point of view, the most favourable being class C.

The plaintiff had drawn up its plans on the basis that, as the site abutted on 3 streets, it had a class C site. Unfortunately, 2 of the streets being less than 4.5 m wide, they ceased to be classified as 'streets' under the new regulations and the site became a class A site. In consequence, a total of 5,338 sq.ft. of permissible floor space has been lost.

The plaintiff seeks 2 declarations -

"(1) A declaration that on the true construction of the Building Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning)(Amendment) Regulations, 1979, the Building Authority was not on October 19, 1979, empowered to reject the plans for building

works at New Kowloon Inland Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the plaintiff on September 8, 1979, on the ground that the site was a class A site and not a class C site within the meaning of Regulation 2 of the Building (Planning) Regulations.

(2) A declaration that the purported refusal by the Building Authority on October 19, 1979, of the said plans on the ground that the site was a class A site and not a class C site was null and void and of no effect."

The explanatory note of the amending regulations reads -

"The Building (Planning) Regulations classify sites by reference to the streets on which sites abut. These amending regulations make clear that in classifying sites for the purposes of the regulations streets of less than 4.5 m wide are to be disregarded."

It is the contention of the Crown that the amendment merely declared the existing law. In other words, the plaintiff's entitlement was never more than a class A site. If this is indeed the case, it will not be necessary to consider the timing and effect of the amending regulations.

The Cheong Ming Case

There is, however, a decision of this Court, dated 6th July, 1979, according to which, as the regulations then stood, the plaintiff would have been entitled to a class C site. The Crown says this case was wrongly decided.(1) It is Cheong Ming Investment Co. Ltd v Attorney General.

There was no appeal from that decision and counsel for the plaintiff submits that the learned judge interpreted the old regulations correctly and that the new regulations have, therefore, effected a change in the law.

My first task must be to examine the judgment in that case. There is no presumption or inference that, because there was no appeal, the learned judge was right.

Section 14 of the Ordinance provides that no person shall commence or carry out any building work, without having obtained from the Building Authority approval of prescribed documents and consent to begin the work. Section 16 provides that the Building Authority may refuse, inter alia, to give his authority where the plans are not such as are prescribed by regulations made pursuant to the

(1) H.C.A. No. 250 of 1979

Ordinance.

The matter is governed by a series of complicated regulations. Trainor J. first set out the definition of street in section 2 of the ordinance -

> "'street' includes the whole or any part of any square, court or alley, highway, lane, road, road-bridge, footpath, or passage whether a thoroughfare or not."

Then he quoted regulation 2 -

> "'street' includes any footpath and private or public streets."

He then considered regulation 16, which deals with the question of the height of a building.

Regulation 16(1) provides -

> "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."

Regulation 16(2) and (3) then proceed to establish a formula as to how the street shadow area shall be ascertained. One of the factors in the formula is the width of the street. Regulation 16(4) provides, inter alia -

> "For the purposes of this regulation -
>
> '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;
>
> 'Street' means a street or service lane at least 4.5 m wide."

I respectfully agree with the conclusion that the word 'street' must mean street as defined by the ordinance, but limited to one of a width of at least 4.5 m. It is equally clear that it is only for the purpose of regulation 16(1), (2) and (3) - the mathematics of determining the height - that there is a qualification of the definition.

The learned judge then looked at regulation 19, which is in these terms -

> "Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, the site coverage for the building or any part thereof and the

plot ratio for the building shall be determined by the Building Authority."

In either of these cases, the Building Authority has complete discretion as to how the height, site coverage and plot ratio shall be determined. In all other cases, the height of a building must be determined in accordance with regulation 16.

The learned judge then came to regulations 20, 21, 22 and 23. Regulation 20 prescribes the permitted coverage of classes A, B and C sites. Regulation 21 prescribes the plot ratio. In neither case may the coverage or ratio exceed what is specified in the First Schedule to the regulations. Regulation 22 provides that in certain cases the site coverage and the plot ratio may be exceeded.

Regulation 23(1) provides -

"For the purposes of regulations 19, 20, 21 and 22 -

(a) the height of a building shall be measured from the mean level of the street or streets on which it afronts or abuts or, where the building fronts or abuts on streets having different levels, from the mean level of the lower or lowest of the streets to the mean height of the roof over the highest usable floor space in the building;

(b) the gross floor area of a building shall be the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony (including the thickness of the sides thereof), and the thickness of the external walls of the building; and

(c) a street that is less than 4.5 m shall be deemed not to be a street.

This is the crux of the matter. As Trainor J. put it, "And it is on the effect of that last paragraph of the sub-regulation on site classification that issue is joined. The plaintiff maintains that the plot is a corner site abutting on 3 streets, as street is defined, and therefore a class C site, while the defendant maintains that by reason of regulation 23(1)(c) the lane, being only 4.45 m, is to be deemed as not existing as a street for the purpose of site classification and therefore the plot must be classified as a class A site. It is conceded by the defendant that it would be otherwise if the lane were 4.5 m."

I am bound to say that I am unable to find fault with the learned judge's reasoning or with his conclusion. Though he does not mention it in his judgment, one does not expect to find such an important definition, absolutely crucial to every developer, and his first point of reference, to be tucked away so obscurely in a sub-regulation. It should be where Trainor J. held it to be, and now undoubtedly is, namely in regulation 2(1), which classifies the various kinds of site.

It would have been neater, as Mr. Barlow has observed, if in regulation 23(1) para. (c) had been inserted immediately after (a), but the draughtsman apparently did not wish to interrupt the flow of the regulation. The use of the conjunction 'and' before (c) also supports the view that the reference is to streets in (a), not to streets in the other regulations.

Moreover, Trainer J. has ably demonstrated that any other interpretation makes nonsense of regulation 19. As he put it at page 9 of his judgment -

> "Were (c) omitted from regulation 23(1) and the circumstances set out in regulation 19 existed, there would result the ambiguity of the Building Authority on the one hand being authorized to determine the height and, on the other, directed in 23(1) that the measurement of the height should be made from the level of the street on which the site abuts. Any possibility of such an ambiguity is removed by the addition of (c). It emphasizes that regulation 19 is not affected by regulation 23(1)(a). It is an ineptly drafted regulation so far as regulation 19 is concerned but there is no doubt as to what was intended."

Discretion under regulation 19

Counsel for the Crown submits that, even if Cheong Ming was rightly decided, this case falls within regulation 19 and the Building Authority had a discretion as to site coverage and plot ratio. Although he purported to deal with the matter under the amended regulation 20, he was, according to Mr. Barlow, in fact exercising his discretion under regulation 19 in refusing the application.

Quite apart from the fact that the Building Authority has not regarded this as a regulation 19 case, the wording of the regulation does not, in my judgment, lend itself to such an interpretation. As I read it, it does not cover the situation where there is more than one street less than 4.5 m wide - as in the present case - but only where a site abuts on a single street less than 4.5 m wide, or abuts on no street at all. Were it otherwise, the legislature could easily have spelled it out.

In any case, the Building Authority cannot be heard to say that he refused the application in the exercise of the general authority conferred by regulation 19, when it is clear that he judged it according to the strict rules and found it wanting.

At the time of the plaintiff's application, therefore, the site was a class C site. The new regulations were published in the Gazette on 9th October, 1979, and the refusal came on 19th October, 1979.

Date of operation of new legislation

Counsel for the Crown concedes that, if the regulations did not come into effect until 30th October, the Building Authority was not justified in refusing the application on the stated grounds. Section 38(5) of the ordinance provides : "Such regulations shall be published once in the Gazette at least 3 weeks before coming into operation: provided that where the Governor in Council deems it expedient such publication may be dispensed with."

The Governor in Council has purported to exercise his discretion concerning publication. The Gazette notice commences: "Made by the Governor in Council under section 38 and in pursuance of the power conferred by the proviso to section 38(5)."

The question is whether the discretion relates to the 3 week period, to publication in the Gazette, or to publication as a whole. If the former, the amendment took effect on the date of publication, otherwise not until 30th October.

Section 3 of the Interpretation Ordinance provides that 'Ordinance' means subsidiary legislation made under any ordinance. Section 20 provides -

"Every Ordinance shall -

(a) be published in the Gazette; and

(b) come into operation on the expiration of the day next preceding the day of such publication or, if it is provided in the Ordinance or in some other law that such Ordinance shall come into operation on some other day, then it shall come into operation on the expiration of the day next preceding such other day."

It is clear from this that the discretion must relate to the 3 week period. When the Governor in Council declared that he was exercising his discretion, he was bringing the legislation into effect forthwith.

Whether retrospective

Counsel for the Crown also maintains that the amending regulations were intended to be retrospective: that the terms of the amendment make it clear that it was intended to vary the mutual relationship between the plaintiff and the Building Authority.

There is, however, a presumption against retrospection. Retrospective effect is not to be given unless, by express words or necessary implication, it appears that this was the intention of the legislature. Phillips v Eyre.(2)

Furthermore, the question whether subordinate legislation is capable of having retrospective effect depends upon the scope of the enabling power. DPP v Lamb.(3) In this case that is section 38 of the Building Ordinance, which is silent on the point. It is not, in my judgment, possible to import any such intention. I find, therefore, that the new regulations are not retrospective to the date when pending applications were lodged.

Accrued rights

Thus, as predicted by Mr. Widdicombe, it all comes down to the question of accrued rights: that is to say whether the plaintiff was entitled to have its application determined according to the law in operation on 8th September, 1979.

Section 23 of the Interpretation Ordinance provides -

"Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any Ordinance so repealed or anything duly done or suffered under any Ordinance so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Ordinance so repealed;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any Ordinance so repealed; or

(e) affect any investigation, legal proceeding or

(2) (1870) 6 Q.B. 1
(3) (1941) 2 K.B. 89

remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Ordinance had not been passed."

It is provided by section 15(1) and regulation 30 of the Building (Administration) Regulations, made thereunder, that the Building Authority shall be deemed to have given his approval to building plans unless, within 60 days from the date on which the plans were submitted, he has notified his refusal in writing.

Section 16(1) of the ordinance sets out 16 grounds on which approval may be refused. Mr. Widdicombe submits that, unless one or more of these grounds exist, the applicant is entitled to approval.

It is necessary to consider some authorities. The first is Hitchcock v Way,(4) in which it was held that, where the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature; by the language used, showed a clear intention to vary the mutual relationship of such parties.

Similarly, in Re Joseph Suche(5) the Master of the Rolls held that the Judicature Act, 1875, did not apply to a winding-up that had been commenced before the Act came into operation. He so ruled because "it is a general rule that when the legislature alters the rights of parties by taking away or confirming any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

Both these cases, be it noted, concerned existing rights of action enforceable in court.

In Heston & Isleworth Urban Council v Grout,(6) the Court of Appeal refused to invalidate a lawful notice given under a statute, subsequently amended by a later Act. The notice, served by the local authority, required the street frontager to sewer and make up a private street. Lindley L.J. said at page 312: "It would be, I think, a very strange and forced construction to say that the notice would have to be dropped and that everything done under it would have to be done over again under a fresh notice."

(4) (1837) 112 E.R. 360
(5) (1875) 1 Ch.D. 48
(6) (1897) 2 Ch. 306

In Colonial Sugar Refining Co. v Irving,(7) it was contended that an Australian statute, the Judicature Act, 1903, was retrospective, in that it applied to a suit pending when the Act was passed and tried soon afterwards, and took away a right of appeal to the King in Council. The Privy Council did not agree. Lord Macnaughten said at page 372: "The Judicature Act is not retrospective by express enactment or necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

A similar example is Lewis v Hughes,(8) where the right to a deduction from rent was held to be a right already accrued to the lessee and could not be taken away by statute in the absence of a contrary intention.

In Hamilton Gell v White,(9) it was held that as soon as a landlord, with a view to selling the property, gave his tenant notice to quit, the tenant acquired a right to compensation under section 11 of the Agricultural Holdings Act, 1908, provided he complied with certain conditions as to notice under that section, which could not be defeated by the repeal of the section before he could satisfy the second condition.

Mr. Widdicombe contrasts the above cases, all of which concerned vested enforceable rights, in situations which did not call for further action by persons other than the beneficiary or grantee, with a more modern case, DPW v. Ho Po Sang.(10)

This was an appeal from the Full Court of Hong Kong to the Privy Council. The facts are set out in the headnote thus: "The second appellant the Crown lessee of premises in Hong Kong, of which the respondents were tenants and subtenants, applied for a renewal of his lease, and a memorandum of agreement was signed which provided, inter alia, that he was, after demolition of the then existing buildings which were subject to the Landlord and Tenant Ordinance, to erect new buildings on the site. Sections 3A-E of the Ordinance as amended provided, inter alia, that if the Director of Public Works (the first appellant) gave a rebuilding certificate the lessee was entitled to call on those in occupation to quit. The

(7) (1905) A.C. 369
(8) (1916) 1 K.B. 831
(9) (1922) 2 K.B. 422
(10) (1961) A.C. 901

lessee applied for a rebuilding certificate, and on July 20, 1956, the director notified him of his intention to give a certificate. Thereupon, in compliance with section 3B(1) of the Ordinance the lessee served notices of the director's intention on the tenants who, pursuant to section 3B(2), appealed by way of petition to the Governor in Council, and the lessee cross-petitioned under section 3B(3).

By the Landlord and Tenant (Amendment) Ordinance, 1957 (effective from April 9, 1957), section 3A-E of the Ordinance were repealed. By that date no decision had been taken by the Governor in Council in regard to the petition and cross-petition. On October 12, 1957, however, the director purported to give the lessee a rebuilding certificate under section 3A(1) and the latter, in purported pursuance of section 3E(1), served notice to quit on all the persons in occupation. The tenants and subtenants thereupon began the present proceedings, contending, inter alia, that after the repeal of sections 3A-E the director had no legal authority to issue a rebuilding certificate."

The judgment of their Lordships was delivered by Lord Morris of Borth-y-Gest. He said at page 921 -

> "Was the lessee therefore possessed on April 9 of a 'right' (or privilege) within the meaning of the Interpretation Ordinance? In their Lordships' view the entitlement of the lessee in the period prior to April 9 to have the petitions and cross-petition considered was not such a 'right'. On April 9 the lessee was quite unable to know whether or not he would be given a rebuilding certificate, and until the petitions and cross-petition were taken into consideration by the Governor in Council no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects.
>
> It is to be observed that under section 10(e) a repeal is not to affect any investigation, legal proceeding or remedy 'in respect of any such right'. The right referred to is the right mentioned in section 10(c), i.e., a right acquired or accrued under a repealed enactment. This part of the provisions in para (e) of section 10 does not and cannot operate unless there is a right as contemplated in para. (c). It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process

of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not."

Mr. Widdicombe quoted this case as an extreme example, where there was no more than a 'hope or expectation' in the lessee. He points then to the present case where, he submits, there is only a fixed number of specified obstacles to be overcome before the Building Authority must approve his application. He asks the Court to hold that this case falls on his side of the line dividing Ho Po Sang and the other cases.

There is a half-way house represented by Free Lanka Insurance Co.Ltd. v Ranasinghe.(11) In that case liability was not actually established by the time the law was changed. But it was held the injured persons's service upon the appellants was an assertion by him of his statutory right against the appellants; and nonetheless effectively so because the quantum of his claim was dependent upon the finding of the Court in a decree made in his favour .....", per Lord Evershed at page 552.

As his Lordship put it: "The respondent had as against the appellants something more than a mere hope or expectation ..... he had in truth a right ..... althouth that right might fairly be called inchoate or contingent."

Ho Po Sang was certainly very different from the earlier cases, where the person concerned was already clothed with his right at the time of the amending legislation. Moreover, the present case has an affinity with Ho Po Sang, in the sense that the latter was dependent upon further action by another person, the Governor in Council.

Conclusion

It seems to me, bearing the above principles in mind, that the scrutineering process required of the Building Authority, followed by the exercise of his discretion, reduced the plaintiff's application, if not to a mere hope or expectation, at least to something short of an accrued right, as determined in the cases cited. The applicant is not entitled to approval, until the Building Authority has examined the application, with reference to the listed grounds of refusal.

How can the applicant, for example, know whether his plan will contravene a draft plan prepared under the Town

(11) (1964) A.C. 541

Planning Ordinance (d); or whether it will result in a building of a different height, or intended use, to a building in the immediate neighbourhood, approval for which has been given by the Building Authority (g); or whether access to the street might, in the Building Authority's opinion, be dangerous to traffic (h)? These are all matters that must be considered by the Building Authority, who is in possession of information not available to the applicant.

I have considered Mr. Widdicombe's objection that, if the new law is to apply to the plaintiff's application, the effect of section 15(1) may be nullified. Suppose, he argues, the regulations took effect on the 59th day after the date on which the application was lodged. This would not give the Building Authority sufficient time to consider it properly.

