

19/83

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL

Appellant

- and -

10 CHENG YICK CHI
ABERDEEN DEVELOPMENT CORPORATION LIMITED
LU SIU WAN
FIVE UP INVESTMENT COMPANY LIMITED
MAK SIU CHUN

Respondents

CASE FOR THE APPELLANT

Record

20 1. This is an appeal by leave of the Court of Appeal of Hong Kong, leave having been granted by order dated the 9th day of June 1982, to appeal against an order of the Court of Appeal of Hong Hong (Leonard V.P., and Zimmern J.A., Cons J.A. dissenting) whereby the Appellant's appeal was dismissed and judgment entered for the Respondents. The appeal was against the judgment of Liu J. delivered on the 4th day of July 1981 in the Supreme Court of Hong Kong (High Court) granting the declarations sought in the Respondents' originating summons.

pp.145-146
p.119

pp.107-115

30 2. This Appeal raises two questions, namely:
(1) Is On Hing Terrace a street for the purposes of Regulation 16 Building (Planning) Regulations so that, forming a corner with Zetland Street, the street shadow calculation in respect of the Building proposed to be erected by the Respondents should be made in accordance with Regulation 16(3); and
(2) Is On Hing Terrace a street so that, forming a corner with Zetland Street the

Record

site of the proposed building is a Class B site within the definition contained in Regulation 2(1) Building (Planning) Regulations for the purposes of calculating permissible site coverage and plot ratios pursuant to Regulations 20 and 21.

The Appellant contends that both questions should be answered in the affirmative.

3. The facts relevant to this appeal are as follows: 10

p.5,
line 2

(1) The Respondents are the joint proprietors of Sections A, B, D and K (remaining portion) of Inland Lot 617 known as numbers 5, 6, 7, 8 and 9 On Hing Terrace in the City of Victoria, Hong Kong.

p.6,
line 15

(2) In or about 1918 Inland Lot No. 617 was developed and subdivided into various smaller lots (including the four lots now held by the Respondents). The reassignment memorials which constituted the subdivision reserved and granted rights of way in favour of the owner, owners or occupiers of each of the subdivided Sections, thus creating On Hing Terrace. Structurally independent buildings each having its means of ingress and egress onto On Hing Terrace had been constructed on each of the sections. 20
30

p.6, line
24 and p.
82, line 3

(3) On Hing Terrace has been in existence and used by the public as and for a street continuously since 1918 to the present time.

p. 5,
line 21

(4) On Hing Terrace runs between Zetland and Wyndham Streets, has steps at each end and is thus raised above the level of Zetland and Wyndham Streets and is not used by vehicular traffic. 40

p. 6,
line 10

(5) The Respondents propose to demolish the four buildings presently upon their four lots and to erect a single multi-storey building in accord with certain plans.

p.66

(6) The new building would utilise On Hing Terrace as a street for access to five shops and to the upper floors, and it

would utilise Zetland Street as an additional means of access to the upper floors. The only means of public ingress to the five shops would be by way of On Hing Terrace. The new building would not encroach on On Hing Terrace.

Record

10 (7) The plans referred to in sub-paragraph 5 hereof were submitted to the Building Authority for approval pursuant to Section 14 of the Buildings Ordinance Chapter 123 of the Laws of Hong Kong. p.7
line 30

(8) The Building Authority in his letter dated the 22nd day of August 1979 refused to give his approval for the following among other reasons:- p.77,
line 1

20 "There is excessive street shadow area (Building (Planning) Regulation 16) Also, your calculations are incorrect in that this site is of "B" classification and street shadow area has also to be shown on On Hing Terrace". p.78,
line 5

4. By their Originating Summons the Respondents sought Declarations that:

30 (a) the portion of the above mentioned properties (described in the Originating Summons) not presently built upon, fronting the existing buildings (hereinafter referred to as "the unbuilt portion") is an area dedicated to the Public for the purposes of passage within the meaning of Regulation 23(2)(b) of the Building (Planning) Regulations made under Cap.123. p.2,
line 30

40 (b) the unbuilt portion should be included in the site area for the purposes of calculating the site coverage and plot ratio of a single building to be erected on the above mentioned properties, under the Building (Planning) Regulations p.2
line 39

