

Attorney General - - - - - Appellant
v.
Firebird Ltd. - - - - - Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 23RD MAY 1983

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD KEITH OF KINKEL

LORD ROSKILL

LORD BRIGHTMAN

LORD TEMPLEMAN

[*Delivered by* LORD ROSKILL]

The respondents to this appeal are a development company in Hong Kong. In 1979 they were concerned to construct a 14 storey composite building comprising shops and flats on a site at 26/36 Shun Ning Road, Kowloon of which they were the leaseholders. To this end on 8th September 1979 they submitted to the Building Authority of Hong Kong, now represented by the appellant, the Attorney General of Hong Kong, plans for the requisite building works. At that date there is no doubt that the site was a Class C site within the Building (Planning) Regulations as then in force. Those regulations classified sites as Class A, Class B or Class C sites, a Class C site then being defined as "a corner site that abuts on three streets and also means an inland site". A Class A site was then defined as "a site that abuts on one street or on more than one street, not being a Class B site or a Class C site". The definition of a Class B site is presently irrelevant.

The Building (Planning) Regulations were amended by order of the Governor in Council dated 9th October 1979 and the amendment was published in the Hong Kong Government Gazette on 12th October 1979. The effect of the amendment was to revoke these definitions of Class A and Class C sites to which their Lordships have just referred and to replace them and the definition of a Class B site by new definitions which so far as presently relevant thereafter read:

"'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 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;"

In the Courts below there was an issue when this amendment took effect. That is no longer relevant and it was common ground before their Lordships that the amendment took effect before 19th October 1979. It was also common ground that the effect of the amendment, if applicable to the site at all, was to change its previous classification from a Class C site into a Class A site to the resultant disadvantage of the respondents.

By letter dated 19th October 1979 the Building Authority refused to approve the plans submitted on 8th September 1979 on two grounds after what was described in the letter as "elementary checking". The first was that the permitted plot ratio and site coverage had been exceeded, the site being a Class A site under the Building (Planning) Regulations as amended. The second was that the plans were not endorsed with or accompanied by a certificate from the Director of Fire Services as required by section 16(1)(b) of the Buildings Ordinance.

The respondents subsequently on 10th June 1980 issued an originating summons in which they were plaintiffs and the appellant defendant claiming two declarations the substance of which was to establish that notwithstanding the amendment to the Building (Planning) Regulations the approval of the plans had to be determined upon the basis that the site remained a Class C site and had not become a Class A site upon the amendment taking effect.

When the summons was heard by Bewley J. many matters, now no longer relevant, were argued. But, so far as now relevant, the appellant maintained first that, upon the amendment taking effect, the site at once became a Class A site and that the approval or disapproval of the plans had to be considered upon that basis, and secondly, and in any event, that the Building Authority was entitled to refuse approval to the plans in the absence of the certificate from the Director of Fire Services to which their Lordships have already referred.

The learned judge in a judgment given on 8th July 1981 upheld the appellant's first submission. Nowhere in his judgment is the second submission mentioned. On the learned judge's view upon the first submission the second did not arise. He therefore refused the declarations sought.

The respondents appealed to the Court of Appeal (Leonard V.P., Cons and Zimmern J.J.A.). In the Court of Appeal matters other than those presently relevant were once again argued. On 27th November 1981 the Court of Appeal allowed the respondents' appeal and reversed the judgment of the learned judge. The first of the two declarations which the respondents sought was granted. The Court of Appeal rejected the appellant's first submission which the learned judge had accepted. Their Lordships will consider later and separately the manner in which the Court of Appeal dealt with the appellant's second submission since in their Lordships' view this appeal falls to be determined by reference to the first. On 19th March 1982 the Court of Appeal gave the appellant final leave to appeal to their Lordships' Board.

The ground upon which all the learned judges in the Court of Appeal allowed the appeal was that once the plans had been submitted on the basis that the site was a Class C site, as it undoubtedly was on 8th September 1978, the respondents had "an accrued right" to have the plans considered on that basis and not by reference to any subsequent change in the law. Leonard V.P. said:

"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.”

Cons J.A. said :

“ The original dimensions are something given to the owner by law. If he has set 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.”

Zimmern J.A. said :

“ 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.”

It will be seen that all the members of the Court of Appeal relied upon section 23 of the Interpretation and General Clauses Ordinance of Hong Kong to support their conclusion. Since Mr. Ogden Q.C. for the respondents stated at the outset of his submissions to their Lordships that the respondents could only succeed in supporting the conclusion reached by the Court of Appeal by reference to that section, their Lordships propose first to consider its provisions and then to consider some of the provisions of the Buildings Ordinance and the Building (Planning) Regulations to which reference was made in argument.

Section 23 of the Interpretation and General Clauses Ordinance reads thus :

“ 23. 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;

(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.”

Since the reference in subparagraph (e) is to “ any such right ”, that plainly refers back to the phrase “ any right, privilege, obligation or liability acquired, accrued or incurred ” in sub-paragraph (c). It is the respondents case and was the view of the Court of Appeal that once the plans were submitted the respondents then and there acquired an “ accrued right ” to have them considered on the basis of the then existing law without regard to subsequent amendment. Their Lordships would mention in passing that it was common ground that the relevant amendment was a “ repeal ” within section 23.