I think the answer to this lies, to some extent, in section 39(1), which provides -

> "(1) Any regulations made under this Ordinance may provide that where plans of building works, street works, lift works or escalator works are submitted to the Building Authority within such period from the coming into operation of the regulations as may be prescribed therein, he may approve any such plans which comply with the provisions of the law before the coming into operation of such regulations and may give consent to the commencement of the works shown therein; and the provisions of sub-section (2) shall apply to such works and to any building which may be erected, any street or access road which may be formed, constructed or laid out or any lift or escalator installed in consequence thereof."

If the Governor in Council feels that plans in the pipeline should not be prejudiced, he may authorise the Building Authority to approve them in accordance with the old law. This is a matter of policy, The example given is, of course, an extreme one and unlikely in practice to occur.

For these reasons both declarations are refused with costs.

(E. de B. Bewley)
Judge of the High Court

Mr. Widdicombe, Q.C., Mr. K. Bokhary,
(Woo, Kwan, Lee & Co.) for plaintiff.

Mr. Barlow and Mr. P.T. Nunn, Senior
Crown Counsel, for defendant.

No. 5

NOTICE OF APPEAL

Civil 1981, No. 98

IN THE COURT OF APPEAL
In respect of High Court M.P. No. 517 of 1980.

B E T W E E N

FIREBIRD LIMITED — Appellant (Plaintiff)

- and -

ATTORNEY GENERAL — Respondent (Defendant)

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the Appellant on appeal from the order of the Honourable Mr. Justice Bewley given in High Court Miscellaneous Proceedings No. 517 of 1980 on the 8th day of July 1981, whereby the Appellant's claim for the relief sought by its Originating Summons therein was dismissed with costs FOR AN ORDER that the said order may be set aside and that judgment may be entered for the Appellant for the said relief with costs to be taxed or for such further or other Order as may be just.

AND FOR AN ORDER that the Respondent pay to the Appellant the costs of this Appeal to be taxed

AND FURTHER TAKE NOTICE that the grounds of this appeal are as follows:-

(1) That the Appellant is entitled to the said relief and that the learned judge erred in law in holding otherwise.

(2) That as a matter of law the Building (Planning) (Amendment) Regulations 1979 did not come into operation upon publication in the Gazette on October 12, 1979, as the learned judge held; rather, by reason of section 38(5) of the Building Ordinance, Cap.123, they only came into operation 3 weeks after such publication, i.e. on October 31, 1979, which was after the Building Authority's refusal on October 19, 1979, of approval of the plans referred to in the said Originating Summons.

(3) That as a matter of law the Appellant was entitled to have the said plans considered under the law prevailing at the time they were submitted to the Building Authority for his approval, i.e. on September 8, 1979, and that the learned judge erred in law in holding otherwise.

AND FINALLY TAKE NOTICE that the Appellant proposes to apply to set down this appeal in the Appeals List.

Dated the 17th day of August, 1981.

WOO, KWAN, LEE & LO,
Solicitors for the Appellant.

TO: the Registrar,
Supreme Court,
Hong Kong.

and

the Respondent,
The Honourable the Attorney General,
Attorney General's Chambers,
Central Government Office,
Main Wing,
Hong Kong.

No. 6

RESPONDENTS NOTICE

(Civil) 1981 No. 98

IN THE COURT OF APPEAL
In respect of High Court M.P. No. 517 of 1980

B E T W E E N

FIREBIRD LIMITED — Appellant (Plaintiff)

- and -

ATTORNEY GENERAL — Respondent (Defendant)

Respondent's Notice

Take Notice that the Attorney General, the Respondent in this Appeal, intends upon the hearing of the appeal under the Appellant's Notice of Appeal dated the 17th day of August, 1981 from the Judgment of the Honourable Mr. Justice Bewley dated the 7th of July, 1981 to contend that the said Judgment should be affirmed on grounds additional to those relied on by the Court below, namely:-

(1) the decision of the High Court in the case of Cheong Ming Investment Co.Ltd. v Attorney General (unreported). High Court Action No. 250 of 1979; Judgment dated 6th of July, 1979 - was wrongly decided and should not be followed. Thus, even before the amendment to Regulation 2(1) of the Building (Planning) Regulations on the 12th of October, 1979 the Appellant did not have a class "C" site for the purpose of those Regulations;

(2) the declarations sought should not be made in any event as the Building Authority's refusal of approval to the plans was based on two grounds one of which (namely, failure to show the approval of the Director of Fire Services to the plans) has not been challenged - so that it would be inefficacious to make the declarations sought.

Dated the 21st day of August, 1981.

(B.G.J. Barlow)
Counsel for the Respondent

To: Messrs. Woo, Kwan, Lee and Lo,
Solicitors for the Appellant
2601 Connaught Centre, Hong Kong.

In the Court of Appeal of Hong Kong

No. 7

Order of Court of Appeal

27th November 1981

No. 7

ORDER OF THE COURT OF APPEAL

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 98 OF 1981

(On appeal from the High Court Miscellaneous Proceedings No. 517 of 1980)

B E T W E E N

FIREBIRD LTD — Appellant (Plaintiff)

- and -

ATTORNEY GENERAL — Respondent (Defendant)

BEFORE THE HONOURABLE MR. JUSTICE LEONARD, VICE-PRESIDENT, THE HONOURABLE MR. JUSTICE CONS, JA AND THE HONOURABLE MR. JUSTICE ZIMMERN, JA, IN COURT

O R D E R

UPON READING the notice of Appeal dated the 17th day of August, 1981, on behalf of the Appellant by way of appeal from the order of the Honourable Mr. Justice Bewley given on the 8th day of July, 1981 whereby the Appellant's claim for relief sought by its Originating Summons therein was dismissed with costs

AND UPON READING the said order dated the 8th day of July, 1981

AND UPON HEARING Counsel for the Appellant and Counsel for the Respondent

IT IS ORDERED :

(1) that this appeal be allowed;

(2) that the said judgment of the Honourable Mr. Justice Bewley dated the 8th day of July, 1981 be set aside in lieu thereof the 1st declaration sought by the Appellant, namely:-

(i) a declaration that on the true construction of the Buildings Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning)(Amendment) Regulations, 1979, the Building Authority was not on

October 19, 1979, empowered to reject the plans for building works at New Kowloon Inland Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the Plaintiff on September 8, 1979, on the ground that the Site was a Class A site and not a Class C site within the meaning of regulation 2 of the Building (Planning) Regulations

10 be granted;

(3) that the Respondent's notice dated the 21st day of August, 1981 be dismissed; and

(4) that the cost of this appeal and in the Court below be to the Appellant with certificate to both parties for two counsel.

Dated the 27th day of November, 1981.

(M.J. Barnett)
Registrar

No. 8
Judgment of the Court of Appeal

27th November 1981

IN THE COURT OF APPEAL

Civil Appeal No. 98 of 1981

B E T W E E N

Firebird Ltd. — Appellant (Plaintiff)

- and -

Attorney General — Respondent (Defendant)

Coram: Hon. Leonard, V-P., Cons & Zimmern, JJ.A.
Date: 27th November, 1981

J U D G M E N T

Leonard, V-P:

This is an appeal from the trial judge's refusal to grant to the appellant declarations that the Building Authority was not, on the 19th October 1979 empowered to reject plans for building works at 26-36 Shun Ning Road, Kowloon, submitted by the appellant on 8th September 1979 on the ground that the site was a class A site within the meaning of Regulation 2 of the Building (Planning) Regulations and a consequential declaration that the rejection was null and void and of no effect.

26-36 Shun Ning Road is a site fronting on to Shun Ning Road, which is a street having a foot path 3.05 m in width and a road surface of 18.29 m in width. On two other sides the site is bounded by what are described on the plans submitted as "service lanes" each of which is within the definition of "street" in Section 2 of the Ordinance and Regulation 2 of the Building (Planning) Regulations. The plans were submitted on the basis that the site was a class C which classification if correct entitled the developer to an enhanced plot ratio and site coverage. The plans having been submitted on the 8th September 1979 were rejected some 41 days later on the 19th October 1979. The grounds given for this rejection are the subject of attack.

The rejection was made on a stereotype form which claimed that "elementary checking" has disclosed that -

"(a) the permitted plot ratio and site coverage are exceeded - Regulation 20 of Building (Planning) Regulations. In this connection, please note that the above site is a class A site within the meaning of the Regulation 2(1) of the Building (Planning) Regulations as amended by Building (Planning)(Amendment) Regulation 1979.

(b) the plans are not endorsed with or accompanied by a certificate from the Director of Fire Services - Section 16(1)(b) of the Building Ordinance. A copy of comments from the Director of Fire Services is enclosed herewith and your proposal, therefore, is disapproved."

The Building Authority further commented -

"As major revision of your proposal is envisaged my above comments are not intended as exhaustive."

Major revision may have been envisaged by the Building Authority. It was not envisaged by the appellant who objected to his site being classified as a class A site and initiated these proceedings.

Several weeks after the appellant's plans had been submitted, that is, on the 9th October 1979 the Governor in Council saw fit to amend the Building (Planning) Regulations by deleting the definitions in Regulation 2(1) of "Class A site", "Class B site" and "Class C site" and substituting the following -

""Class A site" means a site not being a class B site or a class C site that abuts on one street not less than 4.5 m wide or no more than one such street;

"Class B site" means a corner site that abuts on two streets, neither of which is less than 4.5 m wide;

"Class C site" means a corner site that abuts on three streets, none of which is less than 4.5 m wide."

The original Regulations had not in the definitions made reference to the width of the "streets" upon which the site abutted.

I say "saw fit" because Mr. McPherson contended before us that the action of the Governor in Council could not have effectively amended the Regulations until after the date of rejection. I think it would be as well to deal with this contention straight away and in order that I may do so it is necessary for me to refer to Section 38(5) of the Building Ordinance and Gazette Notification L.N. 249 of 1979.

Section 38 enables the Governor in Council to make regulations and sub-section 5 reads "Such regulations shall be published once in the Gazette at least 3 weeks before coming into operation: Provided that where the Governor in Council deems it expedient such publication may be dispensed with."

Gazette Notification L.N. 249/1979 was published on 12th October 1979. It refers to action taken by the Governor in Council on the 9th October 1979. It is expressed to be "made by the Governor in Council under Section 38 and in pursuance of the power conferred by the proviso to Section 38(5)". The only power conferred by that proviso is power to dispense with publication; the result of such dispensation must, it seems to me, be that the Regulations come into force immediately they are made. If they are subsequently published, when already in force, that publication cannot alter the date on which they come into force. I would, therefore, hold with some reluctance that they came into force on the day they were made and consequently were in force on the date of rejection of the plans. I say "with some reluctance" because one would not, save in a case of dire emergency which this was not, expect Regulations which might well have the effect of seriously diminishing the value of a man's property to be made without publication nor would one expect such regulations to come into force overnight without any warning to those interested or to the public generally.

It is said in an "explanatory note" that the amending Regulations "make clear" what Mr. Barlow contends was existing law and I shall have to consider later whether this is so. I am constrained to hold that these Regulations did come into effect on the 9th October 1979 and not 21 days after the publication of the 12th October 1979.

While Mr. McPherson and Mr. Barlow appeared to consider that the only alternatives were the 12th October 1979 and the 31st October 1979 it does not affect the remaining arguments that I should hold that the amendment came into force on the 9th October 1979.

The second issue arising is whether the appellant was entitled to have its plans considered under the law in force on the day of their submission. The trial judge held that the new regulations were not retrospective to the date when pending applications were lodged. The respondent does not challenge this finding by a respondent's notice and I see no reason to differ from it. Mr. McPherson further contends, whether the effective date was the 12th October or the 9th October, that the appellants were entitled to be governed by the law in force on the date of submission of the plans, the 8th September. Consideration of this argument involves acceptance of the trial judge's finding, challenged by Mr. Barlow, that the

new regulations did affect a change in the law and that the appellant did have a class C site on the 8th September. Accepting for the moment that a change in law was effected the question to be decided is whether on presentation of the plans there was in existence "any right, privilege, obligation or liability acquired, accrued or incurred" under the Regulations repealed on the 9th October 1979 (see Section 23(c) of the Interpretation Ordinance) or whether the duty imposed on the building Authority by Section 16 of the Building Ordinance to investigate the appellant's plans was that of investigating "in respect of any such right, privilege, obligation or liability". For if a right had been acquired the investigation should be continued as if the repealing Ordinance had not been passed. (Section 23(e) of the Interpretation Ordinance).

Section 16 of the Building Ordinance sets out 16 specified grounds on which the Building Authority "may refuse to give his approval of any plans of building works". The use of the word "may" suggests discretion but discretion to refuse cannot exist where the "carrying out of the building works shown" (on the plans) "would contravene the provisions of this Ordinance" (Section 16(1)(d)) for the Building Authority is under a duty to enforce it. Hence no appeal lies to an appeal tribunal appointed under Section 43 from a refusal under that ground. Although the Building Authority must enforce the Ordinance he cannot enforce it if it has been in part repealed by the amendment in a way which would deprive the appellant of a "right" which had "accrued" prior to repeal, for that right is not to be affected by the repeal.

The vital question then is whether on the 9th October the Appellant enjoyed a right acquired or accrued under the Buildings Ordinance or Regulations made under it or whether the question was on that date "open and unresolved". Did he have more than "a hope or expectation" that his plans would not be refused under Regulation 20 on the basis that his site was a class C site.

The site in question was and is undoubtedly a corner site that abuts on 3 streets as streets generally are defined in the Ordinance and in the Regulations. The plans were drawn up on the basis that it was a class C site. Under the new Regulations it became (assuming that it was not already) a class A site and lost its favourable site coverage and plot ratio. When seeking to determine the nature of the appellant's rights when he submitted the plans it is necessary to bear in mind that he was the owner of a site the value of which would vary in the open market depending upon whether it was a class A or a class C site. For the owner of a class C site had the right to develop it (subject to the approval of his plans) in a more advantageous manner than if it were a class A site. That additional value attached to the land by virtue of

its nature and situation and because the Building Regulations in existence permitted enhanced development. The effect of submitting plans is to set on foot an enquiry by the Building Authority into sixteen matters. He must refuse approval to the plans if his investigation is unfavourable in at least six of these matters; he has discretion to refuse in others and machinery exists for appeal to an appeal tribunal where he has exercised his discretion. He was obliged to refuse at the time of the submission of the plans if the site was in law a class A site but could not properly have refused for that reason if it was a class C site. On a strict reading of the section he may also have been obliged to refuse if a certificate from the Director of Fire Services was not forthcoming, I will deal with this later.

I consider that in undertaking the laborious and not inexpensive process of having plans prepared and submitted for approval the appellant was asserting a right attaching to his ownership of the site so that the right became an accrued right and the Building Authority incurred an obligation not to reject plans on the ground that they were unsuitable for a class A site if they had been properly prepared and submitted when the site was a class C site. In D.P.W. v Ho Po Sang (1) where the landowner was held to have no more than a "hope" at the time of the repeal i.e. 9th April 1957, that he would receive a favourable decision from the Governor in Council whose discretion was absolute, the considerations applicable appear to have been quite different. Lord Morris of Borth-y-Gest giving the judgment of their Lordships observed -

> "In the present case the position on April 9, 1957, was that the lessee did not and could not know whether he would or would not be given a rebuilding certificate. Had there been no repeal, the petitions and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion.
>
> The Governor would have directed either that a certificate be given or be not given, and the decision of the Governor in Council would have been final. In these circumstances their Lordships conclude that it could not properly be said that on April 9 the lessee had an accrued right to be given a rebuilding certificate. It follows that he had no accrued right to vacant possession of the premises. It was said that there were accrued rights to a certificate, and consequently to possession, subject only to the risk that these rights might be defeated, and it was said that in the events that happened the rights were not defeated. In their Lordships' view such an approach is not warranted by the facts. On April 9, the lessee had no right. He had no more

(1) (1961) A.C. 901

than a hope that the Governor in Council would give a favourable decision. So the first submission fails."

At a later stage in the judgment there occurs the following passage -

"Was the lessee therefore possessed on April 9, of a 'right' (or privilege) within the meaning of the Interpretation Ordinance? In their Lordships' view the entitlement of the lessee in the period prior to April 9 to have the petitions and cross-petition considered was not such a 'right'. On April 9 the lessee was quite unable to know whether or not he would be given a rebuilding certificate, and until the petitions and cross-petition were taken into consideration by the Governor no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects.

It is to be observed that under Section 10(e) a repeal is not to affect any investigation, legal proceeding or remedy 'in respect of any such right'. The right referred to is the right mentioned in Section 10(c), i.e., a right acquired or accrued under a repealed enactment. This part of the provisions in paragraph (e) of Section 10 does not and cannot operate unless there is right as contemplated in paragraph (c). It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given."