(c) the above mentioned properties forming one site for a single building is a Class A site within the meaning of Regulation 2 of the Building (Planning) Regulations p. 3
line 1

Record

p.2,
line 6

(d) the street shadow calculations for a single building to be erected on the above mentioned properties should be made under Building (Planning) Regulation 16, as for a Class A site and with regard to only one street, namely Zetland Street, on which the above mentioned properties are taken as a single site front.

pp.105-106
p. 122,
line 13 and
p. 140
line 39
pp.120-144

Liu J. granted each of the Declarations sought. The Appellant's appeal against Declarations (a) and (b) was abandoned before the hearing in the Court of Appeal. The Court of Appeal dismissed the Appellant's appeal against Declaration (c) and (d) but modified Declaration (d) so as to omit the words "as for a class A site". Declaration (d) relates to the question specified in Paragraph 2(1) hereof and Declaration (c) to the questions specified in Paragraph 2(2) hereof. 10

5. Regulation 2(1) Building (Planning) Regulations provides that 20

"In these regulations, unless the context otherwise requires, words and expressions have the meaning attributed to them in the Building Ordinance, and -

"street includes any footpath and private and public street".

In the Buildings Ordinance, unless the context otherwise requires

"street includes the whole or any part of any square, court or alley, highway, lane, road, roadbridge, footpath or passage whether a thoroughfare or not". (Section 2(1)). 30

6. The Respondents accepted in the Court below that On Hing Terrace was a street within the meaning of these definitions, but that it was not a street for the purposes of Regulation 16 (the first question) or for the purposes of definition of Class B site in Regulation 2(1) (the second question) because the respective contexts otherwise required. 40

THE FIRST QUESTION

7. Regulation 16 provides as follows:-

"(1) Where a building abuts, fronts or projects over a street, the height of

such building shall be determined by reference to the street shadow area thereof.

Record

- (2) Subject to paragraph (3), the street shadow area of a building shall not exceed the area obtained by applying the formula -

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

10 in which -

F is the length of the frontage of the building; and W is the width of the street upon or over which the building abuts, fronts or projects.

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

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

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

in which -

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

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

$$7(WW - WN)$$

in which -

- 40 WW and WN are the widths of the wider and the narrower, respectively, of the 2 streets forming the corner.

Record

(4) For the purposes of this regulation -

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

"frontage" in relation to a building, means that boundary of a site upon which the building is erected which abuts or fronts a street and includes any service lane or other opening within such boundary; 10

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

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

(a) a line formed by the projection from every part of the side of the building abutting, fronting or projecting over such street of planes at an angle of 76° from the horizontal from the highest point on such building or on any projection therefrom of a permanent nature, from which such planes could be drawn uninterrupted by any other part of that building; 20

(b) a line formed by the frontage of the building; and 30

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

pp.107-115
p.120-129,
line 24 and
p.136
line 42 -
p.144

8. Liu J., Leonard V.P. and Zimmern J.A. concluded that On Hing Terrace was not a street for the purposes of the regulation for the following reasons, namely

(1) the boundary of the site for the purposes of the definition of frontage contained in Regulation 16(3) was the boundary of the lot, 40

(2) therefore On Hing Terrace was included in the site,

(3) if On Hing Terrace was included in the site the street shadow calculation would be smaller the higher the building, whereas the manifest purpose of the Regulation was that the street shadow calculation should be larger the higher the building, Record

(4) accordingly On Hing Terrace was not a street for the purposes of Regulation 16.

10 9. Cons J.A. concluded for the reasons he gave that: p.129, line 25 - p.136, line 41

(1) the boundary of the site was the southern boundary of On Hing Terrace,

(2) consequently On Hing Terrace was not within the site and Regulation 16 could be applied to give effect to its manifest purpose,

20 (3) accordingly On Hing Terrace was a street not only as a matter of obvious fact but also for the purposes of Regulation 16.

10. The Appellant submits that Cons J.A. was right and Liu J. Leonard V.P. and Zimmern J.A. were wrong.

11. The Appellant's submissions on the First Question in addition to the reasons given by Cons J.A. are as follows:

30 (1) The Building (Planning) Regulations are concerned with the physical development of land and not with its ownership. There is nothing in the Ordinance to prevent a person submitting and the Building Authority passing plans for the development of a site in which the person submitting the plans has no legal or beneficial interest.

