

Attorney General - - - - - Appellant

v.

Cheng Yick Chi and Others - - - - - Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE 1983

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON

LORD ROSKILL

LORD BRIGHTMAN

LORD TEMPLEMAN

SIR JOHN MEGAW

[Delivered by LORD FRASER OF TULLYBELTON]

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The respondents are the owners of 5 adjoining houses, Nos. 5 to 9 On Hing Terrace, Hong Kong and of a piece of land ("the unbuilt on land") in front of them. The unbuilt on land forms part of a raised terrace, which is open to the public and is used for passage by pedestrians, but not by vehicles because it has a flight of steps at each end. The steps lead down to ordinary public streets, Zetland Street at one end and Wyndham Street at the other end. The whole area owned by the respondents, including the unbuilt on land, has been referred to in the Courts below as "the properties", and their Lordships will refer to it in that way. The respondents wish to develop the properties by erecting a single new building on the land on which the separate houses now stand, while leaving the unbuilt on land as it is. In 1979 they submitted plans to the Building Authority, but the plans were disapproved on the grounds *inter alia* that they did not comply with the relevant regulations.

The questions raised in this appeal are concerned with the application of the Building (Planning) Regulations ("the regulations") made under section 38 of the Buildings Ordinance (Cap. 123), particularly in relation to the unbuilt on land. Two main questions arise. The first is whether the unbuilt on land forms part of the "site" which is to be redeveloped, in the sense in which the word "site" is used in the regulations. The respondents' plans were prepared on the basis that the site includes the unbuilt on land. If it does, the gross floor area of the proposed new building permitted by the regulations would be materially larger than if

the unbuilt on land has to be excluded from the calculations. The second question is whether the unbuilt on land falls to be regarded as a "street", for the purposes of the relevant regulations. If it does, and if it does not form part of the site, the site will be a corner site abutting on Zetland Street on one side and on the unbuilt land on another. The permissible height under the regulations will be different according to whether the site is a corner site or not.

After the refusal of their application, the respondents took out an originating summons in which they sought four declarations. The appellant was called as defendant. Liu J., at first instance, made all four of the declarations sought. The appellant appealed to the Court of Appeal. His formal Notice of Appeal stated four grounds, relating respectively to the four declarations made by the learned judge, but before the appeal came on for hearing Crown Counsel wrote to the respondents and to the Court of Appeal intimating that the first two grounds of appeal (relating to the first two declarations), were being abandoned. Argument before the Court of Appeal was therefore limited to the third and fourth grounds. The Court of Appeal by a majority (Leonard V.P., and Zimmern J.A., with Cons J.A., dissenting) dismissed the appeal. They held that the respondents were entitled to the third and fourth declarations, subject to a minor amendment, consisting of omitting the words "as for a Class A site", shown in square brackets below, from declaration (d). By some oversight this was not stated in the formal Order of the Court.

The declarations were as follows:—

"(a) the portion of the above mentioned properties, 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,

(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,

(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,

(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 taken as a single site front."

One preliminary matter arises. Before this Board the appellants sought leave to re-open argument on the grounds which had been abandoned before the Court of Appeal. The application was opposed by Counsel for the respondents. It is a well-established rule that the Board is very unwilling to entertain any point not duly raised and considered in the Court below. In *Ahamath v. Sariffa Umma* [1931] A. C. 799, 803 Lord Blanesburgh said this:

"It must only be under very exceptional circumstances that an issue dropped in the intermediate Court of Appeal, and for that reason not dealt with or referred to by that Court, can be revived before this Board."

Their Lordships are respectfully in full agreement with that statement. Nevertheless they are of opinion that in the present case there is a very exceptional circumstance which calls for a departure from the general rule. That circumstance is that the issues which were dropped, (those

affecting declarations (a) and (b)), were treated by the Court of Appeal as being closely inter-related to the other issues. The inter-relation was less apparent when the appellant abandoned the first two grounds of appeal than it has since become, because the learned judge of first instance had dealt with the issues separately, as he was of course entitled to do. But in the Court of Appeal the learned judges of the majority started with the assumption that the first two declarations, appeals against which had been abandoned, were well founded in law and they based their reasoning on other issues to some extent on that assumption. The learned Vice-President said this:

“It is with these latter contentions [*i.e.* those relating to declarations (c) and (d)] alone that I have to deal but, as I see it, I must deal with them on the basis that declarations (a) and (b) stand and state correctly the factual and legal position; for they are not contested.”

Their Lordships consider that they could not satisfactorily dispose of the third and fourth grounds of appeal if they are not free to consider also the first two grounds, particularly as counsel for the respondents frankly said that he proposed to argue that the approach of the Court of Appeal had been correct. Their Lordships are not disposed to deal with the issues decided by the Court of Appeal on the basis of assumptions which may or may not be correct. That would be to start with one hand tied behind their back.