In our case the Building Authority had to conduct an investigation into the question whether the appellant should have his plans passed after they had been submitted. Adequately to do so he had to consider whether the site involved was a class C site. This consideration was in my view an investigation in respect of a right given under the original Regulations. The amending Regulations took away this right. As I see it in each particular case that right given by the original Regulations accrued to a developer when he submitted plans, for the site then either was or was not so classified by the definition of "class C site" and plans to be submitted under the Regulations would have to be worked out on the basis of the classification of the site as it was when they were

prepared for submission and submitted. The investigation was an investigation"in respect of any such right" and because of paragraph (e) of Section 23 the right was "unaffected and preserved". The investigation to be carried out by the Building Authority could not change the classification of the site; it could not give a right to a classification and "there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some rights should or should not be given". It is true that the investigation was also to decide whether the plans should be approved but to determine that an investigation in respect of the right to enjoy a class C site was first necessary. I would, therefore, hold that the appellant was entitled to the benefit of Section 23 of the Interpretation Ordinance. The Regulations made on the 9th October 1979 changed the wording of the definitions of the law and I turn to the question whether or not they did change the law.

The explanatory note to these Regulations reads -

> "The Building (Planning) Regulations classify sites by reference to the streets on which sites abut. These amending Regulations make clear that in classifying sites for the purposes of the Regulations streets of less than 4.5 m wide are to be disregarded."

Mr. Barlow claims that the purpose of these Regulations was no more than to declare the existing law and this although no such phrase as "for the purpose of removing doubt" is used. Some short time before the amending Regulations were passed it had been decided in Cheong Ming Investment Co. Ltd. v Attorney General that if a site abutted on three streets although two of these streets were less than 4.5 m in width the site was a class C site. There was no appeal from this decision but Mr. Barlow contended before us and in the Court below that it was wrongly decided. If he is right Section 23 of the Interpretation Ordinance does not come into play.

As I have earlier remarked, lanes no matter what their width, fall within the definitions of "street" contained in Section 2 of the Ordinance and Regulation 2 of the Building (Planning) Regulations. In the original un-amended Regulations "Class C site" is defined as meaning "a corner site that abuts on three streets and also means an island site". (I pause to remark that there is no definition of "island site" but presumably it means a site abutting on all sides on "streets"). Part III of the Building (Planning) Regulations deals with permitted heights, site coverages, plot ratios, open spaces and lanes. In Regulation 16 which deals with the calculation of height with reference to street shadow area the definition of street for the purposes of that Regulation is limited to "street or service lane at least 4.5 m wide".

Regulation 19 reads -

"Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, site coverage for the building and any part thereof and the plot ratio for the building shall be determined by the Building Authority".

Regulation 20 is expressed to be subject to Regulations 19A and 22 and deals with permitted site coverage limiting it "depending on the height of the buildings" by reference to the question whether the proposed building is to stand on a class A site, a class B site or a class C site.

Regulation 21 deals with permitted plot ratio and limits it in the same manner. There is no use of the word "street" in either of these Regulations, but the use in both of the phrase "depending on the height of the building" is a reference back to Regulation 16 in which "street" (when, but only when, used in the formula for the ascertainment of street shadow area) means a street or service lane at least 4.5 m wide.

Regulation 22 deals with cases where part of the lot in question has been dedicated to the public with the consent of the Government or part abutting on the street, has been acquired by Government for the purposes of street widening, in which case the permitted site coverage and plot ratio may be exceeded in manner prescribed.

Regulation 23 reads as follows -

"(1) For the purposes of Regulations 19, 20, 21 and 22 -

(a) the height of a building shall be measured from the mean level of the street or streets on which it fronts or abuts or, where the building fronts or abuts on streets having different levels, from the mean level of the lower or lowest of the streets to the mean height of the roof over the highest useable floor space in the building;

(b) the gross floor area of a building shall be the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony (including the thickness of the sides thereof and the thickness of the external walls of the building); and

(c) a street that is less than 4.5 m shall be deemed not to be a street."

Mr. Barlow's argument in support of the contention that even before the amendment to Regulation 2(1) of the Building (Planning) Regulations the appellant did not have a class C site is, he assures us, summarised in paragraph 3 of a letter quoted by Trainor, J. in Cheong Ming Investment Co.Ltd. v Attorney General. This reads -

"3. The basis of this argument is as follows -

Building (Planning) Regulation 23(1)(c) states 'For the purposes of Regulations 19, 20, 21 and 22 - a street that is less than 4.5 m shall be deemed not to be a street'. Nowhere in Regulations 20, 21 and 22 does the word 'street' appear reference is made however to 'class A, B and C sites' and for Regulation 23(1)(c) to have any meaning in the context of Regulations 20, 21 and 22 only streets having a minimum width of 4.5m can be taken into account for the purposes of classifying a site under Regulation 2.

It has been pointed out by my legal adviser that Regulation 2(1) of the Building (Planning) Regulations contains the following words -

> 'In these Regulations unless the context otherwise requires words and expressions have the meaning attributed to them by the Building Ordinance.'

And that in his opinion Regulation 23(1)(c) is an example of the context otherwise requiring."

In furtherance of the argument contained in that letter, Mr. Barlow emphasized the opening words of Regulation 23(1) and the general structure of that Regulation and the existence of a semi-colon after each sub-paragraph of it. He contended that it was plain that each of the three sub-paragraphs expresses a separate and distinct concept because the draftsman had separated the opening words from each sub-paragraph following.

As I see it this is to place too great an emphasis on the structure and punctuation (as distinct from the wording) of the Regulation and too little on the Regulations in their entirety. Distrust of punctuation as an aid to interpretation stems from the historical fact that before 1850 there was no punctuation in the manuscript copy of an act which received the Royal Assent. In Re Allsop(2) the effect of a proviso to Section 8(1) of

(2) (1914) 1 Ch. 1

the Trustee Act 1888 fell to be considered. Hamilton L.J. observed -

> "The proviso is an answer if the case is rested on paragraph (b). Grammatically and logically it is equally a proviso upon paragraph (a) though as printed in the Law Reports Edition of the Statutes" (which incidentally were supplied to the Council of Law Reporting by the King's printers and did not pass through any editors' hands (see p.15)), "it is by typographical arrangement and by punctuation restricted to (b)."

And it appeared that he was prepared to hold that the proviso applied to paragraph (a) as well as to paragraph (b). In I.R.C. v Hinchy (3) Lord Reid regarded it as "very doubtful" if punctuation in modern acts can be looked at. When one looks at Regulation 23, ignoring the dash, the semi-colons and the indentation of the paragraphs and remembering, as both the trial judge and Trainor, J. pointed out, that the suggested effect of paragraph (c) would make nonsense of Regulation 19, it seems clear that paragraph (c) is used to qualify "street" where that word is used in paragraph (a) and not where it is used in other regulations. I would therefore hold that at the time of his application the appellant had a class C site which, were it not for Section 23 of the Interpretation Ordinance, would have been taken away from him by the amendment of Regulation 2(1). He was entitled to have his plans considered on the basis that he had a class C site and the Building Authority had no right to reject them on the basis that his site was a class A site.

The final contention of the respondent was that the declarations sought should not be made in any event "as the Building Authority's refusal of approval to the plans" was based on two grounds, one of which (namely, failure to show the approval of the Director of Fire Services to the plans) has not been challenged so that it would be inefficacious to make the declarations sought". The trial judge does not deal with this question at all in his judgment. This is perhaps because, as appears from page 42 of the record of appeal (page 18 of the judge's notes), Mr. Widdicombe when met with this argument in the Court below remarked that it was common that the Fire Services Certificate should follow the original application and that no new application was regarded by the Building Authority as necessary in cases which otherwise complied with the Regulations. Mr. Widdicombe suggested that the certificate was a formality and that the substantive question could first be decided. At page 48 of the record Mr. Widdicombe is shown to have submitted by consent the comments of the Fire Services Department upon his

(3) (1960) A.C. 748 at 765.

application and to have pointed out that the objections from the Fire Services were easily remedied and that his clients relied on the practice of the Building Authority not to require a fresh application. Mr. Barlow was not then and was not before us in a position to confirm or deny these instructions received by Mr. Widdicombe and argued that the Building Authority was "entitled to refuse relief" under Section 16(1)(b). I take it that in saying that the Building Authority was entitled to refuse relief he meant that in strict law as distinct from the usual practice of the B.O.O. the Building Authority was entitled to reject the plans on the basis of the absence of the Fire Services Certificate and was entitled not to resile from that position even when supplied with the Certificate. This may be so although it appears bureaucratic. But in the Court below Mr. Widdicombe and before us Mr. McPherson argued that a declaration that the appellant was entitled to have his plans considered on the basis that he owned a class C site could not do any harm to the Crown and might well be of assistance to his client. In my view he had owned a class C site and had an accrued right to have his application considered on that basis. The Building Authority denied that his site was a class C site and denied that he had that accrued right. I think the denial entitles him to a declaration. I would allow this appeal, grant a declaration to the effect that the Building Authority was not empowered to reject the plans submitted by the plaintiff on the ground that the site was a class A site and not a class C site within the meaning of Regulation 2 of the Building (Planning) Regulations. I would order that the respondent should pay the costs here and below.

Cons. J.A. :

By reason of Section 14 of the Buildings Ordinance Chapter 123, no person may commence or carry out any building works without the prior approval of the Building Authority. Section 16 sets out the particular circumstances in which that approval may be refused. Some allow for the exercise of discretion by the Authority, e.g. that the proposed access to the street will in his opinion be dangerous to traffic using the street : para. (h). Others do not, e.g. that the building works would contravene the provisions of the Ordinance or of any other enactment : para. (d). Should the Authority not notify his refusal within 60 days of the submission then the Authority is deemed to have given his approval : Section 15(1) and Regulation 30(3) of the Buildings (Administration) Regulations.

On the 8th of September, 1979 the plaintiff company submitted plans to the Authority in respect of a proposed development in Shun Ning Road, Kowloon. It was to be a 14-storied building, with shops on the lower floors and residential flats above.

The plans had of course not been prepared, so to speak, in vacuo. The architect would have had regard to the various building regulations, and in particular, as far as this appeal is concerned, to those which deal with height, site coverage and plot ratio. Those regulations are to be found in Part III of the Building (Planning) Regulations. They contain rules, formulae and tables of percentages to cover most cases. There is an exception where the proposed building will not abut onto any street at all or only onto a street or streets that are less than 4.5 metres in width. In that case Regulation 19 gives the Authority complete discretion.

Regulation 19

"Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, the site coverage for the building or any part thereof and the plot ratio for the building shall be determined by the Building Authority."

I would assume, although I may be wrong, that these circumstances are unusual, and that when they do exist then, before any building or redevelopment is seriously considered, the Authority is asked in advance for what might be called a "one off" determination.

In normal cases, the three matters of height, site coverage and plot ratio are determined respectively by Regulations 16, 20 and 21.

Regulation 16(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."

Subrule (2) provides a formula to discover the maximum permitted street shadow area. Subrule (3) provides another formula by which that area may be increased "where the building abuts, fronts or projects over two streets forming a corner". By subrule (4) "'street' means a street or service lane at least 4.5 m wide".

Regulations 20 and 21 both operate in a similar fashion. They relate the actual height of the proposed building to the particular class of site on which it will stand and by means of a table scheduled to the regulations the maximum site coverage or plot ratio, as the case may be, is discovered.

Sites fall into one of three classes as defined in Regulation 2(1). On the 8th of September, 1979 the

appropriate part of that subrule read as follows :

> "class A site" means a site that abuts on one street or on more than one street, not being a class B site or a class C site;
>
> "class B site" means a corner site that abuts on 2 streets;
>
> "class C site" means a corner site that abuts on 3 streets and also means an island site;

The class of his site is important to anyone who wishes to develop or redevelop his property, for the scheduled table treats class B sites more favourably than those of class A, and class C most favourably of all.

The plans which the plaintiff company submitted on the 8th of September were based on the premise that the site was a class C site. It abutted on 3 streets and although 2 of those streets were less than 4.5 m in width, there was a judgment of Trainor J. that it did not matter : Cheong Ming Investment Co. Ltd. v Attorney General(1).

Before the Authority considered the plans which the plaintiff company had submitted, the actual wording of Regulation 2(1) was changed. The words which have set out above were replaced by :

> "class A site" means a site, not being a class B site or class C site, that abuts on one street not less than 4.5 m wide or on more than one such street;
>
> "class B site" means a corner site that abuts on 2 streets neither of which is less than 4.5 m wide;
>
> "class C site" means a corner site that abuts on 3 streets none of which is less than 4.5 m wide;

The amending legislation was published in the Gazette on the 12th of October. It bore the date of the 9th of October. Shortly afterwards, i.e. on the 19th of October, the Authority rejected the plaintiff company's plans. He gave his reasons, as he is in effect required to do by Section 15(1). One of these reasons given was that the permitted plot ratio and site coverage were exceeded. The Authority referred to Regulation 20 and asked the plaintiff to note that the site was a class A site. It would seem that he was applying the new definitions.

The plaintiff company, by way of an originating summons, asked the Court to say that the Authority was wrong in that approach. The summons came on before Bewley J. who declined to grant either of the declarations asked for. Both were to much the same effect and before

(1) H.C.A. No. 250 of 1979, unreported.

us. Counsel is content to seek only the first :

"(1) A declaration that on the true construction of the Building Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979 the Building Authority was not on October 19, 1979, empowered to reject the plans for building works at New Kowloon Inland Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the plaintiff on September 8, 1979, on the ground that the site was a class A site and not a class C site within the meaning of Regulation 2 of the Building (Planning) Regulations."

Was the site a Class C site?

In coming to his decision, Bewley J. made four findings, three of which are challenged before us by one party or the other. His first finding was that on the 8th of September, 1979 the site in question was a class C site. In this respect he did not simply follow the decision of Trainor J. He felt impelled to review the earlier judgment, but having done so, was constrained to admit that he could find no fault in the learned Judge's reasoning or with his conclusion.

Counsel for the Attorney General does not agree. He says that Trainor J. overlooked the interplay of Regulations 16 and 23(1) and in particular ignored the opening words of the latter which reads in whole as follows :

"23(1) For the purposes of regulations 19, 20, 21 and 22 -

(a) the height of a building shall be measured from the mean level of the street or streets on which it fronts or abuts or, where the building fronts or abuts on streets having different levels, from the mean level of the lower or lowest of the streets to the mean height of the roof over the highest usable floor space in the building;

(b) the gross floor area of a building shall be the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony (including the thickness of the sides thereof), and the thickness of the

external walls of the building; and

(c) a street that is less than 4.5 m shall be deemed not to be a street.

As I understand the argument of Counsel, it is that the opening words - "for the purposes of Regulations 19, 20, 21 and 22" - must be taken to apply to each paragraph separately, and that although the word "street" is not actually mentioned in either Regulation 20 or 21, it is implied into them by their references to the classes of site, which classes are themselves defined in Regulation 2(1) in terms which do contain the word "street". Thus, it is said, for the purposes of the scheduled table the class of site can only be determined in accordance with streets that are 4.5 m or more in width, and the site in question was therefore, even on the 8th of September, only of class A.

Counsel attempted to draw support from the explanatory memorandum attached to the notice in the Gazette :

> "The Building (Planning) Regulations classify sites by reference to the streets on which sites abut. These amending regulations make clear that in classifying sites for the purposes of the regulations streets of less than 4.5 m wide are to be disregarded."

This indicates, he says, that the "amendment" was intended to be declaratory of the then existing law rather than to effect any change therein.

For my part I would doubt that. Clarifying legislation is usually introduced by words such as "for the avoidance of doubt". In any event on the 9th of October, there was no doubt. Any doubt that had existed earlier had been disposed of by Trainor J.

For my part I am not prepared to accept that by reason of the opening words of Regulation 23(1) paragraph (c) thereof must necessarily be applied to each of the Regulations 19, 20, 21 and 22. Indeed, however one tries, it cannot be made to apply to Regulation 19. Trainor and Bewley JJ. both took the view that it only applied to 23(1)(a). I would respectfully agree. Regulation 23(1) is concerned with measurement, not with classification. I see no reason why it should in anyway be taken to restrict the definition of sites given in Regulation 2(1). In my opinion, the site of the plaintiff company was, as at the 9th of September, a class C site.

<u>When did the amendment take effect</u>?

The second finding of the learned Judge below was

that the amendment to the definition took effect from the 12th of October, i.e. before the plaintiff's application was considered by the Authority. This is challenged by Counsel for the plaintiff. He draws our attention to Section 38(1) of the Ordinance, which empowers the Governor in Council to make regulations, and then to subsection (5) :

> "(5) Such regulations shall be published once in the Gazette at least 3 weeks before coming into operation : Provided that where the Governor in Council deems it expedient such publication may be dispensed with."

Counsel suggests that this is itself a sufficiently comprehensive code of publication to oust the general provisions of Section 20 of the Interpretation & General Clauses Ordinance, Cap. 1 which influenced the Judge below.

I would accept Counsel's argument thus far. But he then goes on to suggest that the proper construction of subsection 5 is that although the Governor in Council has power not to publish at all, in which case the regulations become effective as soon as they are made - a situation designed to cover the dire emergency - if he does in fact publish in the Gazette then the regulations cannot in any event become effective within a period less than 3 weeks thereafter.

