

Hinge Well Company Limited

Appellant

v.

The Attorney General

Respondent

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 11TH JUNE 1986

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*Present at the Hearing:*

LORD KEITH OF KINKEL  
LORD ROSKILL  
LORD TEMPLEMAN  
LORD ACKNER  
LORD OLIVER OF AYLERTON

*[Delivered by Lord Oliver of Aylmerton]*

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This is an appeal from an order of the Court of Appeal of Hong Kong dated 14th October 1985 allowing the respondent's appeal from an order of Penlington J. dated 12th March 1985 in proceedings for judicial review of the decision of the Hong Kong Building Authority to refuse approval of certain redevelopment plans submitted by the appellant.

The appellant is a company incorporated in Hong Kong and carries on there a business of real estate development. Under section 14 of the Buildings Ordinance of Hong Kong (Cap. 123), it is necessary (subject to certain exemptions immaterial in the instant case) before any building work is carried out, to obtain the approval of the Director of Building Development (defined in the Ordinance as "the Building Authority") of documents submitted to him in accordance with regulations made under the Ordinance. Section 38 authorises the making of regulations by the Governor in Council covering (*inter alia*) the manner of making application for and granting approval of, plans of building works and the planning and design of buildings, including "(iii) Heights, site coverage, plot ratio and open spaces including service lanes". The Regulations in force

at the material time and relevant to this appeal were the Building (Planning) Regulations which were introduced in 1956 and have subsequently been amended from time to time.

The provisions immediately material to this appeal are those contained in regulations 20 and 21 and the First Schedule, the effect of which is to limit, depending on the height of the building, the percentage of the area of any "site" which may be covered by a building (such limitations being by reference to the type of site and the type of building) and to prescribe certain plot ratios by reference to the same criteria. 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. The Regulations do not contain any definition of "site" or "plot" but there is a definition of "site coverage" as meaning "the area of the site that is covered by the building that is erected thereon".

The critical question upon which the appeal turns is the effect upon the validity of the Building Authority's refusal to approve the appellant's plans of the existence, prior to the clearance of the site of the proposed development, of what was known as a "scavenging lane" some 1.8 metres in width which formerly ran from east to west between the buildings formerly erected on the site.

Before considering the relevant legislation and the Regulations made thereunder, which are far from easy to construe, it may be convenient to set out a little of the history of the development area, to give some account of its existing physical features and to describe in outline the appellant's current proposals for its development. It is the respondent's contention that the appellant's proposal involves the development of two sites and not one, but it will be convenient, for present purposes and without prejudice to that contention, to describe the area of the proposed development as "the site".

The site consists of four contiguous sections of land forming parts of Lots 2817 and 2818 and lies within a rectangular block of building development in Wanchai bounded on the north by Jaffe Road, on the south by Lockhart Road and on the west and east by Fenwick Street and Luard Road respectively. The Lots within this rectangular area were divided into sections which were developed many years ago by the erection of terraces of houses, the great majority of which fronted respectively on to Jaffe Road and Lockhart Road and were built back to back so that the rear of each house abutted on to what was then called a "scavenging lane" 1.8 metres in width which ran from east to west and through which access from each

property could be obtained to Luard Road. Three houses at the east end of the site and to the north of the scavenging lane appear to have been built so as to front on to Luard Road. The conveyancing history does not matter for present purposes beyond noting that, as a result of various deeds of partition, the surface of the scavenging lane or one half of it, according to how the partition took place, formed part of the title of the individual houses on the north and south respectively, but subject to rights of passage granted or reserved to the owners for the time being of the adjoining or neighbouring properties between their respective properties and Luard Road. It is not in dispute that these rights of passage or at any rate some of them are still subsisting.

All the houses originally built on the rectangular block were demolished some time ago so that, at any rate so far as the appellant's land is concerned, the site of the former scavenging lane ceased to be identifiable as a lane or passage by any landmarks on the ground, although of course the private easements of way over its surface subsisting in the adjoining and neighbouring owners to the east and west remained in being. The area owned by the appellant and proposed as the site for the development consists of an L-shaped block, consisting on the south side (the long arm of the L) of the sites of what were previously the houses numbered 61 to 73 Lockhart Road (including, at the rear, the southern half of the surface of the former scavenging lane) and, on the northern side (the short arm of the L), of the sites of what were formerly the houses numbered 84 to 88 Jaffe Road together with the northern half of the surface of the scavenging lane where it ran at the rear of those properties.

