

**Aik San Realty Limited and Others**     -   -   -   -     *Appellants*

v.

**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 28TH JUNE 1982

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*Present at the Hearing :*

LORD DIPLOCK

LORD SCARMAN

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

SIR SEBAG SHAW

[*Delivered by* LORD DIPLOCK]

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The question in this appeal is whether the appellants, who are property developers, have managed to discover an ingenious but lawful way of circumventing the attainment of the indubitable object of regulation 16 of the Building (Planning) Regulations which controls the height of new buildings erected in areas of high density development in Hong Kong by reference to the amount of light from the sky which the building will shut out from streets.

The High Court judge, Liu J., before whom the matter came upon originating summons, held that the appellants had not succeeded in doing this. So, unanimously, did the Court of Appeal in three separate judgments by Sir Alan Huggins V. P., Leonard J.A. and Li J.A. The reasons that were given for interpreting the regulation in a sense that was adverse to the appellants' claim are not identical in each of the four judgments. Their Lordships do not find this at all surprising since the tortuous structure of the regulation and the choice of language used render its meaning, if it be read literally only, in parts ambiguous and in whole obscure. The object of the regulation, of which their Lordships will have, at a later stage, to quote the major part, is however by no means obscure. On the contrary it is obvious and all four judges in the Supreme Court of

Hong Kong reached the conclusion that they did, albeit by somewhat different paths, by applying to the Regulations the purposive construction called for by section 19 of the Interpretation and General Clauses Ordinance:—

“An Ordinance [an expression which includes a regulation] shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.”

The facts may be stated shortly. The appellants acquired the five separate leasehold interests under Crown leases in five adjacent areas of land (“the sections”) together known as 16–26 Yun Ping Road. Each of the sections extended between that road and a street roughly parallel to it, Jardine’s Crescent. The combined sections formed a single site that was oblong in shape, one of the long sides abutting on Yun Ping Road, the other on Jardine’s Crescent.

The appellants proposed to develop this site by erecting upon it a single building consisting of a podium, five storeys high, to be used as a shopping complex and, on top of the podium, a tower building twenty-two more storeys high to be used for office purposes (“the tower”). The tower was to be built upon the three middle sections of the site. It, and that part of the podium which it surmounted were to have a vertical but windowless face within a foot or two of Jardine’s Crescent. On the opposite side of the proposed building facing Yun Ping Road, the upper storeys of the tower were progressively set back to an extent which reduced the amount of daylight which the building would shut out from Yun Ping Road sufficiently to conform with the requirements of regulation 16. The vertical face of the tower on the Jardine’s Crescent side, and set back less than 2 feet from that street, would shut out from Jardine’s Crescent a considerably larger amount of daylight than was permitted by regulation 16, whereas the reduction of daylight caused by those parts of the podium that were not surmounted by the tower would satisfy the requirements of that regulation.

The device adopted by the appellants, in their attempt to circumvent this limiting factor on the height of the building which they intended to apply for permission to erect, was to transfer to a third party the leasehold interest in a strip of land 15 inches wide lying between what was intended to be the vertical wall of the tower and Jardine’s Crescent itself, and leaving as the only part of the site actually abutting on Jardine’s Crescent in which the appellants retained any leasehold interest, the fifth section, where the podium was not surmounted by the tower. On the 15 inch strip the third party purchaser in fact obtained approval from the Building Authority to the erection of an advertising hoarding, but this cannot affect the question whether the appellants’ proposed building consisting of the podium and surmounting tower would contravene the provisions of regulation 16. That question turns upon whether, upon the true construction of the regulation, the 15 inch strip in separate ownership prevents that part of the boundary of the site which lies behind it from “fronting” Jardine’s Crescent.

Regulation 16 (omitting paragraph (3) which does not apply and does not provide any additional aid to the construction of the remainder of the regulation) is in the following terms:—

“(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—

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

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.