In my opinion that cannot be so. If, when the Governor in Council dispenses with the publication normally required, the regulations come into effect immediately, that effect cannot be retrospectively removed or stayed because the Governor in Council later gives notice of what he has already done. The construction suggested is too strained. The conclusion of the Judge below is correct.

Was there an "accrued" right?

If then the amended definitions became operative before the Authority considered the plaintiff company's plans, did the plaintiff company have any accrued right or privilege that survived the amendment?

Section 23 of the Interpretation and General Clauses Ordinance Cap. 1 provides :

> "23. Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (b) affect the previous operation of any

Ordinance so repealed or anything duly done or suffered under any Ordinance so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Ordinance so repealed;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any Ordinance so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Ordinance had not been passed."

The judge below found that the plaintiff company had no accrued right or privilege, at most the company had only a hope or expectation. In this respect he followed the decision in D.P.W. v Ho Po Sang(2), a decision of their Lordships of the Privy Council on appeal from this jurisdiction. It concerned not the approval of plans by the Building Authority but the issue of a Rebuilding Certificate by the Governor in Council.

Under particular legislation prevailing until the 9th of April 1957, the Director of Public Works might in certain circumstances give notice that he intended to issue a Rebuilding Certificate. If so, and no objection was taken by the tenants or subtenants of the building concerned, the landlord would in due course be able to obtain vacant possession despite the security of tenure given to tenants and subtenants by the Landlord and Tenant Ordinance. On the other hand, the tenants and subtenants could apply by way of petition to the Governor in Council that the certificate be not issued. The landlord could then cross-appeal. There was no formal hearing of the appeal but the law provided that "every petition and cross-petition and cross-petition lodged in due time shall be taken into consideration by the Governor in Council who may direct that the Rebuilding Certificate be given or be not given as he may think fit in his absolute discretion".

In July 1956 the Director gave notice of his intention to issue a Rebuilding Certificate in respect of premises in Temple Street, Kowloon. The tenants and

(2) (1961) A.C. 901

subtenants appealed by way of petition to the Governor in Council. The landlord cross-appealed. However, no decision had been taken by the Governor in Council before the 9th of April 1957 when other legislation repealing the particular provisions came into effect. No provision was made for consideration to be given to pending petitions or cross-petitions or to permit the subsequent giving of a Rebuilding Certificate.

The landlord relied upon Section 10 of Interpretation Ordinance which was in the same words as Section 23 above. He put forward two submissions. The first was that "after the Director had given notice of his intention to give a Rebuilding Certificate, some kind of right (even though one that might be defeated) to such a certificate was then "acquired by" the landlord. Their Lordships did not accept that submission. In their view the landlord had no "right". He had no more than a "hope".

> "The position on April 9th, 1957 was that the (landlord) did not and could not know whether he would or would not be given a Rebuilding Certificate. Had there been no repeal, the petition and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion." (3)

The second submission was that on the 9th of April the landlord had an accrued right to have the matter taken into consideration by the Governor in Council and that if the Governor in Council should think fit subsequently to order the issue of a Rebuilding Certificate - as in fact he did - the accrued right of consideration would be sufficient to give full validity to the certificate.

Their lordships rejected that submission by the same token.

> "On April the 9th, the landlord was quite unable to know whether or not he would be given a Rebuilding Certificate, and until the petition and cross-petition were taken into consideration by the Governor in Council no one could know. The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a Rebuilding Certificate even though he may have had grounds for optimism as to his prospects." (4)

There can be no doubt that the decision of Bewley J. in the present instance was correct if the only right which could have accrued to the plaintiff company was - as

(3) at page 920
(4) at page 921

Counsel for the Attorney insists - a right to have its plans totally approved. That is squarely within the decision of Ho Po Sang.

However, Counsel for the plaintiff company has been assiduous to point out that he does not seek to establish such a right. He seeks only that the plans should be considered on the basis that the site is a class C site, as it was at the time they were submitted. He argues that this would not be inconsistent with their Lordships' views in Ho Po Sang, but would in fact follow naturally from what their Lordships said. When the plaintiff company submitted its plans on the 8th of September, what kind of site it had was not a question that remained "open and unresolved". It was not "an issue that rested in the future". The plaintiff company could and did know that it had a class C site. It could and did discover this by reference to the regulations as they stood. The Authority was bound by those regulations as much as was the plaintiff company. Regardless of how he might exercise his discretion in relation to other matters which he had to consider, the Authority had no discretion whatsoever in relation to the class of site. In that particular respect, the company therefore did have an accrued right. That is all that is claimed.

Counsel for the Attorney argues that no right can be a "accrued right" for this purpose unless it be such as can by itself be enforced as a right of action, and he suggests that because of the other matters still residing in the Authority's discretion the "right" claimed in the present instance does not pass the test.

With every respect, that answer misses the point of the plaintiff's claim. That claim does not touch upon discretion. It is content to leave the Authority to exercise his discretion as he think fit, provided that he does so in accordance with law. It contends however that he has not done so, that by applying the 'new' definition to the plaintiff's application he has made a mistake in law. And it is that mistake in law which the plaintiff company asks the Court to correct, nothing more.

The Judge below appears to have been influenced to some extent by Section 39(1) which provides :

> "39(1) Any regulations made under this Ordinance may provide that where plans of building works, street works, lift works or escalator works are submitted to the Building Authority within such period from the coming into operation of the regulations as may be prescribed therein, he may approve any such plans which comply with the provisions of the law before the coming into operation of such regulations and may give

> consent to the commencement of the works shown therein; and the provisions of subsection (2) shall apply to such works and to any building which may be erected, any street or access road which may be formed, constructed or laid out or any lift or escalator installed in consequence thereof."

He said "If the Governor in Council feels that plans in the pipeline should not be prejudiced, he may authorize the Building Authority to approve them in accordance with the old law".

With respect I think he proceeded on a misreading of the section, which, as I understand it, would apply to plans submitted only after a regulation had come into operation.

In my opinion the argument for the plaintiff company is sound. Section 14 deprives a person of his natural right to build what he likes on his own land, but it gives him a right to build to particular dimensions. Those dimensions are not, except in Regulation 19 cases, fixed at the discretion of the Authority. They are predetermined by the Regulations, that is, by the classification of the site in conjunction with the scheduled table. They do not stem from the exercise of a discretion, as did the Rebuilding Certificate in Ho Po Sang.

It may be that on consideration of plans based on those predetermined dimensions the Authority will have good cause to reject them. And it may be that in some cases the exercise of that power will in fact result in a further restriction upon size. But that is a different question. The Authority has no right to interfere directly. The original dimensions are something given to the owner by law. If he assert his claim before the law is changed, then in my view he has an "accrued right" within the Interpretation Ordinance. With respect to the learned Judge I think he was wrong on this point.

A final point remains. By a respondent's notice the Attorney General seeks to uphold the decision on the ground that equity will not act in vain, that a further consideration of the plaintiff company's application would be useless because the application was not originally accompanied by a certificate from the Director of the Fire Services. This is a ground of refusal expressly mentioned in Section 16. The Authority drew attention to this in his letter of rejection and enclose a copy of the Director's comments.

Counsel further referred us to Section 15(2) :

"(2) The grounds set out for any refusal to approve

plans shall not be treated as being exhaustive, and no such refusal shall be construed as implying any approval of any part of such plans."

and the final words of the Authority in the same letter "As major revision of your proposal is envisaged, my above comments are not intended as exhaustive".

The fire precautions point was raised in the Court below, but not dealt with by the learned Judge. Counsel for the plaintiff company met it at that time by reference to what he alleged was the standard practice of the Authority in such circumstances, i.e. not to withhold the approval at the outset but to deal with the Director's comments piece by piece as the building progressed. Counsel for the Attorney was not able either to confirm or to deny the existence of the practice. Now, some 3 months later, he is still in the same position. Counsel for the plaintiff company is confident that if the declaration were granted the plaintiff company would have no substantial difficulty in resolving the question of fire precautions or any other matter causing anxiety to the Authority. For my part I am prepared to let the company try.

For these reasons, I would allow the appeal and grant the single declaration that is now sought.

Zimmern, J.A. :

In this appeal it will be convenient first to set out the chronological order of events.

1. On the 8th September 1979 the plaintiff appellant through its architects submitted its plan to the Building Authority for approval for the redevelopment of 26-36 Shun Ning Road on the basis that it was a Class C site.

2. On the 9th October 1979 the Governor in Council amended the Building (Planning) Regulations as published in the Gazette dated 12th October 1979 in terms as follows :-

BUILDINGS ORDINANCE
(Chapter 123)
BUILDING (PLANNING)(AMENDMENT) REGULATIONS 1979

Made by the Governor in Council under section 38 and in pursuance of the power conferred by the proviso to section 38(5)

1. These regulations may be cited as the Building (Planning)(Amendment) Regulations 1979. Citation.

2. Regulation 2(1) of the principal regulation is amended by deleting the definitions of "class A site", "class B site" and "class C site" and substituting the following - Amendment of regulation 2 (Cap.123, sub.leg.)

""class A site" means a site, not being a class B site or Class C site, that abuts on one street not less than 4.5 m wide or on more than one such street;

"class B site" means a corner site that abuts on 2 streets neither of which is less than 4.5 m wide;

"class C site" means a corner site that abuts on 3 streets none of which is less than 4.5 m wide."

J.A. Frost,
Clerk of Councils.

COUNCIL CHAMBER,
9th October 1979."

The Gazette shows the following explanatory note :

" The Building (Planning) Regulations classify sites by reference to the streets on which sites abut. These amending regulations make clear that in classifying sites for the purposes of the regulations streets of less than 4.5 m wide are to be disregarded."

Prior to the amendments the regulations read :-

""class A site" means a site that abuts on one street or on more than one street, not being a class B site or a class C site;

"class B site" means a corner site that abuts on 2 streets;

"class C site" means a corner site that abuts on 3 streets and also means an island site."

3. On the 19th October 1979 the Building Authority refused the appellant's application on two grounds namely :-

"(a) The permitted plot ratio and site coverage are exceeded - Reg. 20 of Building (Planning) Regulations. In this connection, please note

that the above site is a class A site within the meaning of Reg. 2(1) of the Building (Planning) Regulations as amended by the Building (Planning)(Amendment) Regulations 1979.

(b) The plans are not endorsed with or accompanied by a certificate from the Director of Fire Services - Section 16(1)(b) of the Building Ordinance."

By an originating summons dated 10th June 1981 the appellant applied to the High Court claiming the following relief :-

"(1) A declaration that on the true construction of the Buildings Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning)(Amendment) Regulations, 1979, the Building Authority was not on October 19, 1979, empowered to reject the plans for building works at New Kowloon Inland Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the plaintiff on September 8, 1979, on the ground that the site was a Class A site and not a Class C site within the meaning of regulation 2 of the Building (Planning) Regulations.

(2) A declaration that the purported refusal by the Building Authority on October 19, 1979, of the said plans in so far as it is on the ground that the site was a Class A site and not a Class C site was null and void and of no effect."

The matter was heard before Bewley J. commencing on the 9th June 1980 and in a reserved judgment dated the 8th July 1981 the learned judge applying D.P.W. v Ho Po Sang(1) refused the 2 declarations sought.

The appellant now appeals before us on the following grounds :-

"(1) That the Appellant is entitled to the said relief and that the learned judge erred in law in holding otherwise.

(2) That as a matter of law the Building (Planning) (Amendment) Regulations 1979 did not come into operation upon publication in the Gazette on October 12, 1979, as the learned judge held; rather, by reason of section 38(5) of the Building Ordinance, Cap.123, they only came into operation 3 weeks after such publication, i.e. on October 31, 1979, which was after the Building Authority's refusal on October 19, 1979, of approval of the plans referred to in the

(1) [1961] A.C. 901

said Originating Summons.

(3) That as a matter of law the Appellant was entitled to have the said plans considered under the law prevailing at the time they were submitted to the Building Authority for his approval, i.e. on September 8, 1979, and that the learned judge erred in law in holding otherwise."

The Attorney General by a respondent's notice seeks to contend that the judgment be affirmed on grounds additional to those relied on by the Court below namely:-

"(1) the decision of the High Court in the case of Cheong Ming Investment Co. Ltd. v Attorney General (unreported). High Court Action No. 250 of 1979; Judgment dated 6th of July, 1979 - was wrongly decided and should not be followed. Thus, even before the amendment to Regulation 2(1) of the Building (Planning) Regulations on the 12th of October, 1979 the Appellant did not have a class "C" site for the purpose of those Regulations;

(2) the declarations sought should not be made in any event as the Building Authority's refusal of approval to the plans was based on two grounds one of which (namely, failure to show the approval of the Director of Fire Services to the plans) has not been challenged - so that it would be inefficacious to make the declarations sought."

The Site

It is a common ground between the parties that the site in question is rectangular in shape and on 3 sides it abuts on a) to the North a service lane 3.050 metres in width, to the east a service lane of the same width and to the south Shun Ning Road 18.290 metres in width. By definition a street includes a service lane.

One of the questions in this case is whether the appellant was at material times entitled to say they had a Class C and not as the Attorney General contends a Class A site. The importance of this is that on a Class C site the intended building is entitled to a greater site coverage and gross floor area than a Class A site.

The Amending Regulations

Mr. MacPherson for the appellant claims the definition section on the 8th September 1981 was loud and clear that the site was a Class C site when the plans were submitted for approval. Further on 6th July 1979 in

M.P. 1979 No. 250 (unreported) Trainor J. had declared in a similar application that a site abutting on to the north an intended road 14.30 metres in width and to the east a lane 4.45 metres in width was a Class B site. The decision is directly in point on the construction of the Ordinance and the Building (Planning) Regulations made thereunder as at the 8th September 1979. There was no appeal from that decision. Instead the Governor in Council took the step of amending the regulations on the 9th October. I cannot let this pass without expressing my dismay at the explanatory note asserting that the amending regulations were to make clear that in classifying sites for the purposes of the regulations streets of less than 4.5 metres wide are to be disregarded. With respects to the Department responsible for the note for the Governor in Council those regulations have been interpreted by the High Court and it is not open to the legislature to challenge that interpretation. There was nothing to make clear as the judgment was clear. The amending regulations were amendments simpliciter and I cannot accept the contention of Mr. Barlow for the Attorney General that the amending regulations were declaratory. He now asks us to say that Trainor J. was wrong. That, of course, he can do.

The Date the Amending Regulations Came into Effect

The appellant contends that the amending regulations came into effect on 31.10.79 whereas the Attorney General says 12.10.79 the date they were gazetted. This turns on the interpretation of the Ordinance.

Section 38(1) empowers the Governor in Council by regulation to provide for, inter alia, planning and buildings and subsection (5) provides "Such regulations shall be published once in the Gazette at least 3 weeks before coming into operation : Provided that where the Governor in Council deems it expedient such publication may be dispensed with."

Mr. MacPherson argues that Section 38(5) specifically provides for a publication at least 3 weeks before coming into operation and the proviso in the sub-section only empowers the Governor in Council not to publish at all. Therefore he says by the fact of publication in the Gazette on the 12th October 1979 the amending regulations only came into operation three weeks thereafter i.e. 30th October 1979. I am unable to accept this argument. The amending regulations were expressly made under Section 38 and were so gazetted. I interpret that proviso to empower the Governor in Council, if he think it expedient in any given case, to dispense with publication in the Gazette at least three weeks before coming into operation. The proviso does not empower dispensation of any publication but only "such publication" under

Section 38(5). The Governor in Council did so dispense with such publication. Accordingly I find the amending regulations came into effect on the 12th October 1981. This then disposes of the issue that if the effective date was 30th October 1979 the Building Authority would have had no power to refuse the plans under his ground (a).

Was the Appellant's Site a Class A Site or a Class C Site on 8.9.79

The learned judge found the amending regulations were not retrospective and there is no appeal from that. Mr. Barlow for the Attorney General submits that under the regulations existing on 8.9.79 the site was a Class A site and Trainor J. in Cheong Ming Investment Co.Ltd. v Attorney General M.P. 1979 No. 250 (unreported) was wrong and the judge in the Court below in following Trainor J. and finding the site to be a Class C site on 8.9.79 was also wrong. I have set out the definitions of the site classifications as they stood in the regulations prior to the amendments and in order to review the 2 decisions in respect of this matter it is necessary to set out the whole of regulation 23(1) which reads as follows:-

"For the purposes of regulations 19, 20, 21 and 22

(a) the height of a building shall be measured from the mean level of the street or streets on which it fronts or abuts or, where the building fronts or abuts on streets having different levels, from the mean level of the lower or lowest of the streets to the mean height of the roof over the highest usable floor space in the building;

(b) the gross floor area of a building shall be the area contained within the external walls of the building measured at each floor level (including any floor below the level of the ground), together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony (including the thickness of the sides thereof), and the thickness of the external walls of the building; and

(c) a street that is less than 4.5 m shall be deemed not to be a street."