The present position as regards the development of the rectangular block is that at the western end (fronting on to Fenwick Street) there has been erected a twenty-four storeyed office building which straddles the end of the site of the scavenging lane and thus prevents any access from that lane to Fenwick Street. This building has itself no means of access to the lane and, because it is a wholly non-domestic building, is not required by the Building Regulations to have any. To the immediate east of this building and on the southern frontage (that is fronting on to Lockhart Road) is a substantial twelve-storey office building with one floor allocated for domestic use. This abuts at the rear on the site of the former scavenging lane and has a staircase communicating with it. To the north of this building and of part of the appellant's site is the site of what were formerly numbers 68 to 82 Jaffe Road, which site is currently being developed as a twenty-four storey composite building (i.e. a

building for mixed shop, office and domestic use) which will front on to Jaffe Road. It is not proposed that this building should have any access to the site of the former scavenging lane at the rear and that part of the lane (i.e. the northern half of it where it is contiguous to the site of the new building) has been surrendered to the Crown. On the eastern side of the appellant's property to the south of the lane are two office buildings of thirteen and twenty-five storeys respectively (formerly numbers 75 to 79 and numbers 81 to 85 Lockhart Road) each having one staircase which communicates with the site of the lane. Finally on the north side of the lane there is a twenty-five storey office building erected on the corner plot formerly the site of numbers 90 and 92 Jaffe Road and 15 to 19 Luard Road. That has one staircase communicating with the site of the former scavenging lane.

Thus there is a physically identifiable passage on the site of the former scavenging lane between the buildings on numbers 75 to 85 Lockhart Road to the south and the building on numbers 90 to 92 Jaffe Road and 15 to 19 Luard Road to the north. In fact in the way in which that development has been carried out the width of the passage has been enlarged from the original 1.8 metres to 3 metres. An identifiable passage will, similarly, exist on completion of the development of the site of numbers 68 to 82 Jaffe Road between that building and the buildings to the south (including a part of the appellant's proposed hotel if erected in accordance with present plans).

The Crown leases under which the appellant holds its land do not contain any provision which would restrict the amalgamation of its four sections into a single building site and the private rights of way of the adjoining or neighbouring owners over the site of the former scavenging lane constitute the only incumbrance on the appellant's title to the land. The appellant's intention is and has at all material times been to redevelop all four sections together as a single site by the erection of a substantial hotel. It is common ground that the site (whether it be one site or two) is a class A site as defined by the Building (Planning) Regulations, that a hotel is, for the purposes of the Regulations, a domestic building and that, accordingly (subject to the Building Authority's power of modification and exemption under section 42 of the Building Ordinance), any plans prepared for submission must comply with the appropriate site coverage and plot ratio specifications contained in the first and third columns of the First Schedule to the Regulations and must also make provision for an open space of not less than one half of the roofed-over area of the building in accordance with regulation 25 and the Second Schedule.

The plans prepared by the appellant's architects treated the entirety of the appellant's land as a single site and embodied the concept of a podium covering substantially the whole of the site of the former buildings 61 to 73 Lockhart Road, but with a covered means of access provided from Lockhart Road to the north through to Jaffe Road, and a substantial open space to the north (being the site of the former buildings 84 to 88 Jaffe Road) which would constitute the forecourt of the hotel, containing a loading and unloading area, provision for taxis, etc., and bounded on each side by a pavement running from south to north to provide pedestrian access between the hotel and Jaffe Road. This forecourt was so planned as to include within its area the whole of the site of the former scavenging lane so far as it was contiguous to numbers 84 to 88 Jaffe Road and that area was included in the site for the purposes of calculating site coverage and plot ratio. So far as the hotel building is concerned this has been planned as set back a distance of three feet from what had formerly been the southern edge of the scavenging lane where it ran behind numbers 76 to 82 Jaffe Road so that it will still remain physically possible to pass along the site of the lane between the hotel and the building in course of erection to the north and thus gain access to the forecourt of the hotel and, via the forecourt, to Jaffe Road or, through the passage provided between the buildings on the east, to Luard Road. This part of the site of the lane has not, so their Lordships have been given to understand, been taken into account as part of the site for the purposes of calculating plot ratio and site coverage. Thus the question of how far the site of the lane has or has not to be taken into account for the purpose of calculating plot ratio and site coverage is restricted to that portion of the site of the lane which is included in and forms part of the proposed forecourt.