(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;

‘street’ means a street or service lane at least 4.5 m 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;
- (b) a line formed by the frontage of the building; and
- (c) lines drawn from each extremity of the frontage of the building at right angles to the centre line of the street.”

In their Lordships’ view the regulation is intended to apply to every building which has a side that faces on a street that is more than 4.5 metres wide. This follows from the references to “every part of the side of the building” in the description of line (a) in the definition of “street shadow area” in paragraph (4). The situation in relation to the street itself of that side of the building that faces on it may be of any of the three different kinds referred to both in that description and in paragraph (1). It may “abut” the street i.e. be contiguous with the boundary of the street at street level; it may “front” the street i.e. be set back from the street without being contiguous with its boundary; or it may “project over” the street i.e. be constructed (as is contemplated by regulation 22(1)) with a colonnaded footpath at street level dedicated to the public and so forming part of the street itself as that expression is defined in regulation 2(1).

Their Lordships are not in the instant case concerned with a projecting building. What they are concerned with is the distinction which regulation 16 draws throughout between the verb “abut” and its participle “abutting” on the one hand and “front” and its participle “fronting” on the other. The verb “abuts” appears on its own in several other regulations including the definitions of class A, class B and class C sites in regulation 2(1) and thus, by incorporation, in regulations 20 and 21 which deal respectively with site coverage and plot ratio. The only other regulation in which “fronts” as well as “abuts” appears is regulation 23(1)(a) which deals with the measurement of the height of buildings above mean street level for the purpose of calculating site coverage and plot ratio.

The inclusion of "fronts" and "fronting" in regulation 16 and 23(1)(a) in addition to "abuts" and "abutting" cannot be brushed aside as a mere inconsidered divagation into pleonasm by the draftsman of these particular provisions of the regulations. This can be ruled out on considerations of syntax alone by the immediate context in which the word "fronts" first appears in regulation 16(1): "abuts, fronts or projects over a street" and the corresponding context in which "fronting" appears in the description of line (a) in the definition of "street shadow area" in paragraph (4). Although the conjunction "or" is capable, exceptionally, of being used in literary language to connect two words that are intended to mean the same thing (e.g. let or hindrance; jot or tittle), "or" in the immediate context now being considered is plainly used in its usual and disjunctive sense to distinguish between words or descriptions whose meanings are not identical, because they have at least one necessary characteristic that is *not* common to both of them, although they may share other characteristics. That "projects over" is not synonymous with either "fronts" or "abuts", because it has a characteristic, that of overhanging a street in a vertical plane, which is not a necessary characteristic of either of the two other verbs, is beyond argument; so the "or" between "fronts" and "projects over" is used in the disjunctive sense and, since the comma between "abuts" and "fronts" acts as substitute for another "or" in the same disjunctive sense, "fronts" is not intended to be synonymous with "abuts" either.

Detailed syntactical analysis apart, however, their Lordships, in common with all four judges in the courts below, are quite unable to accept that in regulation 16 "abut" and "front" and their respective derivatives were intended to mean precisely the same thing. In the context of a regulation whose manifest purpose is to ensure that too much daylight is not shut off from a street by buildings facing on it, the only sensible meaning to ascribe to "fronts" as distinguished from "abuts" in relation to a building is that which their Lordships have already indicated. In relation to a building it is intended to refer to one that has a side which faces a street but which is set back from the street by some distance that is not far enough to prevent its shutting off from the street a significant amount of daylight.