Mr Barlow says the basis of his arguments are as follows:-

" Building (Planning) Regulation 23(1)(c) states 'For the purposes of regulations 19, 20, 21 and 22 - a street that is less than 4.5 m shall be deemed not to be a street.' Nowhere in regulations 20, 21 and

22 does the word street appear. Reference is made however to 'class A, B and C sites' and for Regulation 23(1)(c) to have any meaning in the context of regulations 20, 21 and 22 only streets having a minimum width of 4.5 m can be taken into account for the purpose of classifying a site under regulation 2. Regulation 2(1) of the Building (Planning) Regulations contains the following words -

'In these regulations unless the context otherwise requires, words and expressions have the meaning attributed to them by the Buildings Ordinance.'

And that in his opinion regulation 23(1)(c) is an example of the context otherwise requiring."

He says that is the only way effect can be given to the Regulations and though Regulation 23(1) cannot be applied in that manner to Regulation 19 nevertheless the language of the regulation "is plain and unambiguous it must be enforced although it should lead to absurd or unjust results." (per Lord Salmon in Lai Man Yau v The Attorney General (No. 2)(2)

As I see them :-

Regulation 16 provides the formula for ascertaining the maximum height for buildings which abut over a street or two streets forming a corner where the street or streets are at least 4.5 metres wide.

Regulation 19 empowers the Building Authority to determine the height, the site coverage and plot ratio for any building on a site which abuts on a street less than 4.5 metres or does not abut on a street.

Regulation 20 provides the method for ascertaining the maximum permitted site coverage for a building. Subject to matters which are not relevant, the coverage is obtained by taking the height of the building, whether it is domestic or otherwise and the class of the site i.e. A, B or C and applying those three factors to a table in the schedule, the permitted percentage is shown.

Regulation 21 provides the method for ascertaining the maximum permitted plot ratio for a building. The plot ratio of a building may be expressed by the equation Gross Floor Area = Plot Ratio x Site Area. Mutatis mutandis what I have said about Regulation 20 applies and by applying the same three factors the table

(2) [1978] H.K.L.P. at p.548

will give the maximum permitted plot ratio and that multiplied by the site area will give the maximum permitted gross floor area.

I do not need to venture into Regulation 22.

Regulations 20 and 21 have three factors in common, height, site class and whether domestic or otherwise. There is no dispute about the third factor for the purposes of argument in this case and assuming the classification of the site to be as defined in Regulation 2 in September 1979 then clearly nothing turns on any Class A site if the street it abuts over is less than 4.5 metres wide for it will be caught by Regulation 19. This controversy can only arise in respect of a Class B site where one of the streets is less than 4.5 metres wide and in respect of a Class C site one or two of such streets. There is this in common, each class must abut on to at least one street of not less than 4.5 metres.

Having gone through the necessary regulations in some detail, I find Mr. Barlow's arguments quite untenable. Where Regulation 16 provides the formula for ascertaining the maximum permitted height for a building abutting on to one or two streets of at least 4.5 metres wide, Regulation 23(1)(a) and (c) directs how height is to be measured in relation to such streets. One of the common factors in both Regulations 20 and 21 is height. What Regulation 23(1) clearly means is that for the purpose of measuring the height under Regulations 20 and 21, Regulation 23(1)(a) and (c) applies. Mr. Barlow could not apply Regulation 23(1)(a) and (c) to Regulation 19. In my view Regulation 23(1)(a) and (c) have no application to Regulation 19 at all, but it is Regulation 23(1)(b) which applies for under Regulation 19 the Building Authority determines the plot ratio from which the gross floor area is ascertained and 23(1)(b) provides the method of measuring that gross floor area. Of course 23(1)(b) also applies to Regulation 21. Any application of 23(1)(c) by itself to Regulation 19 will create an absurdity.

The above is sufficient to refute Mr. Barlow's contentions and I am quite unable to give Regulation 23(1)(c) that element of elasticity by which it can stretch directly or indirectly to catch and affect the site classifications in the regulations. I would dismiss the Attorney General's cross appeal contending that the Cheong Ming Investment Co.Ltd. was wrongly decided and hold that on the date of submission of the plans the appellant held a Class C site.

<u>The Effect of holding that the site was a Class C site on 8.9.79</u>

At law in Hong Kong every Crown lease holder is entitled to build whatever he likes on his land subject to the Crown Lease and Ordinance. I think it is common

ground in this case that the appellant's entitlement to build in accordance with the plans submitted by it is governed by the Buildings Ordinance and the regulations made thereunder.

By Section 14 of the Ordinance no person shall commence or carry out any building works without having obtained from the Building Authority his approval in the prescribed form of documents submitted to him in accordance with the regulations.

By Section 15 the approval is deemed to be given unless within 60 days refusal is notified in writing setting out the ground for such refusal.

Section 16 sets out 16 grounds on which the Building Authority may refuse his approval of any plans of buildings. Some of them appear to give the Building Authority a discretion.

The appellant on 8th September 1979 submitted to the Building Authority for approval under Section 14 the plans for the building on a Class C site as I have found it then was.

On the 9th October 1979 the Governor in Council lawfully amended certain regulations effective on 12th October 1979 as I have found whereby the appellant's site would be defined as a Class A site.

On the 19th October 1979 the Building Authority refused the application on a ground with which we are concerned in this particular issue namely that the site was a Class A site by reason of the amending regulations.

The question is whether the appellant had a right on 8th September 1979 and if he had what effect the amending regulations had if any on that right.

Bewley J. in the Court below applying the Privy Council case of D.P.W. v Ho Po Sang (1) held "that the scrutineering process required of the Building Authority followed by the exercise of his discretion reduced the plaintiff's application to something short of an accrued right." He decided therefore that the appellant having no accrued right under Section 23 of the Interpretation and General Clauses Ordinance which reads in part :-

> "Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not -
>
> (c) affect any right, privilege obligation or liability acquired accrued or incurred under any Ordinance so repealed."

the amending regulations were effective to change the classification of the site from C to A and the Building Authority was right in refusing on that ground.

In the Ho Po Sang case the Board concluded on the facts no right existed or had accrued and the intended investigation which had not taken place before the time of the repeal was an investigation in order to decide whether a right should or should not be given whereas if a right existed prior to the repeal and the investigation was in respect of it then the right was unaffected. The question in instant case is whether the appellant had an accrued right at the date of submission of its plans and if it had what was the right. As I have said the appellant was and is a Crown lessee of the land at law and subject to the Crown lease and Ordinance it has a right to build on its land. To exercise that right the Buildings Ordinance requires it to submit its plans under Section 14 for investigation. The Building Authority is the statutory body appointed to investigate such submissions and he has a statutory duty so to investigate for under Section 15, if he does not refuse and he can only refuse for cause though given a certain amount of discretion, 60 days thereafter the Building Authority will be deemed to have consented. As I see the picture I find it impossible to say that at the date of submission the appellant did not have an accrued right to have its plans based on a Class C site investigated by the Building Authority. That right was unaffected by the Amending Regulation by reason of Section 23 of the Interpretation Ordinance. The Building Authority could only refuse for cause and under ground (a) he did not refuse for cause but on a wrong view of the law and with no disrespect I am unable to uphold the learned judge's conclusion on this issue. (3) In Heston and Isleworth Urban District Council v Grout which concerned the validity and effect of a notice served under a Section of an Act of Parliament which was subsequently repealed, Lindley L.J. at p.311 said :-

> "We have then to determine what effect S.25 has upon the notice. It would then be, I think, a very strange and forced construction to say that the notice would have to be dropped and that everything done under it would have to be done over again under a fresh notice. I should not think that was right even without the aid of the Interpretation Act."

I adopt the reasoning of learned Lord Justice and say it cannot be right that an intending developer who must have spent time and money on his plans after submission to the Building Authority can be told that the Governor-in-Council through the process of instant amending regulations has rendered his plans abortive and he must therefore start

(3) [1897] 2 Ch. 306.

all over again. Mr. Barlow misconceived the appellant's case. Mr. MacPherson never claimed that his client had a right to have its plans approved as a Class C site. He said the appellant had an accrued right at the date of submission to have its plans considered and investigated as a Class C site which it then was and remained unaffected by the amending regulations.

I now turn to the final issue, the 2nd ground of the Attorney General's cross appeal.

Mr. MacPherson hardly entered the arena in this issue. He asked the Court for leave to amend the second declaration sought by adding the words "in so far as it is" which was granted and the amendment made forthwith. That was sufficient to dispose of that cross-appeal.

Mr. Barlow's contention is that even if the Building Authority were wrong on ground (a) of his refusal he had a right to refuse the plans on ground (b). As the declarations sought are discretionary the Court ought not to grant a relief which serves no useful purpose as the submission has been lawfully refused on ground (b). I find this quite unrefreshing but we are not asked by the appellant to concern ourselves with the refusal on the 2nd ground. The declarations sought are clear about that.

I would also dismiss the 2nd ground of the cross appeal and allow the appellant's appeal and grant the 1st declaration sought with costs here and below.

(P.F.X. Leonard)
Vice-President

(D. Cons)
Justice of Appeal

(A. Zimmern)
Justice of Appeal

Mr. MacPherson Q.C., Mr. K. Bokhary,
(Woo, Kwan, Lee & Lo.) for plaintiff

Mr. Barlow and Mr. P.T. Nunn, Senior Crown Counsel, for defendant.

No. 9

NOTICE OF MOTION FOR CONDITIONAL LEAVE TO APPEAL

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 98 OF 1981

(On appeal from High Court Miscellaneous Proceedings No. 517 of 1980)

B E T W E E N

Firebird Ltd. — Appellant (Plaintiff)

- and -

Attorney General — Respondent (Defendant)

TAKE NOTICE that the Court of Appeal will be moved on Monday, the 21st day of December 1981 at 10.00 o'clock in the forenoon at the sitting of the Court or so soon thereafter as counsel on behalf of the above-named Respondent can be heard for an order that conditional leave be granted to the Respondent to appeal to Her Majesty the Queen in Her Privy Council from the judgment of this Honourable Court pronounced by the Court on the 27th day of November 1981, the Respondent undertaking to comply with the provisions of the Rules and Instructions concerning Appeals to Her Majesty the Queen in Her Privy Council.

Dated the 10th day of December, 1981.

(Signed) BARRIE BARLOW
Counsel for the Respondent

To : Messrs. Woo, Kwan, Lee & Lo,
Solicitors for the Appellant
2601 Connaught Centre,
26th Floor, Central,
Hong Kong.

Estimated time : Not exceeding 15 minutes

In the Court of Appeal of Hong Kong

No. 10
Order of Court of Appeal Granting Conditional Leave to Appeal

21st December 1981

No. 10

ORDER OF COURT OF APPEAL GRANTING CONDITIONAL LEAVE TO APPEAL

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 98 OF 1981

(on appeal from High Court Miscellaneous Proceedings No. 517 of 1980)

B E T W E E N

FIREBIRD LTD. — Appellant (Plaintiff)

- and -

ATTORNEY GENERAL — Respondent (Defendant)

BEFORE THE HONOURABLE MR. JUSTICE LEONARD, VICE-PRESIDENT, THE HONOURABLE MR. JUSTICE CONS J.A. AND THE HONOURABLE MR. JUSTICE ZIMMERN, J.A. IN COURT

O R D E R

UPON READING the Notice of Motion dated the 10th day of December, 1981 filed herein on behalf of the above-named Respondent

AND UPON HEARING Counsel for the Appellant and Counsel for the Respondent

IT IS ORDERED that the Respondent do have leave to appeal to Her Majesty the Queen in Her Privy Council from the Judgment of the Court of Appeal dated the 27th day of November, 1981 on condition that :-

(1) The Respondent undertakes to pay any costs that may be ordered by Privy Council;

(2) The Record of the Appeal be prepared and despatched to England within 2 months from the date hereof.

Dated the 21st day of December, 1981.

(N.J. Barnett)
Registrar

No. 11

ORDER OF COURT OF APPEAL GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL
CIVIL APPEAL NO. 98 OF 1981

(On Appeal from High Court Miscellaneous Proceedings No. 517 of 1980)

B E T W E E N

Firebird Ltd. — Appellant (Plaintiff)

- and -

Attorney General — Respondent (Defendant)

BEFORE THE HONOURABLE MR. JUSTICE LEONARD, VICE-PRESIDENT, THE HONOURABLE MR. JUSTICE CONS, JUSTICE OF APPEAL

O R D E R

UPON READING the Notice of Motion herein dated the 8th day of March, 1982 on behalf of the above-named Respondent for final leave to appeal to Her Majesty in Privy Council from the judgment of the Court of Appeal dated the 27th day of November, 1981.

AND UPON READING the Affidavit of Mr. B.G.J. Barlow sworn on the 5th day of March, 1982

AND UPON HEARING Counsel for the Appellant and Counsel for the Respondent

AND IT IS ORDERED that the Respondent do have final leave to appeal to Her Majesty in Privy Council from the judgment of the Court of Appeal dated the 27th day of November, 1981. Costs in the appeal.

Dated the 19th day of March, 1982.

N.J. Barnett
Registrar

EXHIBITS

P1
Affirmation of Wang Teh Huei

P1 - AFFIRMATION OF WANG TEH HUEI WITH EXHIBITS

10th June 1980

1980, No. 517

IN THE HIGH COURT

IN THE MATTER of the Buildings Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979

and

IN THE MATTER of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon =

B E T W E E N

FIREBIRD LIMITED — Plaintiff

- and -

ATTORNEY GENERAL — Defendant

AFFIRMATION OF WANG TEH HUEI

I, WANG TEH HUEI of 9th Floor, Baskerville House, 22 Ice House Street, Hong Kong do solemnly, sincerely and truly affirm and say as follows :-

1. I am a Director of the Plaintiff Company and am duly authorised to give evidence on their behalf in this matter.

2. The Plaintiff Company is the leasehold owner of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon.

3. On 8th September 1979 the Plaintiff Company (by their Architect, Mr. K.K. Wong) applied under the Buildings Ordinance for approval of plans of building works on the site comprised in the abovementioned Lots. There is now produced and shown to me marked Exhibit A a true copy of the application for approval and accompanying plans. The plot ratio and site coverage for the building works were calculated in accordance with the Building (Planning) Regulations on the basis that the site was a Class C

site, as defined in Regulation 2(1), namely a corner site abutting on three streets.

4. By letter dated 19th October 1979 the Building Authority purported to refuse approval of the building plans on the grounds that "The permitted plot ratio and site coverage are exceeded". The Building Authority added the comment that "the above site is a Class A site within the meaning under Regulation 2(1) of the Building (Planning) Regulations as amended by the Building (Planning) (Amendment) Regulations, 1979". There is now produced and shown to me marked Exhibit B a true copy of the said letter.

5. The Building (Planning)(Amendment) Regulations, 1979, to which the Building Authority refer in their letter, were made by the Governor in Council under s. 38 of the Buildings Ordinance, and were published in the Hong Kong Government Gazette on 12th October 1979. I am advised that these Regulations do not have retrospective effect, and do not apply to applications for approval of building works made before 31st October 1979, the date on which they came into operation. Accordingly I am further advised that the Building Authority wrongly rejected the plans on the grounds that the permitted plot ratio and site coverage were exceeded.

(Signed)

AFFIRMED at 9th Floor
Holland House
Victoria, Hong Kong this
6th day of June 1980

Before me,

(Signed)

Exhibits

P1
Affirmation of Wang Teh Huei

10th June 1980

(continued)

1980, No. 517

IN THE HIGH COURT

IN THE MATTER of the Buildings Ordinance, Cap. 123, the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979

and

IN THE MATTER of New Kowloon Inland Lots Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon

B E T W E E N

FIREBIRD LIMITED — Plaintiff

- and -

ATTORNEY GENERAL — Defendant

THESE ARE THE EXHIBITS REFERRED TO IN THE AFFIRMATION OF WANG TEH HUEI FILED HEREIN ON THE 10th DAY OF JUNE, 1980

Exhibit Marked	Consists of Sheets
A	8
B	1

WOO, KWAN, LEE & LO,
Solicitors &c.,
2601 Connaught Centre,
HONG KONG

B.O.O. 2/4366/78

K. K. WONG, Esq
Room 1001 Baskerville House
22 Ice House St.,
HONG KONG.

Office of the Building Authority
Public Works Department
Murray Building, 7th-10th floors,
Garden Road, Hong Kong.

Tel. No.: 5-2670-2366

19th October 1979

Dear Sir,

26-36 Shun Ning Road - N.K.I.Ls. 3688, 3689, 3690, 3691, 3692, 3693

I refer to your application received on 8.9.79 for approval of proposals.

