

15/83

No.31 of 1982

IN THE JUDICIAL COMMITTEE OF 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 :-

ATTORNEY GENERAL

Appellant
(Defendant)

- AND -

MIGHTYSTREAM LIMITED

Respondent
(Plaintiff)

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CASE FOR THE RESPONDENT

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Introduction

1. This is an appeal by leave of the Court of Appeal in Hong Kong from a Judgment of that Court (Leonard, V.-P. and Cons and Zimmern, J.J.A.) dated January 21, 1982, allowing an appeal by the Respondent from a Judgment of the High Court (Fuad, J.) dated October 8, 1981. Fuad, J. had refused to grant the Respondent declarations that

p.33
pp.16-32
pp.6-11

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(a) its site, Inland Lot No.2232, 12 Bowen Road, Hong Kong is a class A site within the meaning of the Building (Planning) Regulations and

(b) the Building Authority's purported refusal by his letter dated June 20, 1980, to approve plans for the redevelopment of the Respondent's site is incorrect, null and void in so far as it is grounded on the basis that

(i) the site does not abut a street and that,

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(ii) accordingly, the height of and the site coverage and plot ratio for any building thereon falls to be determined under regulation 19 of the said Regulations.

2. The Court of Appeal unanimously reversed the p.14, line 28-
p.15, line 10

learned Judge and granted the Respondent the said declarations.

Site classification and regulation 19 in general

3. In terms of permitted building volume there are four types of sites. In ascending order they are: (i) sites which come within the operation of regulation 19 of the Building (Planning) Regulations, (ii) class A sites, (iii) class B sites and (iv) class C sites.

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4. Your Lordships are only concerned with sites which come within the operation of regulation 19 and with Class A sites. The Appellant contends that the Respondent's site comes within the operation of regulation 19. The Respondent contends (as the Court of Appeal unanimously held) that its site is a class A site.

5. Sites which come within the operation of regulation 19 are those which only abut on a street less than 4.5 metres wide or which do not abut on a street at all. The site coverage and plot ratio for buildings to be erected on such sites fall to be determined by the Building Authority.

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6. The position with class A, B, and C sites is different and more advantageous to the property owner. The permitted site coverage and plot ratio for buildings to be erected on such sites are not matters of discretion. They are laid down in the First Schedule to the Building (Planning) Regulations.

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7. The definition of class A sites (which is contained in regulation 2(1) of the said Regulations) reads:-

"class A site" means a site, not being a class B site or a class C site, that abuts on one street not less than 4.5m wide or on more than one such street'.

The site here in question

8. The Respondent's site is connected to a street named Borrett Road by a road-bridge which spans a nullah separating the site from Borrett Road and its continuation to the south (which continuation may or may not be part of Borrett Road itself). All this is illustrated by a diagram of the site provided by Cons, J.A. in the opening paragraph

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of his Judgment. Further, the Respondent's site is shown in the 6 photographs stapled to the plan marked "GLL-5" and exhibited to the Affidavit of Graham Leonard Lowman filed in these proceedings on July 4, 1981.

p.83 at seq.
pp.34-36

The issue

9. The issue between the parties can be reduced to two questions:-

- 10 (a) Is the road-bridge a street within the meaning of that term as used in the definition of class A sites in the said Regulations?
- (b) Does the site abut Borrett Road or its said continuation?

20 10. The Appellant contends for negative answers to both questions. The Respondent contends for affirmative answers to both questions. Provided one answer is in the affirmative the site is a class A site. Fuad, J. answered both questions in the negative. The Court of Appeal answered the first question in the affirmative. As a result, it held that the site was a class A site (even though it answered the second question in the negative).

p.9, lines 4-6 &
p.11, lines 3-10.
p.20, lines 35-47,
p.27, lines 4-5,
p.31, lines 41-43.
p.16, line 39 -
p.17, line 2.
p.23, lines 2-18,
p.27, line 40-
p.28 line 10.