40 (2) In practice the person submitting the plans is likely to have a legal or beneficial interest in the site but it does not follow therefrom that the site must necessarily be the whole of the area of land in which his legal or beneficial interest exists. For example the owner of land may seek to develop half of it by the erection of a building. In such circumstances the site is the half on which the building is to be erected, together with the surrounding

Record

area (if any) forming its curtilage. Any other construction would lead to absurd results if, in respect of two successive developments, one on each half, the whole of the lot was the site for each development.

- (3) The normal meaning of the word "site" is "a plot intended or suitable for building" (Shorter Oxford English Dictionary Vol. 2, p.1903). In the context of Building (Planning) Regulations the normal meaning is "a plot intended for building", the relevant intention being ascertained from the plans submitted for approval. 10
- (4) None of the plans submitted by the Respondents for approval indicated any intention to build on On Hing Terrace. Accordingly On Hing Terrace, which is obviously a street, does not form any part of the site and Regulation 16(3) can and should be applied in relation to On Hing Terrace. 20
- (5) The Respondents' argument is inconsistent with
- (a) the principal submitted in subparagraph (1) above;
- (b) the provisions of s.19 Interpretation and General Clauses Ordinance which require that an Ordinance (including Regulations made thereunder) "shall receive such fair large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to the true intent, meaning and spirit." 30
- (c) Regulation 22 which draws a clear distinction between sites and lots. 40

THE SECOND QUESTION

12. Regulation 2 provides (inter alia) as follows:-

- "(1) In these regulations, unless the context otherwise requires, words and expressions have the meaning

attributed to them by the Buildings Ordinance, and -

Record

"Class A site" means a site, not being a Class B site or Class C site, that abuts on one street not less than 4.5m 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 4.5m.

10 "Class C site" means a corner site that abuts on 3 streets one of which is less than 4.5m wide."

20 The expressions Class A site, Class B site and Class C site are relevant to Regulations 20 and 21 which, subject to the height of the Building and in certain special cases dealt with in Regulation 22, prescribe the maximum permitted site coverage and plot ratio. As indicated in the First Schedule the percentage site coverage and plot ratio, where different, are higher for a Class B site than for a Class A site and higher for a Class C site than for a Class B site. Permitted percentage site cover reduces but plot ratios increase as the height of the building increases.

13. Regulation 23(2) provides as follows:-

"In determining for the purposes of regulation 20, 21 or 22 the area of the site on which a building is erected -

- 30 (a) no account shall be taken of any part of any street or service lane; and
- (b) there shall be included any area dedicated to the public for the purposes of passage."

14. Liu J. concluded that On Hing Terrace comes within Regulation 23(2)(b) and made Declarations (a) and (b) accordingly. p.111, line 45

40 He also concluded that the site was a Class A site and not a Class B site because site meant prima facie the leased area which because it included On Hing Terrace did not abut on it. p.112, line 29

15. In the Court of Appeal Leonard V.P. and Zimmern J.A. concluded that the site was a Class A site for all or some of the following reasons, namely p.126, line 17 and p.140 line 46

Record

p.122, line
13 and p.140
line 39

(a) as the Appeal against Declarations (a) and (b) had been abandoned On Hing Terrace had to be treated as included within the site for the purpose of Regulations 20-22;

p.126,
line 17

(b) in any event the site meant the lot or leased area;

p.126, line
17 and p.
140, line 46

(c) as a site cannot abut on part of itself it did not abut On Hing Terrace.

p.131,
line 22

16. Cons J.A. concluded that On Hing Terrace was not included in the site and that Declarations (a) and (b) did not require On Hing Terrace to be included within the site only that the area of On Hing Terrace had to be included in the area of the site for the purpose of the mathematical calculation required to ascertain the maximum permitted site coverage and plot ratios. He accordingly concluded that the site was a Class B site. 10

p.136,
line 37

17. If permitted so to do the Appellant would wish to contend that Declarations (a) and (b) were wrongly made and insofar as may be necessary to appeal therefrom notwithstanding that such an appeal was abandoned before the hearing in the Court of Appeal. The Appellant contends that the circumstances are exceptional (cf. Udama Lebbe Ahamath v Levena Marikar Sakiffa Umma (1931) A.C. 799) in that: 20