It is the usual practice in the Buildings Ordinance Office for all submission to be checked carefully to ensure that contraventions of the Buildings Ordinance and Regulations are not present and that from other aspects where the public interest is involved, the proposals are viable. However, the pressure of work in the Buildings Ordinance Office is such that this usual practice cannot be followed without most serious delay continuing to affect all submissions to the B.O.O. Therefore, your application has been checked on the basis of certain elementary checks only but this elementary checking has disclosed that

(a) The permitted plot ratio and site coverage are exceeded - Regulation 20 of Building (Planning) Regulations. In this connection, please note that the above site is a Class A site within the meaning under Regulation 2(1) of the Building (Planning) Regulation as amended by Building (Planning) (Amendment) Regulations 1979.

(b) The plans are not endorsed with or accompanied by a certificate from the Director of Fire Services - Section 16(1)(b) of the Buildings Ordinance.

A copy of comments from the Director of Fire Services is enclosed herewith, and your proposal therefore is disapproved.

This curtailment of the usual range of checks emphasizes your duties and responsibilities as Authorized Person and I must stress the importance the Building Authority attaches to the proper assumption of responsibility by Authorized Persons. It is self-evident that any alteration to a building during erection or on completion, costs money and causes delays. Where the Building Authority is of the opinion that an Authorized Person has failed in his duty appropriate action will be taken.

Please ensure, therefore, that a re-submission complies fully with the Buildings Ordinance and Regulations, and that all relevant information is attached.

As major revision of your proposal is envisaged, my above comments are NOT intended as exhaustive.

Yours faithfully

(Sgd) (D.KOWK)

pro Building Authority

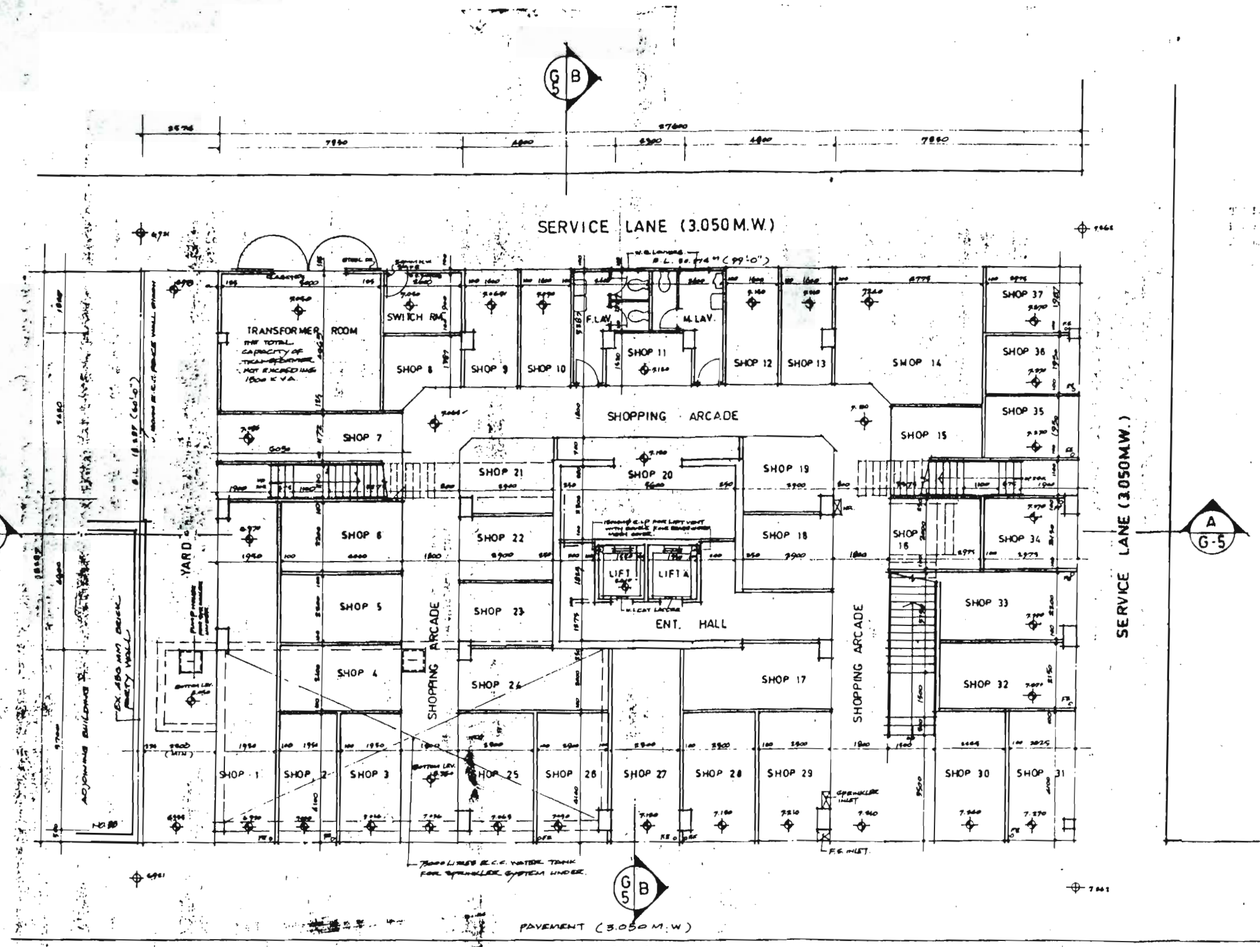
This is the exhibit marked "B"
referred to in the Affirmation
of Wang Teh Huei affirmed this
6th day of June 1980

Before me,

(Signed)

Solicitor, Hong Kong

c.c. Firebird Ltd.,
9/F., Baskerville House,
22 Ice House St.,
Hong Kong.



GROUND FLOOR PLAN

(SPRINKLER SYSTEM TO BE PROVIDED)

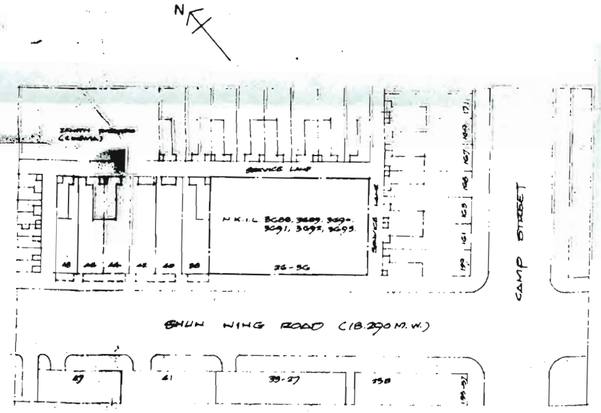
GENERAL NOTES :-

1. R.C.C. CALCULATIONS AND DETAILS TO BE SUBMITTED SEPARATELY.
2. W.S. AND DRAINAGE PLANS TO BE SUBMITTED LATER.
3. ALL V.I. CONC. BLOCK AND BRICK WORK TO BE BUILT IN 1:3 CEMENT MORTAR.
4. MIN. CLEAR HEIGHT FROM F.L. TO UNDERSIDE OF BEAM SHOULD BE 2300 H
5. MIN. CLEAR HEIGHT FROM F.L. TO UNDERSIDE OF BEAM OF STAIRCASES SHOULD BE 2200 MM H. [illegible]
6. ALL TREADS OF STAIR NOT LESS THAN 225 MM AND RISERS NOT MORE THAN 175 MM.
7. ALL BATHS W.C AND KITCHENS TO HAVE 1200 MM HIGH GLAZED TILE DADO MIN.
8. ALL STAIRCASES TO HAVE HANDRAIL ON BOTH SIDES.

COLOUR INDICATION :-

- R.C.C. WORK
- BRICK WORK
- V.I. CONC. BLOCK
- HARDCORE

Scale of drawings.



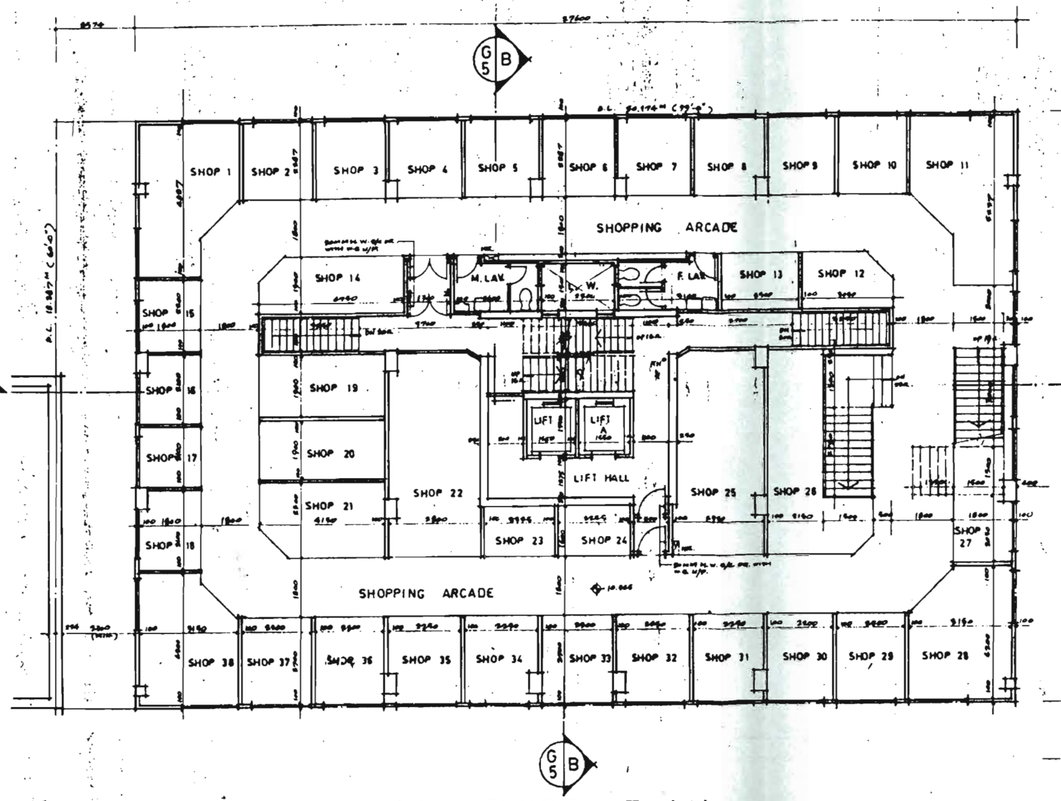
BLOCK PLAN

SCALE 1:600

USABLE FL AREA FOR GRD FL

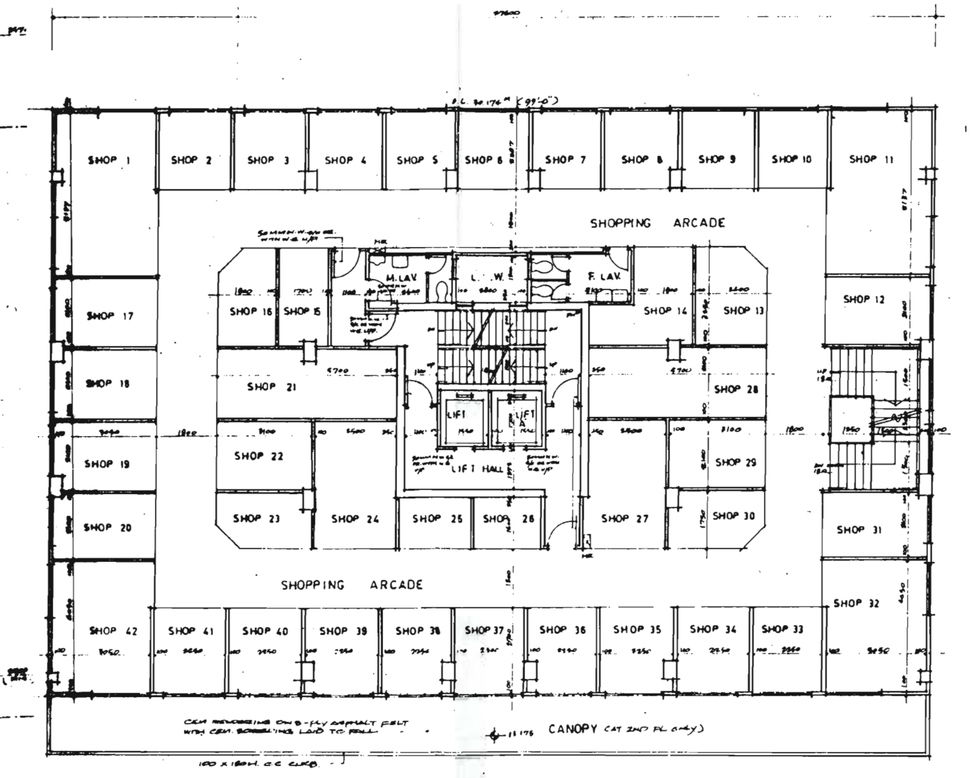
UNIT		U.F.A	NO OF PERSONS PER SANITARY FITMENT	NO OF PERSONS PER DISCHARGE UNIT
SHOP	1	11.268	2	5
	2	7.995	1	2
	3	7.995	1	2
	4	8.100	1	2
	5	8.100	1	2
	6	8.100	1	2
	7	7.091	1	2
	8	5.445	1	2
	9	5.419	1	2
	10	5.419	1	2
	11	4.356	1	2
	12	5.419	1	2
	13	5.419	1	2
	14	15.967	2	4
	15	4.760	1	2
	16	5.950	1	2
	17	10.340	2	3
	18	6.849	1	2
	19	6.960	1	2
	20	16.800	2	4
	21	6.960	1	2
	22	5.800	1	2
	23	5.800	1	2
	24	10.340	2	3
	25	9.430	2	3
	26	9.430	2	3
	27	14.260	2	4
	28	9.430	2	3
	29	9.431	2	3
	30	9.123	2	3
	31	9.123	2	3
	32	9.783	2	3
	33	9.240	2	3
	34	6.396	1	2
	35	5.801	1	2
	36	5.801	1	2
	37	5.911	1	2
TOTAL			40	93

K.K.WONG			
CHARTERED CIVIL ENGINEER AUTHORIZED PERSON			
PROPOSED NEW BUILDING ON N.K.I.L. 3088, 3089, 3090, 3091, 3092, 3093 AT NOS. 20-30 SHUN NING ROAD (KOWLOON)			
SCALE:	1:100 M.	JOB NO.:	
DATE:	5/9/79	DRAWING NO.:	G-1



1ST FLOOR PLAN

(SPRINKLER SYSTEM TO BE PROVIDED)



2ND TO 4TH FLOOR PLAN

(SPRINKLER SYSTEM TO BE PROVIDED)

USABLE FL. AREA FOR 1ST FL

UNIT	U.F.A	NO. OF PERSON FOR SANITARY FITMENT	NO. OF PERSON FOR DISCHARGE VALUE
SHOP 1	12.810	1	3
2	5.221	1	2
3	5.221	1	2
4	5.146	1	2
5	5.146	1	2
6	5.260	1	2
7	5.146	1	2
8	5.146	1	2
9	5.031	1	2
10	5.091	1	2
11	16.693	1	4
12	5.798	1	2
13	4.750	1	2
14	9.055	1	3
15	3.960	1	2
16	3.780	1	2
17	3.780	1	2
18	3.780	1	2
19	7.890	1	2
20	7.895	1	2
21	9.565	1	3
22	17.660	2	4
23	3.560	1	1
24	3.560	1	1
25	18.888	2	5
26	16.098	2	4
27	3.650	1	1
28	13.108	1	3
29	5.940	1	2
30	5.940	1	2
31	9.975	1	2
32	6.078	1	2
33	6.210	1	2
34	6.078	1	2
35	6.078	1	2
36	5.940	1	2
37	5.940	1	2
SHOP 38	12.105	1	3
TOTAL		41	88

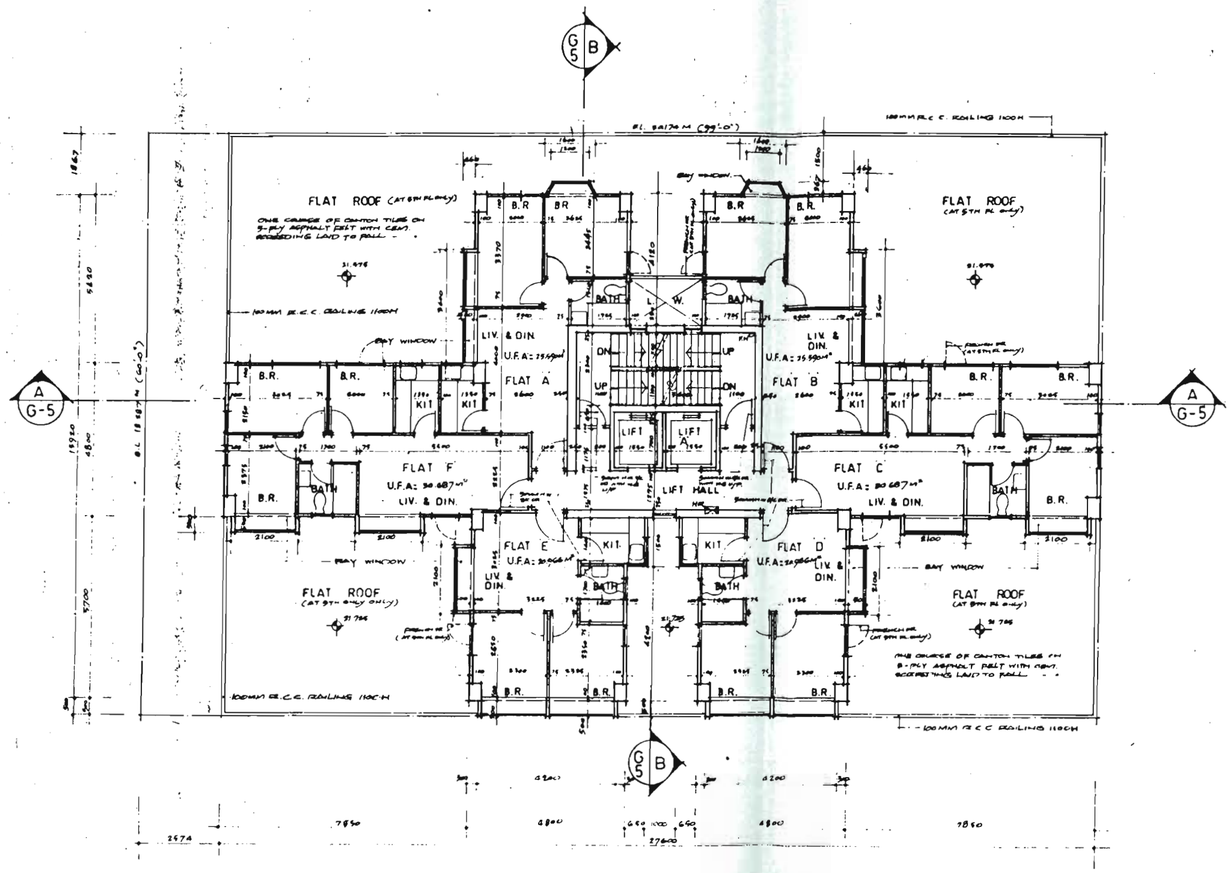
USABLE FL. AREA FOR 2ND TO 4TH FL.