Such was the appellant's plan and before considering the objections to it raised by the Building Authority it will be convenient to set out the relevant portions of the Building Ordinance and the Regulations upon which the objections were grounded. Section 2 of the Ordinance contains a number of definitions, only two of which are material for present purposes. "Domestic building" is defined as a "building constructed or intended to be used for habitation". "Street" is defined as including "the whole or any part of any square, court or alley, highway, lane, road, road-bridge, footpath, or passage whether a thoroughfare or not.". Section 16 authorises the Building Authority to refuse approval of plans (*inter alia*) where the plans are not such as are prescribed by Regulations or where "the carrying out of the building works shown therein would contravene the provisions of this Ordinance or of any other enactment". Section 42(1) provides:-

"Where in the opinion of the Building Authority special circumstances render it desirable he may, on receipt of an application therefor and upon payment of the prescribed fee, permit by notice in writing in the prescribed form modifications of the provisions of this Ordinance."

Sub-section (3) provides that a permit granted under the section may contain such conditions as the Building Authority shall deem necessary. The only other provision of the Ordinance of which a passing mention should perhaps be made, although its relevance is purely historical, is section 31 which prohibits building in, over or on any portion of any street.

The important provisions for the purposes of the instant appeal are those contained in the Regulations. Reference has already been made briefly to the general effect of regulations 20 and 21 and it is unnecessary for present purposes to refer to them in any greater detail. Regulation 2(1) contains definitions but starts with the important provision that:-

"In these Regulations, unless the context otherwise requires, words and expression (sic) have the meaning attributed to them by the Buildings Ordinance and ..."

Thus the definitions which follow are supplemental to and not in substitution for the definitions contained in section 2 of the Ordinance. The only definition of importance for present purposes is that of "street" which "includes any footpath and private and public street". Regulation 16 contains some detailed provisions for regulating the height of a building by reference to street shadow. It is unnecessary to recite them and they are relevant only in relation to regulation 19, which is designed to regulate the height of a building where it does not abut on a street. That regulation in turn is relevant only to the construction of what are, in the context of this appeal, the critical provisions, that is to say, those contained in regulation 23(1) and (2). Regulation 19 provides:-

"Where a site abuts on a street less than 4.5m 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 and any part thereof and the plot ratio for the building shall be determined by the Building Authority."

The side-note to regulation 23 describes it as "provision supplementary to regulations 19, 20, 21 and 22.". It provides (so far as material):-

"(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 ..."

Sub-paragraph (b) of paragraph (1) deals with the calculation of the gross floor area of a building in determining the permitted plot ratio for the purposes of regulations 20 and 21. Sub-paragraph (c) provides:-

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

Regulation 23(2) is in the following terms:-

"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."

There is no definition of the expression "service lane" in the Regulations, although, as is evident from the definition of "street" in section 2(1) of the Ordinance, a lane may be a street. A "service lane", however, is (subject to certain exceptions) a compulsory adjunct to a domestic building. Regulation 28 provides:-

"(1) In addition to any open space required under regulation 25 every domestic building shall be provided with a service lane at the rear or side of such building:

Provided that a service lane shall not be required -

- (a) where a public lane not less than 3m wide or a street already exists;
- (b) for detached and semi-detached buildings;
- (c) where exempted by the Building Authority.

(2) Every such service lane shall be accessible from an existing street but where such access is not immediately possible, this regulation shall be deemed to have been complied with if

access would be obtained in the event of future development of re-development of other lots within the block."