(1) Liu J. treated the point arising on Declaration (c) as quite separate from those arising on Declarations (a) and (b); 30

(2) The point is one of law only;

(3) It would impede the rational and consistent construction of the Regulation if Her Majesty in Council were prevented from considering the proper construction of Regulation 23(2) by the existence of Declarations (a) and (b). 40

18. If permitted so to do the Appellant's submissions will be as follows:

(1) The Appellant accepts that On Hing Terrace was at some stage dedicated to the public for the purpose of passage but it does not follow therefrom that it falls within Regulation 23(2)(b).

- (2) Regulation 23(2)(b) refers back to Regulation 22(1). So far as material that Regulation provides that

10 "where.....a building.....is set back from a boundary of the lot on which it is erected.....and with the consent of the Government.....the part of the lot which is thereby not built upon is dedicated to the public for the purposes of passage."

The Building (Planning) Regulations regulate proposed developments but in many instances including Regulations 19-23 are drafted on the assumption that the proposed development has been carried out. Thus the first part of Regulation 22(1) quoted above should be read as

20 "where a building is to be set back from a boundary of the lot on which it is to be erected".

In exactly the same way the last part of Regulation 22(1) should be read as

"is to be dedicated to the Public".

30 This construction is confirmed by the use of the word "thereby", because if that part of the lot had been previously dedicated to the public it would not be built upon because so to do would be unlawful rather than because the proposed developer had voluntarily set back the proposed building from the boundary of the lot.

- 40 (3) Moreover an area dedicated to the public for the purposes of passage must, particularly in Hong Kong, normally be a street within the definition contained in the Regulations. Thus there would be an unresolvable conflict between sub-paragraphs (a) and (b) of Regulation 23(2).

- (4) Accordingly, past dedication is not material for the purposes of Regulation 22(1) and 23(2)(b) because "dedicated" must be construed as "is to be dedicated" and because such a construction avoids the conflict in a manner consistent with s.19 Interpretation and General Clauses Ordinance.

- 19. The Appellant will in any event contend that
 - (1) the site for the purposes of Regulations 2, 19-23 does not include On Hing Terrace, for the reasons given in Paragraph 11 hereof;
 - (2) the inclusion in the area of the site of the area dedicated to the public is for the purposes of calculation and not by way of enlargement of the site itself;
 - (3) such inclusion is not required by Regulation 23(2)(b) to be made for the purpose of Regulation 2 by which the different classes of site are defined; 10
 - (4) accordingly there is no context which required On Hing Terrace, which obviously is a street, to be treated as not a street.

20. Accordingly the Appellant submits that the Appeal should be allowed and Declarations (c) and (d) and if permitted Declarations (a) and (b) also should be discharged with costs for the following among other 20

R E A S O N S

- 1. BECAUSE the site for the purposes of Regulation 16 Building (Planning) Regulations does not include On Hing Terrace.
- 2. BECAUSE On Hing Terrace is a street and the street shadow calculation should be made pursuant to Regulation 16(3) in relation to On Hing Terrace as well as in relation to Zetland Street. 30
- 3. BECAUSE the Appellant should be permitted to contend that On Hing Terrace is not an area dedicated to the public for the purposes of passage within Regulation 23(2)(b).
- 4. BECAUSE the site for the purposes of Regulations 19-23 does not include On Hing Terrace. 40
- 5. BECAUSE On Hing Terrace is a street.
- 6. BECAUSE the site is a Class B site as defined in Regulation 2.

7. BECAUSE Cons J.A. was right and Liu J.,
Leonard V.P. and Zimmern J.A. were wrong.

Record

Andrew Morritt Q.C.

Neil Strawbridge

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF HONG
KONG

B E T W E E N :

THE ATTORNEY GENERAL Appellant

- and -

CHENG YICK CHI
ABERDEEN DEVELOPMENT
CORPORATION LIMITED
LU SIU WAN
FIVE UP INVESTMENT
COMPANY LIMITED
MAK SIU CHUN Respondents

CASE FOR THE APPELLANT

MACFARLANES,
Dowgate Hill House,
London EC4R 2SY
Solicitors for the Appellant