UNIT	U.F.A	NO. OF PERSON FOR SANITARY FITMENT	NO. OF PERSON FOR DISCHARGE VALUE
SHOP 1	18.368	2	4
2	5.031	1	2
3	5.146	1	2
4	5.146	1	2
5	5.146	1	2
6	5.821	1	2
7	5.146	1	2
8	5.146	1	2
9	5.031	1	2
10	5.091	1	2
11	15.668	2	4
12	6.615	1	2
13	7.860	1	2
14	7.670	1	2
15	4.580	1	2
16	3.780	1	2
17	6.405	1	2
18	6.446	1	2
19	6.405	1	2
20	8.405	1	2
21	11.970	1	3
22	6.810	1	2
23	5.498	1	2
24	9.625	1	3
25	3.760	1	1
26	3.960	1	1
27	9.685	1	3
28	11.970	1	3
29	6.810	1	2
30	5.498	1	2
31	6.615	1	2
32	12.353	1	3
33	6.078	1	2
34	6.078	1	2
35	6.078	1	2
36	6.078	1	2
37	6.210	1	2
38	6.078	1	2
39	6.078	1	2
40	6.078	1	2
41	6.078	1	2
SHOP 42	18.353	1	3
TOTAL		46	92

K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3688, 3689, 3690, 3691
3692, 3693.
AT NOS. 26-30 SHUN NING ROAD
(KOWLOON)

SCALE:	1 : 100 M.	JOB NO.:	
DATE:	5/9/79	DRAWING NO.:	G-2



5TH TO 12TH FLOOR PLAN

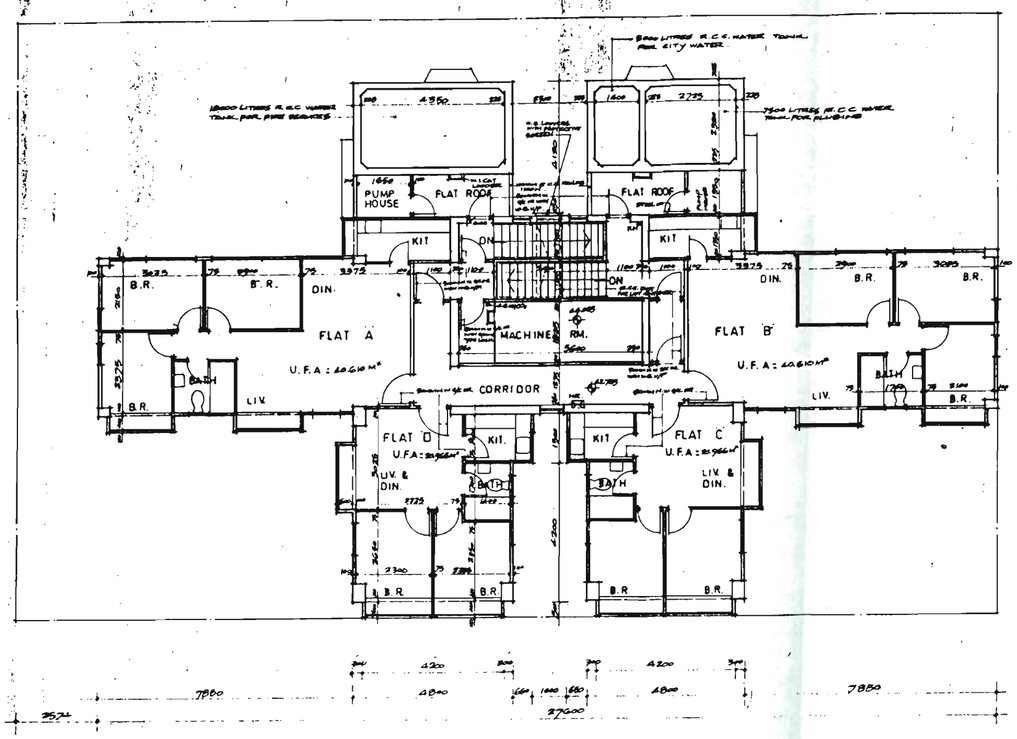
FIRE SERVICES NOTES :-

1. A FIRE HYDRANT / HOSE REEL INSTALLATION CONSISTING OF 13 HYDRANTS AND 18 HOSE REELS AT THE POSITIONS INDICATED ON PLANS
2. ONE F.S INLET & ONE SPRINKLER INLET TO BE PROVIDED AT THE POSITIONS INDICATED ON PLANS.
3. A WATER TANK WITH A CAPACITY OF NOT LESS THAN 18,000 LITRES TO BE PROVIDED TO SUPPLY THE FIRE HYDRANT / HOSE REEL INSTALLATION.
4. A MANUALLY OPERATED FIRE ALARM SYSTEM TO BE PROVIDED THROUGHOUT THE BUILDING AND TO BE INCORPORATED IN THE FH / HR. INSTALLATION
5. IT IS RECOMMENDED THAT ALL REQUIRED EXIT TO BE CLEARLY INDICATED BY ILLUMINATED 'EXIT' SIGNS IN ENGLISH AND CHINESE CHARACTERS.
6. LIFT/S MARKED A ON PLANS TO BE ARRANGE AS FIREMAN'S LIFT.
7. IT IS REQUIRED THAT AN AUTOMATIC SPRINKLERS INSTALLATIONS BE PROVIDED AND INSTALLED IN ACCORDANCE WITH THE 30TH EDITION F.O.C RULES TO PROTECT GRD & 1ST TO 4TH FL. EXCEPT TRANSFORMER, SWITCH RM.
8. IT IS STRONGLY RECOMMENDED THAT ELECTRICAL CIRCUITS BE PROTECTED BY MINATURE CIRCUITS BREAKERS IN LIEU OF CONVENTIONAL RE-WIREABLE FUSES.
9. WALL & CEILING LININGS. IT IS RECOMMENDED THAT ALL INTERNAL LININGS FOR ACCOUSTIC OR THERMAL INSTALLATION OR DECORATIVE PURPOSES BE OF CLASS 1 OR 2 RATE OF SURFACE FLAME SPREAD AS LAID DOWN BY B & S NO. 476 OF 1971 (PART 7)
10. PARITY VALVES TO BE PROVIDED WHERE NECESSARY SO AS TO MAINTAIN A PRESSURE NOT EXCEEDING 0.7MPa NOR LESS THAN 0.02 MPa AT ANYONE HYDRANT POINT.
11. THE WATER SUPPLY FOR SPRINKLER MUST CONFORM TO 30TH EDITION FIRE OFFICES COMMITTEE RULES FOR AUTOMATIC SPRINKLERS INSTALLATION.
12. IF A DIRECT TOWNS MAINS CONNECTION OR PUMP SUCTION TANK IS PROPOSED A COPY OF THE LETTER OF CONSENT FROM THE WATER AUTHORITY FOR SUCH A CONNECTION OR SUPPLY TO THE TANK WILL HAVE TO BE SUBMITTED BEFORE CERTIFICATION OF THE FINAL PLANS CAN BE MADE.
13. A SPRINKLERS ANNUNICATOR PANEL TO BE PROVIDED TO INDICATE THE FLOOR UPON WHICH SPRINKLERS ARE OPERATING.
16. (A) PIPE DUCT SHOULD BE OF SUBSTANTIAL FIRE AND MECHANICAL RESISTANT CONSTRUCTION IE BRICK OR CONCRETE.
    (B) PIPE DUCT SHOULD BE SEALED UP AT POINTS WHICH THEY PASS THROUGH FLOOR AND COMPARTMENT WALL AND ALL INSPECTION DOOR SHOULD BE 50MM HARDWOOD SELF-CLOSING OR EQUIVALENT
15. ATTACHED STANDARD REQUIREMENTS FOR A TRANSFORMER AND SWITCH RM. TO BE COMPLIED WITH WHERE APPLICABLE.
16. A SECONDARY ELECTRICITY SUPPLY TO BE PROVIDED TO MAINTAIN ALL ESSENTIAL SERVICES (IE. LIGHTING FOR: ALL PASSAGE WAYS AND STAIRCASES AND ILLUMINATION OF ALL EXIT SIGN MANUAL AND AUTOMATIC FIRE ALARM SYSTEM SPRINKLER ALARM SYSTEM, FIRE PUMPS FIREMAN'S LIFT) IN THE EVENT OF A MAIN'S POWER FAILURE OR A FIRE INCIDENT.
17. ATTACHED STANDARD REQUIRSMENTS FOR EMERGENCY ELECTRICAL GENERATOR TO BE COMPLIED WITH WHERE APPLICABLE.
18. FIRE EXTINGUISHERS :-
    - 2 x 4.5 Kg CO_2
    - 1 x 2.3 Kg CO_2
    - 12 x 9.1 LITRES AIR EXPELLED WATER OR WATER/CO_2

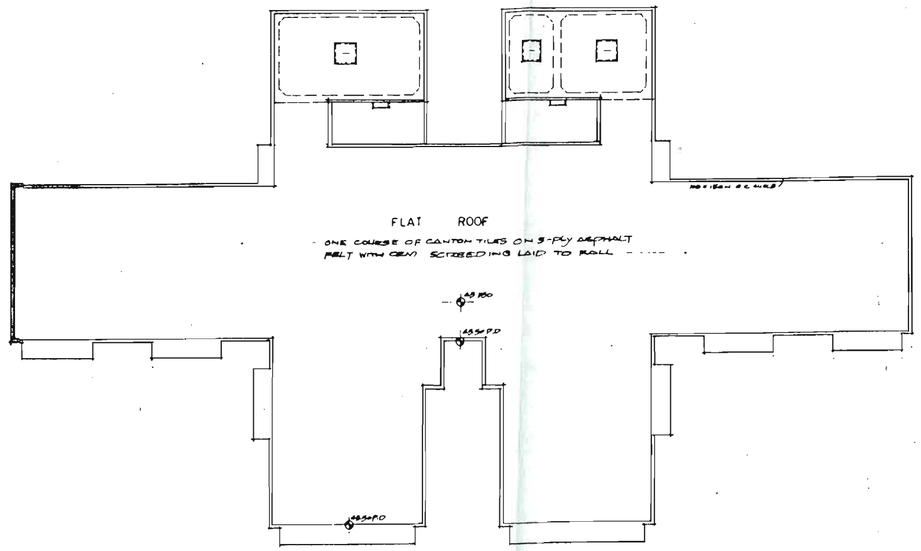
K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3688, 3689, 3690, 3691, 3692, 3698.
AT NOS 26-30 SHUN NING ROAD
(KOWLOON)

SCALE:	1:100 M	JOB NO.:	
DATE:	6/8/93	DRAWING NO.:	G-3



13TH FLOOR PLAN



ROOF PLAN

FIRE RESISTANCE REQUIREMENT FOR ELEMENT OF CONSTRUCTION

FLOOR	USE	CLASS	COMPUTATION OF BUILDING: FL. AREA (M²)	COMPUTATION OF BUILDING: VOLUME (M³)	F.R.P. REQUIRED	MIN. DIMENSION OF ELEMENT OF CONSTRUCTION: R.C.C. SLAB: THICKNESS	R.C.C. SLAB: COVER TO STEEL	R.C.C. BEAM & COL.: THICKNESS	R.C.C. BEAM & COL.: COVER TO STEEL
GROUND	SHOP	2	474.722	1661.527	2	125	15	300	50
1ST TO 4TH	SHOP	2	801.271	1603.542	2	125	15	300	50
BETWEEN 4TH & 5TH	SHOP	2	801.271	1203.907	2	125	15	300	50
6TH TO 12TH	DOMESTIC	3	246.172	615.960	1	100	15	225	25
13TH	DOMESTIC	3	194.400	510.300	1	100	15	225	25
ROOF		6			2	125	15	300	50
TRANSFORMER ROOM		6			2	125	15	300	50

CALCULATIONS OF MINIMUM WIDTH OF EXIT ROUTE & EXIT DOOR

FLOOR	UNIT	USE	NOS. OF PERSON	REQUIRED MIN. WIDTH OF: EXIT DOOR	REQUIRED MIN. WIDTH OF: EXIT ROUTE	PROVIDED MIN. WIDTH OF: EXIT DOOR	PROVIDED MIN. WIDTH OF: EXIT ROUTE
1ST TO 4TH	SHOP 1 TO 42	SHOP	92	850	1050	870	1100
5TH TO 12TH	FLAT A TO F	DOMESTIC	4	750	900	870	1100
13TH	FLAT A TO D	DOMESTIC	5	750	900	870	1100

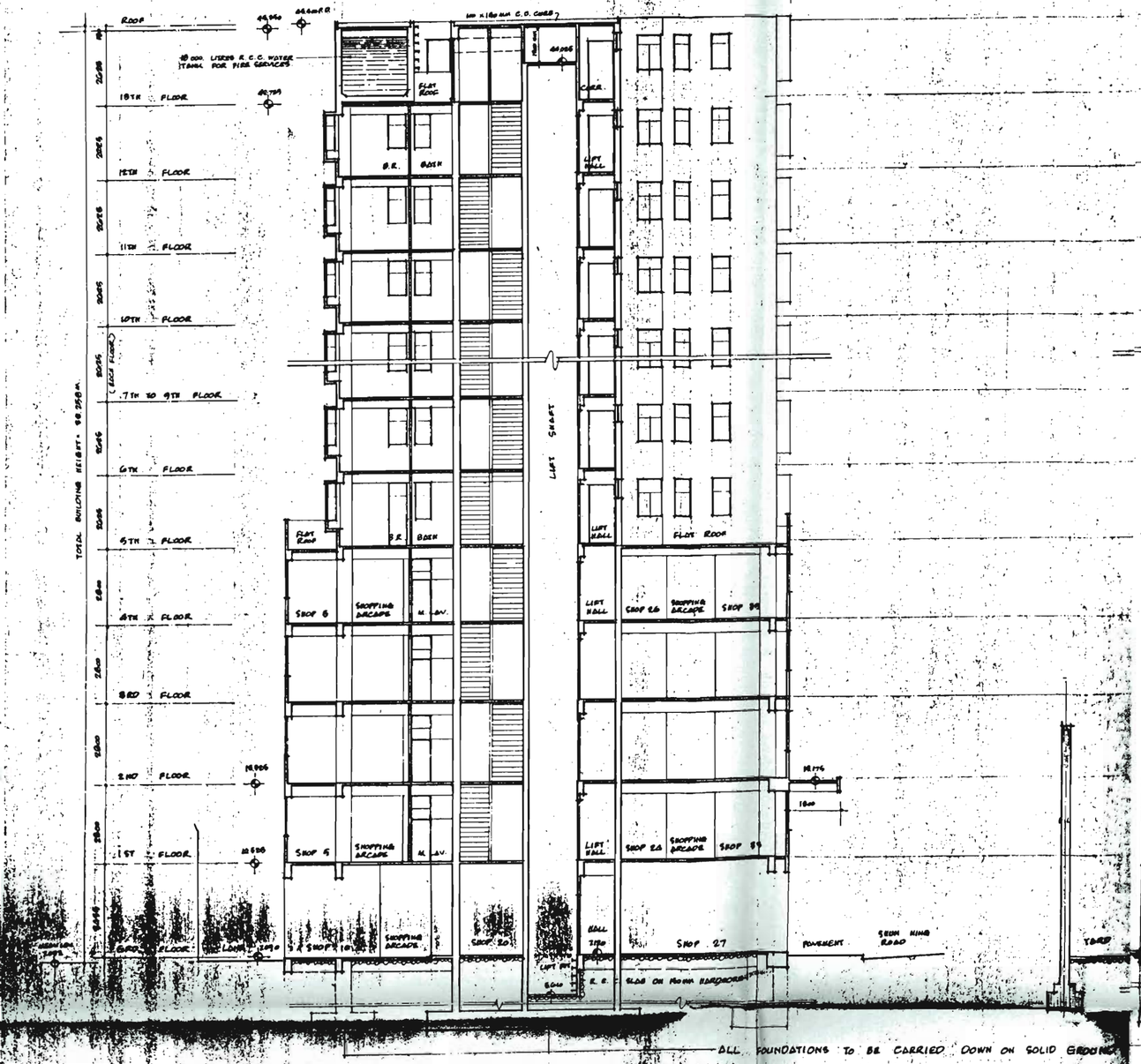
SCHEDULE OF REQUIREMENT OF SANITARY FITMENT