Turning now to the events immediately leading to the proceedings from which this appeal arises, the appellant's redevelopment plan was submitted to the Building Authority on 25th April 1984. By letter dated 22nd June 1984 the Building Authority refused approval on the ground that the proposed development should be considered as comprising two separate sites one on each side of the site of the former scavenging lane (described in the letter as "the existing service lane") and that accordingly it infringed the restrictions in regulations 20 and 21 and the First Schedule as regards site coverage and plot ratio. It is indeed obvious that if the land to the south of the former scavenging lane is treated as a separate site in isolation from the land to the north the site coverage of the proposed building is well in excess of the permitted maximum. The plans were re-submitted on 18th July 1984 with an application for exemption from section 31(1) of the Ordinance - an application which the appellant says was in fact misconceived since it was not envisaged that any street would be built on. Approval was again refused on substantially the same grounds. The position taken by the Building Authority appears from a letter to the appellant's solicitors dated 14th September 1984 which, so far as material, was in the following terms:-

"Your clients' properties comprise Nos. 61-73 Lockhart Road and Nos. 84-88 Jaffe Road, which currently are 'de facto' two independent sites separated by an existing service lane. While there is no objection in principle to the amalgamation of the two sites for joint redevelopment, permission to incorporate the existing lane as part of the site, (whether to build over it or not), would only be given (by granting a modification of Building (Planning) Regulation 23(2)(a), and an exemption from section 31(1) of the Buildings Ordinance, as appropriate), on condition that suitable diversion lanes (not less in width than the existing lane) are provided, and these must be physically defined and excised from the site area in accordance with the said regulation.

Your clients would then be at liberty to develop the net amalgamated sites in accordance with the Buildings Ordinance and Regulations. Incidentally, it is confirmed that no new service lane would be required to be provided by virtue of the proviso to Building (Planning) Regulation 28; the diversion lanes would be required as a condition under section 42(3) of the Buildings Ordinance."



Following this letter the appellant applied to the High Court on 28th January 1985 for judicial review of the Building Authority's decision.

In the High Court Penlington J. rejected the respondent's argument that "the site", for purposes of the ascertainment of site coverage and plot ratio, was to be treated as two separate sites separated by the area of the former scavenging lane. He also rejected both the argument that in any event the area of the scavenging lane, so far as it was to be incorporated in the forecourt, fell to be excluded for the purposes of calculating the area of the single site and the alternative argument that the area of the proposed pavements should similarly be excluded. His reasoning was that the service lane as a service lane had ceased to exist and that the pavements, although they were "streets" which would *prima facie* have to be excluded under the regulation 23(2)(a), were nevertheless taken out of the operation of that regulation by virtue of regulation 23(1)(c), since they were less than 4.5 metres in width.

From this decision the respondent appealed to the Court of Appeal which, by a majority, allowed the appeal on the ground that, because Government was concerned to preserve the area of the scavenging lane for public services, that area had "taken on a public character" which took it out of the control of the landowner and thus provided, in effect, a barrier between the two areas of land lying to the north and south, with the result that they constituted two separate sites to each of which, subject to the Building Authority's dispensing power, the site coverage and plot ratio requirements of regulations 20 and 21 had to be applied separately. The Building Authority were, therefore, entitled to withhold approval and to impose, if thought fit, the conditions referred to in the letter of 14th September 1984.

The respondent's argument before their Lordships' Board has followed the same course as in the courts below, that is to say, the primary contention has been that the previous existence of the scavenging lane and the continued existence of rights of passage over its geographical surface have the effect of dividing the land into two separate sites to which the provisions of regulations 20 and 21 must be independently applied. Reliance has been placed on the decision of this Board in *Attorney General v. Cheng Yick Chi and Others* (Privy Council Appeal 32/1982) (which may conveniently be referred to as "the On Hing Terrace case") and particularly to the following passage in the judgment of the Board delivered by Lord Fraser of Tullybelton:-

"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."

In that case, one of the questions raised was whether a raised terrace over which there was a public right of way constituted part of the site of the respondents' proposed building. It was held that, since the terrace had been dedicated to the public for purposes of passage, it was not available for inclusion by the respondents in their development and so did not form part of the site.

The circumstances in that case, however, were entirely different from those which exist in the instant case. It is not suggested for a moment that the site of the previous scavenging lane was anything other than private land utilised by the landowner for the private purpose of serving the houses previously erected on the land and for the exercise by adjoining occupiers of their private easements of passage. There is no question of any dedication to the public and the question may be postulated in this form - does the mere existence over a piece of land in single ownership of a private easement or other incorporeal right in some adjoining or neighbouring owner compel the conclusion that the land has to be treated as two separate parcels? Their Lordships can see no ground upon which so extreme a view can be supported.