The other factors which, although not very exceptional, have weighed with their lordships in deciding to allow the abandoned arguments to be re-opened are these:

- (1) The matters now sought to be re-opened raise pure questions of law depending on construction of the regulations. The relevant facts are not in dispute.
- (2) The questions were considered and dealt with by the judge of first instance, so the Board is not entirely without assistance from the Courts below.
- (3) Due notice was given by the appellant of his intention to seek leave to re-open the issue, and there is no question of the respondents having been taken by surprise.

Coming now to the main argument it will be convenient to begin by considering declaration (c). It relates to the first of the two main issues already mentioned, namely whether the site includes the unbuilt on land. A Class A site is defined in regulation 2 (as amended in 1979) of the regulations which provides *inter alia* as follows:—

“‘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.”

Regulation 2 also provides . . . .

“‘Street’ includes any footpath and private and public street;”

That is quite consistent with the Buildings Ordinance section 2 which provides *inter alia* as follows:

“‘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;

'Private Street' means a street on land held under lease, licence or otherwise from the Crown or on land over which the Crown has granted a right of way;"

In order to make the purpose of declaration (c) clear it is necessary to explain the layout of the properties in a little more detail. On Hing Terrace runs approximately northwest and southeast. At its southeast end a flight of steps leads down to Zetland Street, which runs at right-angles to On Hing Terrace and on to which the southeast side of the site abuts. It is a street which is more than 4.5 m. wide. On the southwest and northwest the properties abut on a narrow lane less than 4.5 m. wide and on other buildings respectively. To the northeast of the proposed new building is the unbuilt on land which forms part of On Hing Terrace and which is more than 4.5 m. wide. Beyond the unbuilt on land is a narrow lane, called Mason's Lane, which is at present impassable and which is less than 4.5 m. wide.

If the site comprises the whole of the properties, including the unbuilt on land, it cannot abut on the unbuilt on land, because a site can only abut on something outside itself. So if the site includes the unbuilt on land, it abuts on only one street, Zetland Street, and it is a Class A site. On the other hand, if the site does not include the unbuilt on land, it does abut on it, and, as it is more than 4.5 m. wide and forms part of On Hing Terrace, it is admittedly a street for the purpose of classifying the site. In that case the site abuts on two streets and it is a Class B site.

Neither the regulations nor the Buildings Ordinance contains a definition of "site". The respondents contend that the site is the whole of the properties, including the unbuilt on land. The appellant contends that, in this case, it is only the land on which the houses at present stand. It was common ground between them that the site, in the sense of the regulations, is not necessarily limited to the ground on which buildings actually stand. That it cannot always bear such a limited meaning appears from several provisions in the regulations. For example, regulation 5(2) refers to the provision of an access lane "within the site" of a new building, and regulation 25(1)(a) requires that every domestic building shall have "within the site" an open space at the rear. Clearly neither an access lane nor an open space can be on ground on which a building stands.

Mr. Widdicombe for the respondents said that the site for purposes of development is normally a whole "lot", using "lot" to mean the leased area held directly or indirectly under a lease from the Crown. That may well be so. But (rightly) he did not contend that the "site" was necessarily co-extensive with the "lot", because the word site must be flexible enough to apply to a case in which the person holding several adjacent lots under Crown leases proposes to develop them together as a single site. It must also apply where the owner develops only part of his lot, or develops it bit by bit at different times. For example, if a development scheme applies to a substantial area of perhaps an acre or more, to be developed by building a detached house on part of it, with the rest of the land being laid out as a garden and tennis court, the whole area would be the site. If some years later the tennis court is sold off in order to build a separate house on it, the site for that later development would be limited to the tennis court.

Their Lordships are of the opinion that the land which forms a "site" for the purposes of the regulations must be ascertained as a question of fact in the case of each development. It means, in addition to the land on which it is proposed to erect buildings, any land which the developer *bona fide* proposes to include in the development. It can

only include land which he owns or which he has a realistic prospect of controlling. The additional land must be at least sufficient to enable the proposed building to comply with the regulations and it must, of course, not have been taken into account and, so to speak, used up in enabling some other existing building to comply with the regulations.

The learned judges of the majority in the Court of Appeal took the view that there was no distinction between the lot (or leased area) and the area of the site. The Vice-President relied largely on the wording of regulation 22(2)(a) which refers to "a building erected on that lot, *being a Class A, B or C site*," and which in his view equiparated a lot with a site. For the reasons already explained their Lordships are unable to agree with that view. They consider that the words quoted from regulation 22(2)(a) are only a shorthand way of saying "a building erected on that lot, being a building the site of which is a Class A, B or C site".

Applying these considerations to the unbuilt on land here, their Lordships are of the opinion that it does not form part of the site in the present development scheme. It has been dedicated to the public for purposes of passage, and it is therefore not available for inclusion by the respondents in the present development. Mr. Widdicombe submitted that, although the surface of the unbuilt on land was dedicated to the public, the land still belonged to the respondents and they could build cellars underneath the terrace if they chose. Their Lordships are not satisfied that the last part of that submission is correct, but they do not have to decide the question, because no such proposal forms part of the present scheme of development. If, as their Lordships think, the unbuilt on land is not included in the site, the site abuts on that land. It abuts also on Zetland Street. It is therefore a Class B site, and declaration (c) should be refused.