In order to determine what, if any, rights the respondents acquired upon the submission of their plans, their Lordships turn to consider

sections 14 and 15 of the provisions of the Buildings Ordinance. Section 14 provides:

“ 14(1). Save as otherwise provided, no person shall commence or carry out any building works or street works without having first obtained from the Building Authority—

- (a) his approval in the prescribed form of documents submitted to him in accordance with the regulations; and
- (b) his consent in the prescribed form for the commencement of the building works . . . shown in the approved plan. . . .”

Section 15(1) provides:

“ Where an application is made in the prescribed form for the Building Authority to approve plans or to consent to the commencement of building works he shall be deemed to have given his approval or consent, as the case may be, unless within the period prescribed by the regulations he has notified his refusal to give his approval or consent, as the case may be, in writing setting out the grounds for such refusal, and where one of such grounds is that further particulars and plans are required, he shall specify such plans and particulars.

(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.”

It was agreed that the relevant period prescribed by regulations in connection with provisions of section 15(1) was 60 days.

Section 16, to which their Lordships will not refer in detail, lists many grounds upon which the Building Authority may refuse consent to plans which are submitted.

So far as the Building (Planning) Regulations are concerned, their Lordships need only mention first section 2(1) which in its unamended form and then in its amended form classifies sites into Classes A, B and C and secondly that Part III contains elaborate provisions in relation to heights of buildings, site coverage and plot ratios some of which plainly give the Building Authority discretionary powers.

Mr. Ogden put in the forefront of his submissions the contention that the respondents had an accrued right to have their plans approved once they were submitted, unless the Building Authority could show that there was something wrong with them when appraised on the basis that the site was a Class C site. This submission does not seem to have been advanced in the courts below and certainly in their Lordships' view, is not covered by the first declaration sought. But in any event, in their Lordships' opinion the submission is, with respect, untenable. The only right accorded by this legislation is to have the plans considered within 60 days with the safeguard in section 15 of deemed approval. Furthermore their Lordships are of the clear opinion that the Building (Planning) Regulations confer on the Building Authority discretionary powers in relation to a number of matters which makes it impossible to say that the respondents ever had an absolute right to have their plans approved, as contended by Mr. Ogden.

Alternatively, Mr. Ogden contended, in this respect supporting the judgments in the Court of Appeal, that the respondents had an accrued right to have their plans considered on the basis of the existing law. In their Lordships' view any right which the respondents did acquire under this legislation was a right correlative with the public duty of the Building Authority to consider the plans according to law, and the relevant law must be the law applicable at the date when the Building

Authority performs its statutory duty of considering the plans within the 60 days, and not some other spent law. This right of the respondents is a right in public law which can be enforced when appropriate by judicial review. It is not a private right akin to an accrued cause of action. In their Lordships' view, section 23(c) is not dealing with a "right" of this nature and, with all respect to the Court of Appeal, their Lordships are of the opinion that the learned judges in that court were in error in treating this right to have the plans considered within 60 days as a right falling within section 23(c). The respondents' proposition may be tested by reference to the obverse case. Suppose the amendments had enlarged the respondents' rights and not restricted them. Their Lordships find it impossible to accept that the Building Authority, when considering the plans after the relaxing amendment had taken effect, would have been justified in refusing to accord to the respondents the benefit of those amendments upon the ground that it was the spent law which alone was relevant. In so doing, the Building Authority would not be performing their statutory duty to consider the plans according to law.

In their Lordships' view this conclusion is sufficient to dispose of this appeal. They will therefore humbly advise Her Majesty that the appeal must be allowed, the order of the Court of Appeal set aside, the order of Bewley J. restored and the declaration sought in, and granted by, the Court of Appeal refused.

But their Lordships think it necessary to add some observations upon the second point, the absence of a certificate from the Director of the Fire Services. In their Lordships' view the absence of such a certificate empowered the Building Authority, without more ado, to refuse to approve the plans—see section 16(1)(b) of the Buildings Ordinance. But the Court of Appeal felt able to by-pass this second submission by the appellant on the ground that there was some reason to think that in fact, the requirements of the Fire Authority could, in the event, have been satisfied. See especially the judgment of Cons J.A. Mr. Ogden sought to place further evidence before their Lordships with a view to establishing this as a matter of fact. Their Lordships declined to receive this evidence since the matter was not investigated in the courts below where, if it was desired to seek to overcome this difficulty in the respondents' path by evidence of this kind, that evidence ought to have been led. On the view their Lordships take on the first issue, no further question arises upon the absence of this certificate. But their Lordships feel bound to observe that they do not regard the manner in which this point was dealt with by the Court of Appeal as satisfactory.

The respondents must pay the costs before this Board and in the Court of Appeal.

In the Privy Council

ATTORNEY GENERAL

v.

FIREBIRD LTD.

**DELIVERED BY
LORD ROSKILL**

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