In the end the respondent's argument is based, as it has to be, on the use by this Board in the On Hing Terrace case of the words "land which he owns or which he has a realistic prospect of controlling". Of course, a landowner whose land is subject to a private easement may have, if he cannot negotiate with those entitled to the easement, to accommodate any use which he wishes to make of his land to the continued existence of the easement. But that is a very different thing from saying that he has no realistic prospect of controlling the land over which the easement is exercisable. That must be a question of fact in each case and their Lordships can see no ground in the instant case upon which it could properly be argued that such realistic prospect of

control is lacking. If one looks at the actual circumstances on the ground, there is one building at the western end of what used to be the scavenging lane which now has no access to it and is not required to have any. There is one building to the south of it and to the west of the appellant's site which has a staircase debouching on to the area of the lane from which access to Luard Road and to Jaffe Road is preserved by the proposed development. There are three buildings to the east whose inhabitants can hardly in any circumstances wish to pass over the appellant's land to the west for any purpose connected with the original lane, since there is no useful *terminus ad quem* to the west.

As to the suggestion made in the majority judgments in the Court of Appeal that the lane had "taken on a public character" their Lordships are unable to see whence this derives. It is true that if one goes back to the earlier regulations in 1903 one finds that a domestic building was then required to be provided with a public scavenging lane. The requirement of a public lane was dropped in subsequent regulations although there was created, by section 181(2) of the Public Health and Buildings Ordinance (No. 1 of 1903) as amended, a right for public officers and other persons to use such lanes for the purpose of inspecting, scavenging or cleansing buildings communicating with the lane. That right was preserved in section 15 of the Public Health (Sanitation) Ordinance 1935 but that legislation was repealed in 1960 and the substituted legislation contained no similar provision. No such provision is contained in the Buildings Ordinance or the Regulations and it is no part of the respondent's case that there is any such provision in any other legislation currently in force. Section 22 of the Buildings Ordinance contains extensive powers of entry for authorised persons but these relate to land generally and could not even arguably be said to take the land out of the control of the owner. In any event, even assuming that public officers may have, under current public health regulations, powers to enter upon service or scavenging lanes for various statutory purposes, their Lordships cannot see how this can be said to create some sort of public right or easement which removes such lanes from the effective control of the landowner. For instance, section 181(1) of the Public Health and Buildings Ordinance of 1903 required the owner of a building to allow access for purposes of inspection, cleansing and similar purposes by authorised persons to the open space required to be provided under the legislation which preceded the present legislation but it seems to their Lordships quite impossible to argue from this that the open space was thus taken out of the owner's effective control or ceased to be part of the site of the building. If, therefore,

this appeal depended on the one site/two site argument alone, their Lordships would feel bound to allow the appeal and to restore the order of Penlington J.

The more difficult point, however, is the impact in the circumstances of this case of regulation 23(2). To begin with, their Lordships are not able to agree with the reasoning of Penlington J. that since both the original scavenging lane and the proposed pavements are of a width of less than 4.5 metres, regulation 23(2)(a) can have no application, since regulation 23(1)(c) deems them not to be streets. Regulation 23(1) is far from easy to construe. In particular it is difficult to see why it should be thought necessary (if that was what was intended) to deem a street of less than 4.5 metres in width not to be a street for the purposes of regulation 19 when that regulation in terms applies where the site abuts on a street less than 4.5 metres in width. It seems, therefore, tolerably clear that, if any reasonable meaning is to be given to sub-paragraph (c), it can rationally refer back to and qualify only sub-paragraph (a) and that it has no relevance to sub-paragraph (b) or to the provisions of regulations 20 and 21 in neither of which does the word "street" appear. As was pointed out by the Court of Appeal this is in fact the effect of a number of decisions of the courts of Hong Kong which were not, it seems, cited to Penlington J., in particular, the case of *Firebird Ltd. v. Attorney General* in the Hong Kong Court of Appeal (Civil Appeal No. 98 of 1981), the actual decision in which was reversed on other grounds - see Privy Council Appeal No. 17 of 1982. Their Lordships agree with the Court of Appeal that this is the only reasonable construction to be placed upon regulation 23(1)(c) and that it cannot be construed as qualifying also regulation 23(2). In their Lordships' opinion, the width of the street or service lane has no relevance to the question of whether account is or is not to be taken of it in computing the area of a site for the purposes of regulations 20 and 21.