Declarations (c) and (d) are closely related and Mr. Widdicombe conceded, inevitably as their Lordships think, that, if he failed on (c), he must also fail on (d). But as their Lordships are differing from the Court of Appeal on declaration (d) they will briefly indicate their reasons for so doing. Declaration (d) refers to regulation 16 which makes provision for limiting the height of buildings by reference to the street shadow area which they cast.

Regulation 16(1) provides as follows:—

"(1) Where a building abuts, fronts or projects over a street, the height of such building shall be determined by reference to the street shadow area thereof.

(2) Subject to paragraph (3), the street shadow area of a building shall not exceed the area obtained by applying the formula—[there follows a formula].

(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—[in accordance with a different formula].

(4) For the purposes of this regulation—. . . 'street' means a street or service lane at least 4·5 m. wide."

As their Lordships are of opinion that, for the reasons already explained, the proposed building abuts on two streets, declaration (d) must also be refused.

Declaration (a), to which their Lordships now turn, raises a question of the construction of regulation 23(2). Regulation 23 contains provisions supplementary to *inter alia* regulations 20, 21 and 22. Regulations 20 and 21 respectively provide that the "site coverage" and the "plot

ratio" for buildings shall not exceed the figures specified in the First Schedule to the regulations. "Site coverage" is defined by regulation 2 to mean "the area of the site that is covered by the building that is erected thereon . . .". Plot ratio is ascertained by dividing the gross floor area of the building by the area of the site on which the building is erected—see regulation 21(3). It is not necessary to go into the details of the calculations. It is enough to note that an essential element in calculating the permitted site coverage and plot ratio is the area of the site. The difficulty arises from regulation 23(2) which provides as follows:—

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

- (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."

The question raised by declaration (a) is whether in determining for the purposes of regulations 20 and 21 the area of the site the unbuilt on land should be excluded by reason of paragraph (a) of regulation 23(2), as the appellant submits, or included by reason of paragraph (b) of the regulation, as the respondents contend. The problem is whether or how the two paragraphs can be reconciled. Liu J. held that paragraph (b) in effect constituted an exception to paragraph (a), and that the unbuilt on land, whether it was a street or not, fell to be included in the area of the site because it had been dedicated to the public. That conclusion could be reached by reading the word "and" at the end of paragraph (a) as if it were "but" or "provided that". But in the opinion of their Lordships to read it in either of these ways would be to change, and almost to reverse, the meaning of the word. Alternatively the conclusion might be reached by reading paragraph (a) as if it said "no account shall be taken of any part of any street, *not being an area dedicated to the public . . .*". Apart from the semantic objections to either of these readings there is the further objection that almost every piece of land dedicated to the public for passage would be a street within the definitions already quoted, so that paragraph (b) might have a very wide application. In their Lordships' view, the proper reconciliation of paragraphs (a) and (b) is to be found, as submitted by Mr. Morrill for the appellant, by treating paragraph (b) as applying only to areas which, in accordance with the relevant scheme for development, are proposed for dedication in the future, as if the words "to be" occurred between "area" and "dedicated". That would be consistent with many other provisions in the regulations, which use the present tense in a context where it evidently refers to the future. Thus regulation 22(1) provides that "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 that is thereby not built upon is dedicated to the public for the purposes of passage . . .". The regulations are regulating proposed developments and strictly speaking the passage just quoted should read "where a building is *to be* set back from a boundary of the lot on which it is *to be* erected" and later on it should refer to the part of the lot which is "*to be* dedicated to the public". That construction is confirmed by the use of the word "thereby" because, if that part of the lot had been previously dedicated to the public, the reason why it would not be built upon would be that building would be unlawful and not that the developer had voluntarily proposed to set it back from the street.

The effect of the construction which in their Lordships' view is correct, is that in determining for the purposes of regulations 20, 21 and

22 the area of a site, no account is to be taken of any part of any existing street, but account is to be taken of any area which, in the proposed development, is to be dedicated to the public for passage. Areas dedicated in the past are excluded. In that way a developer who gives up some of his land by dedicating it to the public has his reward on the occasion of the dedication, but not again—a result which is intelligible and seems consistent with the scheme of the regulations. Accordingly, declaration (a) ought to have been refused. Declaration (b) is merely consequential on (a) and it also must be refused.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and that all four declarations should be refused.

With regard to costs, the respondents must pay the appellant's costs in the Court of first instance. There will be no order for costs in the Court of Appeal. The appellant must pay the costs of the respondents before this Board because if he had not abandoned his first two grounds of appeal before the Court of Appeal, the appeal to this Board might not have been necessary.

In the Privy Council

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ATTORNEY GENERAL

v.

CHENG YICK CHI AND OTHERS

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