The formula for calculating the maximum permitted street shadow area laid down in paragraph (2) of regulation 16 involves measuring the length of the frontage of the proposed building on the side facing the street. Although this paragraph speaks of the "frontage of the building", the definition of frontage in paragraph (4) makes it plain that for the purposes of the calculation what has to be measured is not the length of the frontage of the street-facing side of the proposed building itself, but the length of the whole of the boundary of the site itself on which the building is proposed to be erected, whenever that boundary abuts or fronts the street. The reason for this is obvious enough. It is only that part of a site that has buildings on it that shuts off from the street light from the sky that would otherwise reach it. If it suits a developer to leave unimpeded access of daylight to the street over part of his site so as to enable him to erect a higher building on the rest of it, the total amount of light from the sky cut off from the street by the development of his site (which is the mischief against which the regulation is directed) is no greater than it would have been if he had erected a lower building over a larger part of the site. The definition of "frontage" by reference to the boundary not of the proposed building the length of whose frontage has to be ascertained, but by reference to the boundary of the site upon which it is proposed to be erected is for purposes of measurement only. Although the drafting is to say the least inelegant, their Lordships cannot find in its ineptitude any compelling reason why in this definition

“fronts” should be given a different meaning from that which in their opinion it manifestly bears in paragraph (2), merely because instead of being applied to the three-dimensional building proposed actually to be erected, it is here applied to a two-dimensional boundary of a site every part of which is potentially available to the site-owner for the erection of some building.

Their Lordships have already drawn attention to the reference in the definition of “street shadow area” to “every part of the side of the building abutting, fronting or projecting over [the street]”, where, as in paragraph (1), the comma and the “or” can only be disjunctive. The surface area enclosed by the three lines (a), (b) and (c) runs right up to the boundary of the site where it would be crossed by any straight line running at right angles to the centre line of the street from any part of the side of the proposed building that faces on the street; but only that part of the area so enclosed that lies upon the surface of the street itself constitutes “street shadow area”. Since the situation of line (a) on the surface of the street is determined by multiplying the height of the building by the tangent of 14° (viz: 0.2493) and using the resulting figure as the distance at which line (a) lies from a spot at ground level vertically beneath that part of the building of which the height was measured, it follows that the further back from the street the building is located the less the “street shadow area” will protrude into the street and the higher the building can be built. If the site boundary as well as the building itself is set back from the boundary of the street by the interposition between the two boundaries of a strip of land belonging to some third party and so does not form part of the site, this cannot have any effect upon the “street shadow area” of any building erected on the site since that area ends at the boundary of the street and not at the boundary of the site except where the two boundaries coincide.

Identical buildings that are set back the same distance from the boundary of a street shut off the same amount of daylight from the street whether the boundary of the site on which they are built coincides with the boundary of the street itself or lies somewhere between the boundary of the street and the building itself.

In their Lordships’ view it would be contrary to the true intent, meaning and spirit of the regulation to construe and interpret the regulation so as to treat that part of the boundary of the site in the instant case between which and the boundary of Jardine’s Crescent the alienated strip was interposed, as if it did not “front” the street for the purpose of calculating permitted “street shadow area”.

Their Lordships can dispose briefly of the appellants’ argument based on regulation 19 by which Sir Alan Huggins V.P. felt somewhat troubled. That regulation reads—

“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.”

Regulation 23(1)(c) adds additional obscurity to this regulation by providing that for the purpose of this regulation “a street that is less than 4.5m. shall be deemed not to be a street”.

One thing at least is clear about regulation 19. It has no application to the instant case since the site abuts on Yun Ping Road and also upon Jardine’s Crescent, both of which are more than 4.5m. wide, and does not abut on any street that was less than 4.5m. wide. In their Lordships’

view regulation 19, whatever it does mean, is incapable of throwing any light upon the meaning of regulation 16.

Their Lordships have not found it necessary to refer to cases decided under other statutes, dealing principally with the liability of frontagers for private street works, several of which are cited in the judgment of Liu J. In construing ordinary English words appearing in legislation passed with a readily identifiable object, it is seldom helpful to cite cases in which a particular meaning was attached to similar words used in a different context in legislation passed with some other object.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.



In the Privy Council

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**AIK SAN REALTY LIMITED  
AND OTHERS**

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**ATTORNEY-GENERAL**

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LORD DIPLOCK

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