FLOOR	UNIT	USE	NOS OF PERSON		SANITARY FITMENT REQUIRED: W.C.	BASIN	URINAL	BATH	SANITARY FITMENT PROVIDED: W.C.	BASIN	URINAL	BATH
GROUND	SHOP 1 TO 37	SHOP	40	M = 20	1	1	1		1	1	1	
				F = 20	2	1			2	2		
1ST	SHOP 1 TO 38	SHOP	41	M = 21			1				1	
				F = 20	2				2	2		
2ND TO 4TH	SHOP 1 TO 42	SHOP	44	M = 22	1	1	1		1	1	1	
				F = 22	2	1			2	2		
5TH TO 12TH	FLAT A & B	DOMESTIC	3		1	1		1	1	1		1
	FLAT C & F	DOMESTIC	4		1	1		1	1	1		1
	FLAT D & E	DOMESTIC	5		1	1		1	1	1		1
13TH	FLAT A & B	DOMESTIC	5		1	1		1	1	1		1
	FLAT C & D	DOMESTIC	5		1	1		1	1	1		1

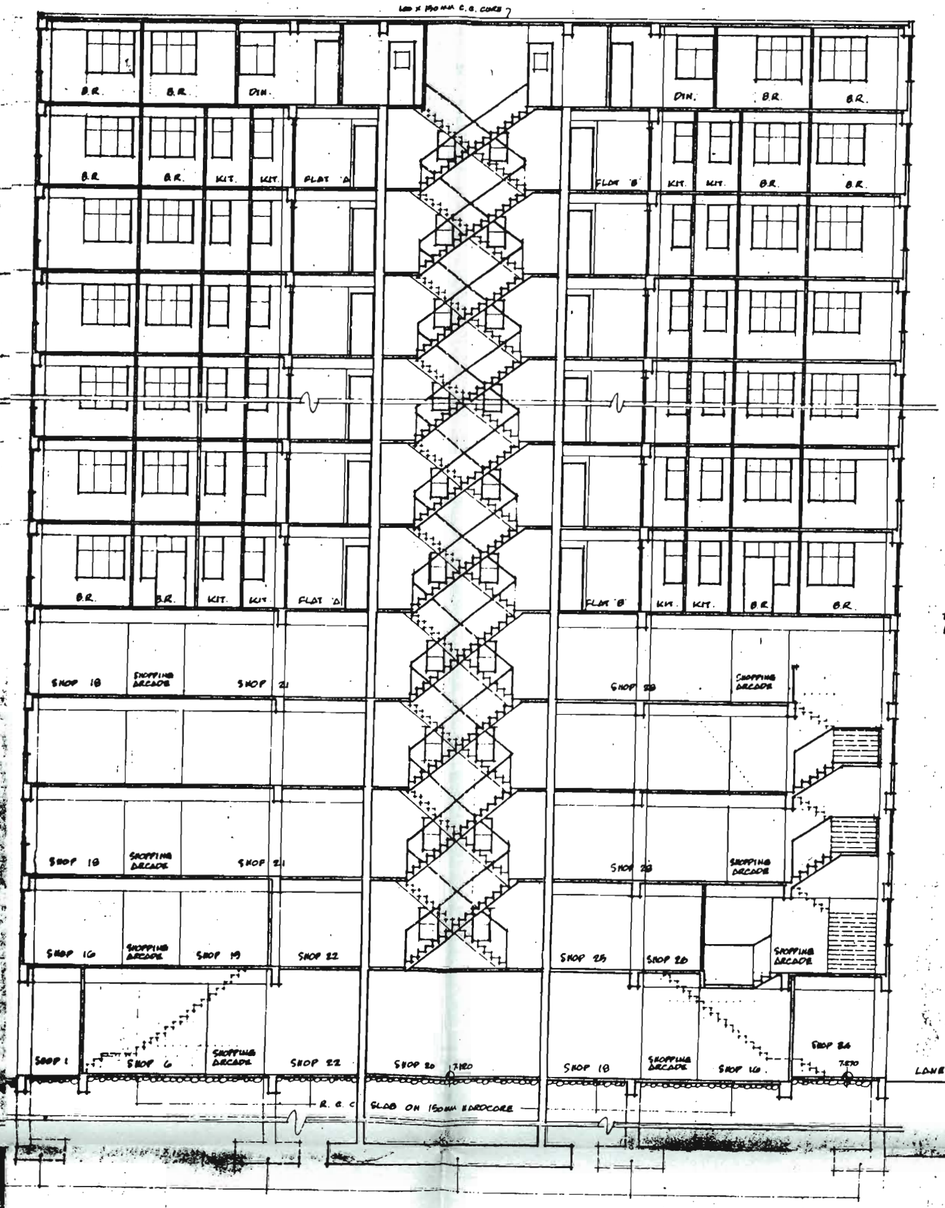
K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3688, 3689, 3690, 3691
3692, 3693
AT NOS. 26-36 SHUN NING ROAD
(KOWLOON)

SCALE:	1 : 100 M.	JOB NO.:	
DATE:	5/9/79	DRAWING NO.:	G-4



SECTION 'B-B'



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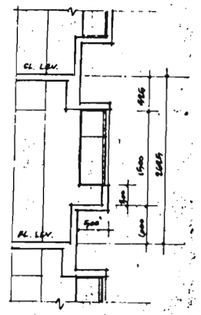


TYPICAL DETAILS OF BAY WINDOW
(SCALE 1:50M)

K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3088, 3089, 3090, 3091
3092, 3093.
AT NOS. 20-30 SHUN NING ROAD
(KOWLOON)

SCALE:	1 : 100M	JOB NO.:	
DATE:	5/19/79	DRAWING NO.:	G-5

SOUTH WEST ELEVATION

SOUTH EAST ELEVATION

K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3688, 3689, 3690, 3691
3692, 3698.
DT NOS. 26-30 SHUN NING ROAD
(KOWLOON)

SCALE:	1:100 M.	JOB NO.:	
DATE:	5/9/79	DRAWING NO.:	G-6

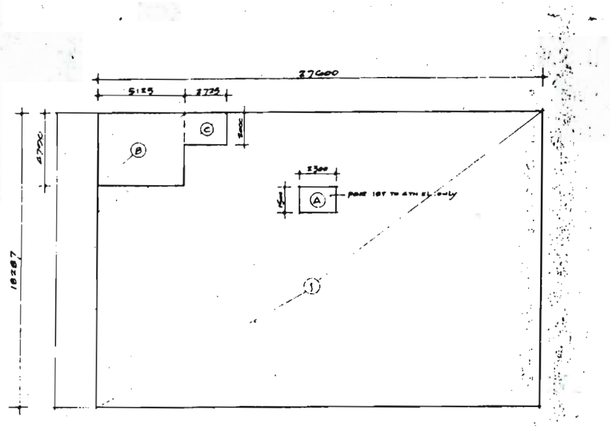
NORTH WEST ELEVATION

NORTH EAST ELEVATION

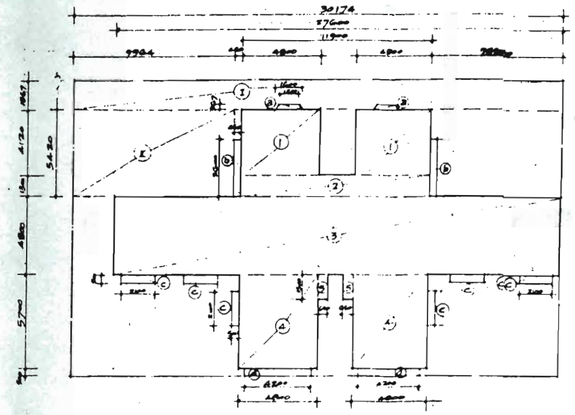
K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3688, 3689, 3690, 3691, 3692, 3693
AT NOS. 26-36 SHUN NING ROAD
(KOWLOON)

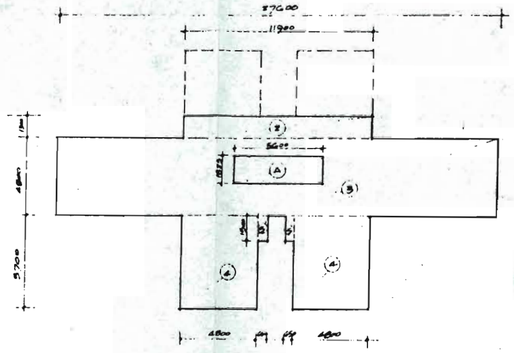
SCALE:	1:100 M.	JOB NO.:	
DATE:	5/9/79	DRAWING NO.:	G-7



GROUND & 1ST TO 4TH FL AREA DIAG.



5TH TO 12TH FLOOR & OPEN SPACE AREA DIAG.



13TH FLOOR AREA DIAG.

COVEDED AREA CALCULATION :-

5TH TO 12TH FL

	GROSS FL AREA	—	244.172 SM
	ADDED BAY WINDOW AREA		
③	$\frac{(1600+1300)\times 367}{2}$ X 2	=	1.028 "
⑤	2 X 3600 X 460	—	3.312 "
⑥	6 X 2100 X 500	—	6.300 "
④	2 X 4200 X 500	—	4.200 "
	TOTAL	—	258.012 SM

GROSS FLOOR AREA CALCULATION :-

GROUND FL

①	27600	X 18287	—	504.721 SM
	DEDUCT			
⑧	5155	X 4700	—	24.549 "
⑥	2725	X 2000	—	5.450 "
		TOTAL	—	474.722 SM

1ST TO 4TH FL

①	27600	X 18287	—	504.721 SM
	DEDUCT			
(A)	2.300	X 1500	—	3.450 "
		TOTAL	—	501.271 SM

5TH TO 12TH FL

①	2 X 4800	X 4120	—	39.595 SM
②	11900	X 1300	—	15.470 "
③	27600	X 4800	—	132.480 "
④	2 X 4800	X 5700	—	54.720 "
⑤	2 X 650	X 1500	—	1.950 "
		TOTAL	—	244.172 SM

13TH FL

②	11900	X 1300	—	15.470 SM
③	27600	X 4800	—	132.480 "
④	2 X 4800	X 5700	—	54.720 "
⑤	2 X 650	X 1500	—	1.950 "
	DEDUCT			
(A)	5600	X 1825	—	10.220 "
		TOTAL	—	194.400 SM

CALCULATIONS OF SITE COVERAGE & PLOT RATIO :-

SITE AREA (N.K.I.L. 3688, 3689, 3690, 3691, 3692, 3693)
NOS 26-36 SHUN NING ROAD
000 X G : 5940.000 SF 5940.000 ÷ 10.764 — 551.830 S.M.

CLASS 'C' SITE
HEIGHT OF BUILDING — 98.458 S.M.
PLOT RATIO NON-DOMESTIC = 11.2
DOMESTIC = 6.5
DOMESTIC COVERAGE = 47%
PERMITTED DOMESTIC COVERED AREA :-
47% X 551.830 — 259.360 S.M.
ACTUAL DOMESTIC COVERED AREA — 259.012 S.M.
259.012 < 259.360

PERMITTED DOMESTIC GROSS FLOOR AREA
551.830 X 6.5 — 3586.954 S.M.
ACTUAL DOMESTIC GROSS FLOOR AREA :-
5TH TO 12TH FL 244.172 X 8 = 1953.376 S.M.
13TH FLOOR — 194.400 S.M.
TOTAL — 2147.776 S.M.

PERMITTED NON-DOMESTIC GROSS FLOOR AREA
(3586.954 - 2147.776) X 11.2/6.5 — 2470.814 S.M.
ACTUAL NON DOMESTIC GROSS FLOOR AREA
GROUND FL. — 474.722 S.M.
1ST TO 4TH FL 501.271 X 4 — 2005.084 "
TOTAL — 2479.806 S.M.

REMAINING NON-DOMESTIC GROSS FLOOR AREA
2470.814 - 2470.806 — 0008 S.M.

CALCULATIONS OF OPEN SPACE :-

OPEN SPACE REQUIRED :-
¼ X 259.012 — 64.753 S.M.

OPEN SPACE PROVIDED
① 30174 X 1847 — 55.735 S.M.
② 9904 X 5420 — 54.605 "
TOTAL — 110.340 S.M.

110.340 > 64.753

SHADOW AREA CALCULATION :-

FACING SHUN NING ROAD
FRONTAGE — 30174
WIDTH OF ROAD — 18290
PERMITTED SHADOW AREA
$\frac{30174 \times 18290}{2}$ — 275.941 S.M.

ACTUAL SHADOW AREA :-

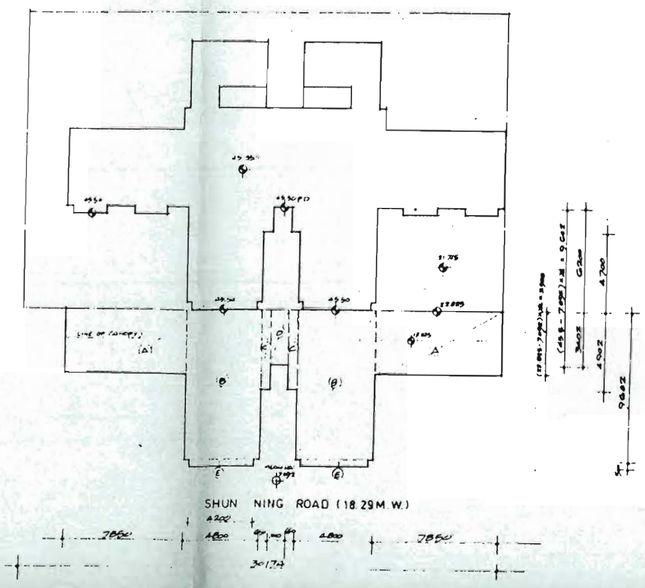
(A)	2 X 7850	X 3933	=	61.748 SM
(B)	2 X 4800	X 9602	—	92.179 "
(C)	2 X 650	X 4902	—	6.373 "
(D)	1000	X 3402	—	3.402 "
(E)	2 X 4200	X 500	—	4.200 "
		TOTAL	—	167.902 SM

167.902 < 275.941

CALCULATIONS OF DISCHARGE VALUE :-

13 STOREYS ABOVE GROUND FL SERVED BY
2 - 1100 MM STAIRCASES DISCHARGE VALUE
PERMITTED DISCHARGE VALUE
1075 + (60 X 3) 1255 PERSONS
ACTUAL DISCHARGE VALUE
1ST FL 41 PERSONS
2ND TO 4TH FL 44 X 3 = 132 "
5TH TO 12TH FL 20 X 8 = 160 "
13TH FL = 16 "
TOTAL = 349 PERSONS

349 < 1255



SHADOW AREA DIAGRAM

K. K. WONG
CHARTERED CIVIL ENGINEER
AUTHORIZED PERSON

PROPOSED NEW BUILDING
ON N.K.I.L. 3688, 3689, 3690, 3691
3692 3693
AT NOS 26-36 SHUN NING ROAD
(KOWLOON)

SCALE:	1 : 100 M	JOB NO.:	
DATE:	5/9/79	DRAWING NO.:	G-8

No. 17 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

ATTORNEY GENERAL — Appellant (Defendant)

- and -

FIREBIRD LTD — Respondent (Plaintiff)

RECORD OF PROCEEDINGS

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