Thus the question is whether the area of the previous scavenging lane or the area of one or both of the proposed pavements, regardless of width, forms part of a street or service lane for the purpose of regulation 23(2)(a) and so has to be left out of account in calculating the area of the site for the purposes of ascertaining the permitted site coverage and plot ratio. Before considering that question, however, there should be noted an important concession made by the respondent before their Lordships. Although originally, as appears from the letter of 14th September 1984, the Building Authority was insisting as a condition of approval of the appellant's plans that the areas of both the proposed

pavements must be treated as excluded from the site, it is now conceded that, on any view, only the site of the western pavement will be required to be excluded. That removes part of the area of contest but it does not, of course, answer the question whether any approval is required.

In the On Hing Terrace case it was held by this Board that on its proper construction regulation 23(2)(b) is to be read as if the words "to be" were inserted between the word "area" and the word "dedicated". It was pointed out that only in this way could any reasonable meaning be given to the regulation which would otherwise be self-contradictory. Thus sub-paragraph (a) applied to exclude from the site areas already dedicated to the public but sub-paragraph (b) enabled the developer to include any area which, under his scheme of development, he was prepared to dedicate to public use. The matter was expressed thus by Lord Fraser of Tullybelton:-

"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."

That case was not, of course, directly concerned with the status of a private street or of a service lane, nor with the question whether, in addition to existing streets, sub-paragraph (a) was capable of a construction which would include within the expression "street or service lane" a private street or service lane not currently existing but planned as part of the prospective development. What is clear, however, is that sub-paragraph (a) requires the site of any existing street or service lane to be excluded.

The appellant contends - and this must, in their Lordships' view, be correct - that the material time for determining whether there is or is to be a street or service lane within the meaning of regulation 23(2) is the time at which the proposed development is to be undertaken. The appellant argues first that where the Ordinance and the regulations refer to a street they are referring to something having a physical configuration on the ground and not merely

to an area of land across which some right of passage exists or may exist. Put another way, it is an essential element in the concept of a street that it should be identifiable physically on the ground and since there was, at the material time, no physical configuration of the former scavenging lane, it was not and is not a street for the purposes of regulation 23(2)(a).

An alternative argument is based upon the absence of any public rights of passage over the area of the former lane. As their Lordships understand the argument, it runs thus:-

As defined by section 2 of the Ordinance "street" would ordinarily include a service lane, since it includes a "lane" and the addition of the word "service" merely designates the purpose of the lane, not its quality as a lane. It follows therefore that there must be a specific purpose in regulation 23(2)(a) in mentioning a service lane in terms as something distinct from a street, otherwise the reference is tautologous. The only purpose can be to indicate that in this regulation "street" does not have its ordinary statutory meaning but is used in a sense which excludes a service lane and distinguishes a street from it. The salient feature of a service lane (regulation 28) is that it is a private lane provided by the landowner to service his own dwelling house and not a public way. Thus "street" here is used to signify a street dedicated to the public and the On Hing case shows that what is meant by a street in this context is an area already dedicated to the public as opposed to an area to be dedicated to the public, which falls under regulation 23(2)(b). Here there is not and never has been any question of any part of the appellant's land having been dedicated as a public way, so that in the context of the application of regulation 23(2)(a), the only question is whether the area of the former scavenging lane constitutes a "service lane" and not whether it is a street. Assuming for the sake of argument, although this is not admitted, that prior to demolition the lane might have been properly described as a service lane, it ceased to be such when the houses on the site were demolished, for the essence of a "service" lane is that it is an area dedicated to serving the domestic building erected on the land, not to serving other buildings erected on other parcels of land. Thus any character of "service" which may have been possessed by the area of the scavenging lane evaporated with the demolition of the building to be served. Accordingly, since at the material time there was neither a public street on the land nor a service lane there was nothing upon which regulation 23(2)(a) could operate. Equally, if regulation 23(2)(a) has a prospective as well as a present significance, there is no service lane being provided

under the appellant's plans and none is required nor are the pavements (which will undoubtedly, when formed, be "streets" as defined by section 2(1) of the Ordinance) "streets" in the sense in which that word is used in regulation 23(2)(a) of public streets and if they were they would, in any event, fall under regulation 23(2)(b).