30 11. The Respondent asks Your Lordships' to uphold the Court of Appeal's answer to the first question. If Your Lordships do so, then the appeal should be dismissed however Your Lordships answer the second question. Nevertheless, the Respondent asks Your Lordships to differ from Fuad, J. and the Court of Appeal and answer the second question in the affirmative too.

40 12. The first question arises and arises in the form shown above because it has been conceded that the site abuts the road-bridge, and the only question here is whether it is a street within the meaning of the said definition. The Appellant has taken two points on this question. First, the Appellant contended that the road-bridge was not a street within the meaning of the said Regulations at all. Secondly, the Appellant contended that even if it was, it was not a street within the meaning of the said definition because, although it is more than 4.5 metres wide, it is to be taken as being less than 4.5 metres wide since its 'internal clear width' (to use the expression chosen by the Appellant) is less than 4.5 metres wide and only that width is to be taken into account and the rest of the road-bridge is to

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be ignored.

13. Fuad, J. accepted the first argument. He was persuaded that a road-bridge was not a 'street' in the natural and popular sense of the word and that the only statutory definition which was applicable was the one in the Building (Planning) Regulations, which reads:-

p.9, lines 26
-29.

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

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14. The Court of Appeal unanimously held that the definition of 'street' in the said Regulations was to be read together with the definition thereof in the Ordinance under which they were made, namely, the Buildings Ordinance, Cap.123, and that the road-bridge undoubtedly and expressly fell within that definition, which reads:-

p.17, lines 7
-15, p.24,
lines 15-
17, p.28,
lines 11-
17.

"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'.

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15. Fuad, J. had concluded that the definition in the Regulations excluded the definition in the Ordinance because the word 'footpath' appeared in both definitions and it would have been unnecessary to repeat that word in the definition in the Regulations if the definition in the Ordinance applied to the Regulations.

p.9, lines
15-26

16. The Court of Appeal was not impressed by that argument; and it is respectfully submitted that the Court of Appeal was plainly right. The approach to construction upon which that argument is based (which equates unnecessary repetition with exclusion) is inherently unreliable. There are, for example, a number of things which are brought within the definition of 'street' in the Interpretation and General Clauses Ordinance Cap. 1 which are repeated in the definition of 'street' in the Buildings Ordinance. The definition in the Interpretation and General Clauses Ordinance reads:-

p.17, lines 7
-12, p.23,
line 47-
p.24 line
15 p.28,
lines 11-
17

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"street" and "road" mean -

(a) any highway, street, road bridge, thoroughfare, parade, square, court, alley, lane, bridle-way, footway, passage, tunnel; and

(b) any open place, whether situate on land leased from the Crown or not, used or frequented by the public or to which the public have or are permitted to have access'.

10 Such repetition is attributable to the same thing that the repetition which impressed Fuad, J. is attributable, namely, the fact that draftsmen do not in drafting one piece of legislation necessarily have in mind everything which had ever been drafted in connection with the same subject.

17. In any event, there are other overriding reasons why, it is respectfully submitted, the definition of 'street' in the Building (Planning) Regulations and the one in the Buildings Ordinance must be read together.

20 18. It is important to look at the definition of 'street' in regulation 2 of the Building (Planning) Regulations together with the opening words of that regulation. When one does that one sees:-

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

"street" includes any footpath and private or public street'. (underlining supplied)

30 19. This indicates that the definition in the Regulations is additional to and not in lieu of the one in the Buildings Ordinance. If this construction needs support, such support is to be found in section 31 of the Interpretation and General Clauses Ordinance, Cap. 1, which provides:-

40 'Where any Ordinance confers power to make any subsidiary legislation, expressions used in the subsidiary legislation shall have the same meaning as in the Ordinance conferring the power, and any reference in such subsidiary legislation to "the Ordinance" shall be construed as a reference to the Ordinance conferring the power to make such subsidiary legislation'.