So far as the respondent's argument is based upon the area of the former scavenging lane being a service lane, it is difficult to see any logical answer to the appellant's argument. The concept of a service lane is to be found in regulation 28 and although that regulation provides that the lane is to have access to a street it creates no easement of passage in the landowner over adjoining land nor any similar easement in any adjoining landowner over the site of the service lane. It is moreover implicit in the regulation that the purpose of the service lane is solely that of serving the domestic building which is the reason for its existence. Once there ceases to be a building on the land capable of being served it is difficult to see how the area formerly dedicated to the purpose of serving it can realistically be treated as a "service" lane nor why the mere fact that there are adjoining properties which may enjoy rights of passage over the area from the service lanes forming parts of those properties should preserve its character as a "service lane" in relation to the property of which it forms part. Since regulation 23(2)(a) is, at any rate in the vast majority of cases, applicable to land on which there is no existing building, it seems clear that in its reference to a service lane at least it must be referring not to the comparatively rare case of land on which there is proposed the development of an existing building already served by an existing service lane but to the more normal case of the service lane which is required to be provided under regulation 28 as an adjunct to a domestic building intended to be erected on the land which has been cleared for development. As has already been mentioned, the geography of the site here is such that no service lane is required under that regulation and that indeed is conceded by the Building Authority in the letter to which reference has already been made.

That, however, does not provide a complete answer to the respondent's contentions because there remains the question whether the area of the former scavenging lane is a "street". The fallacy in the appellant's argument, in their Lordships' view, is that it leaves out of account that there are, both as a matter of law and of fact, subsisting rights of passage in adjoining or neighbouring occupiers. It is true that these may at some time in the future be disposed of by arrangement with those entitled to

them, but that has not in fact been done. Although, as indicated, the mere existence of these rights is no ground for holding that the site falls to be treated as two separate sites, their impact on the question of the area to be taken into account for density purposes still has to be considered. The philosophy which underlines regulation 23 is effectively concealed by the delphic obscurity with which the regulation is expressed, but in so far as it is possible to discern the purpose of paragraph (2) it appears to be to exclude from computation for building density purposes such part of the land as cannot be built on in fact, whilst at the same time ensuring that the developer does not suffer a disadvantage by voluntarily precluding future building on such part of the land as he is prepared to dedicate to public use.

It does not, however, follow from the On Hing Terrace case or from the framework of the regulation that the differentiation in regulation 23(2)(a) of a street from a service lane necessarily involves reading "street" solely in the sense of "street dedicated to the public". In their Lordships' view an area of land (not being a service lane) over which there are private rights of passage in an adjoining occupier may nevertheless remain a street within regulation 23(2)(a). The statutory definition includes, for instance, a private footpath or private way and their Lordships can see no reason for treating the area of such a way as not comprehended in the word "street" where it is used in the regulation. Unless and until the rights of adjoining occupiers are surrendered or extinguished such an area remains as unavailable for building purposes as an area dedicated for passage by the general public. There is no doubt that, prior to demolition of the houses on the site, the scavenging lane was a street within the statutory definition. Equally the existing passages to the east and west were and still are streets or parts of streets.

Their Lordships can see no reason for saying that simply because the physical landmarks which delineated the previously existing street where it passed over the appellant's land have now disappeared that which was plainly a street before has ceased to be such. No doubt if the position were that there was neither any physical delineation of a way on the ground nor any right of any person but the landowner himself to use it the area could no longer be said to be a street in the statutory sense or indeed in any sense. But so long as the rights of passage of the adjoining occupiers subsists the area is apt to serve exactly the same purpose as it was serving before, that is to say, that of providing a communicating link between the passage on the west and that on the east. It continues to be unavailable to be built on



and in their Lordships' view it remains a "street" within the meaning of section 23(2)(a) and so has to be left out of account in computing the area of the site for purposes of regulations 20 and 21. It follows therefore that inasmuch as the appellant's plans have been based upon a site coverage and plot ratio calculated on the basis of the inclusion in the area of the site of that part of the former scavenging lane which forms part of the proposed forecourt, the Building Authority was and is entitled to refuse approval and was correct in its assertion that a modification of the Building Regulations was required under section 42 and that it was entitled to impose conditions upon the grant of permission to build in accordance with the present plans.

Although, therefore, they have felt unable to adopt the reasoning of the Court of Appeal, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant should pay the respondent's costs of the appeal before their Lordships' Board.