The power to make the Building (Planning) Regulations is, of course, conferred by the Buildings Ordinance.

20. The Appellant had argued below that even if the definition in the Buildings Ordinance applied, a

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road-bridge is not a street for the Regulations unless it has the common characteristics of a street, in other words, that it is already a street in the natural and popular sense of the word. One result of that proposition would be that 'roads' would not be encompassed by references in the Ordinance or Regulations to 'streets'. The result of that would be chaos. As Leonard V.-P. pointed out in rejecting the argument, the development of all sites abutting only a road (as distinct from a common law street) would then be controlled under regulation 19 in the discretion of the Building Authority; and a developer interested in the purchase of such a site would have no means of knowing the extent to which it might be developed. The learned Vice-President said that he could not believe that the legislature intended such a result. Cons, J.A. also gave an example of the difficulties which the Appellant's proposition (which he did not accept) would lead to if correct. Regulation 5(1) of the Building (Planning) Regulations provides:-

p.20, lines
25-34

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p.25, line 44
-p.26, line
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'Every building shall be provided with means of obtaining access thereto from a street'.

p.28, lines
30-31

As the learned Justice of Appeal pointed out this would create difficulties if 'street' were given only its natural meaning (i.e. a highway with houses on one or both sides) Zimmern, J.A. also rejected the Appellant's argument which he said could have far reaching effect on the application of the Regulations if correct.

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21. The chaos which would result from the proposition just dealt with would also result from taking the definition of 'street' in the Building (Planning) Regulations in lieu of rather than in addition to the definition thereof in the Buildings Ordinance as that would likewise mean that 'roads' would not be encompassed by reference in the Regulations to 'streets'.

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22. In connection with the question whether or not the road-bridge is a street within the meaning of that term as used in the definition of class A site in the Building (Planning) Regulations, there remains only the Appellant's argument that even if the road-bridge was a street for the purposes of the Regulations generally it is not a street within the meaning of the said definition. As Your Lordships have seen (in paragraph 7 hereof) the only streets taken into account in that definition are streets which are not less

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10 than 4.5 metres wide. As Your Lordships have seen (in paragraph 12 hereof) the Appellant has contended that although the road-bridge is admittedly more than 4.5 metres wide, it is to be taken as being less than 4.5 metres wide. This is because, the Appellant argued, its 'internal clear width' (to use the expression chosen by the Appellant) is less than 4.5 metres wide and only that width is to be taken into account and the rest of the road-bridge is to be ignored.

20 23. This argument was unanimously rejected by the Court of Appeal. If it is raised before Your Lordships, it can be dealt with very shortly. First, there can be no warrant for reading the word 'road-bridge' in the legislation as meaning the 'internal clear width' of a road-bridge or any other limited portion of a road-bridge. Secondly, the definition of 'street' in the Buildings Ordinance refers, in any event, to '... the whole or any part of any ... road-bridge'; and it is submitted that there cannot be the slightest doubt that there is no warrant for excluding the parapet or any other part of the road-bridge.

p.20, lines 42
-47, p.23
lines 22-35,
p.28, lines
11-14.

24. There remains only the second question posed at the beginning of paragraph 9 hereof, namely: Does the site abut Borrett Road or its continuation?

30 25. As has been pointed out (in paragraph 11 hereof) the Respondent does not have to succeed on this point in order to succeed in this appeal. Indeed, the Respondent succeeded in the Court of Appeal despite its argument on this point being rejected. Nevertheless, the Respondent seeks to re-new the argument on this point before Your Lordships (doing so further or in the alternative to the point on which it succeeded in the Court of Appeal). This can be done quite shortly.

40 26. Fuad, J. visited the site and found what he described as 'a very substantial natural feature in the form of a nullah' separating the site from Borrett Road and its continuation. He stated that it was '... far from something in the nature of a mere gully which might perhaps properly be disregarded, if precise contiguity is not required (underlining supplied). It is in the words underlined that one detects, it is respectfully submitted, an error in the application of the principle to be applied.

p.10, lines
47-52
p.11, lines 1-3

50 27. It is respectfully accepted that Fuad, J. coreectly stated the principle, which was

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enunciated by Lord Esher, M.R. in Lightbound v. Higher Bebington Local Board (1885) 16 Q.B.D. 577 at p.580: 'Such a question must ... be a question of fact, depending on the facts and the application of rules which have been laid down in several cases'.

28. One of these cases is Wakefield Local Board v. Lee (1883) 1 Ex. 336. There the question was whether Lee's premises fronted, adjoined or abutted upon a street from which it was separated by a stream. The stream although described as narrow was obviously a far more substantial feature than a nullah for storm water such as the one in the present case. The stream actually formed the boundary between two townships (see p.p.339-340 of the report) this is how Grove, J. dealt with the matter (at p.343):-

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' In my opinion the appellants are entitled to judgment. I quite admit that if the question to be decided were really of fact, we ought not to interfere with the decision of the magistrates; but what we have to determine is whether, upon the facts stated, the respondent's premises are really "fronting, adjoining or abutting upon" Dyehouse Lane. Except in mathematics, it is difficult to frame exhaustive definitions of words; they must be construed with reference to the subject-matter to which they are applied. Now it is to be observed that the narrow stream is crossed by two bridges, and these bridges are under the control of the respondents. There is for practical purposes no division by intervening land, and I think that the respondent's premises may be said in popular language to abut upon the lane, for the bridges, so far as appears, are useful only to them; and I also think that they may be said to front the lane; and further, I do not say that they may not adjoin.'

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29. It is respectfully submitted that the principal (although not conclusive) consideration is whether or not the feature which lies between the two things said to abut constitutes intervening land for practical purposes. The stream in Wakefield Local Board v. Lee (supra) did not; nor does the nullah in the present case.

p.16, line 39 30. The members of the Court of Appeal did not
p.17, line positively endorse Fuad, J.'s view that the
2 p.23, Respondent's site did not abut Borrett Road or its
lines 3-8,
p.28, line
9-10

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continuation. They merely felt unable or unwilling to disagree with it.

31. Going back to the passage in Fuad, J.'s Judgment quoted in paragraph 26 hereof, one sees that the learned Judge thought that even if precise contiguity is not required (which he is apparently not prepared to accept) it is '... only something in the nature of a mere gully which might perhaps properly be disregarded'.

p.11, lines
1-3

10 32. It is respectfully submitted that this is a wholly incorrect approach; that the matter is wholly at large before Your Lordships; and that in all the circumstances the correct answer to the question whether or not the site abuts Borrett Road or its continuation is in the affirmative.

Conclusion

20 33. The Respondent accordingly submits that the decision of the Court of Appeal ought to be affirmed with costs for the following (among other)

R E A S O N S

- (1) BECAUSE the Respondent's site is a class A site since
- (a) the road-bridge (which it admittedly abuts) is a street not less than 4.5 metres wide and, further or alternatively;
 - (b) it abuts Borrett Road or its continuation (which are admittedly streets not less than 4.5 metres wide)
- (2) BECAUSE it was right to grant the Respondent the relief it obtained in the Court of Appeal.
- (3) BECAUSE the Court of Appeal was right in holding that the said road-bridge was a street not less than 4.5 metres wide and that is sufficient to entitle the Respondent to the said declaration.

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MICHAEL OGDEN

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KEMAL BOKHARY

No.31 of 1982

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ON APPEAL

FROM THE COURT OF APPEAL OF HONG
KONG

BETWEEN:-

ATTORNEY GENERAL

Appellant
(Defendant)

- AND -

MIGHTYSTREAM LIMITED

Respondent
(Plaintiff)

CASE FOR THE RESPONDENT

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