

15/83

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 -

10 MIGHTYSTREAM LIMITED Respondent
(Plaintiff)

SUPPLEMENTAL CASE FOR THE RESPONDENT

RECORD

Introduction

1. The Respondent seeks to file a Supplemental Case in order to deal with two points raised by the Appellant, which were not argued in the Court of Appeal, and, therefore, not considered by the Court and not mentioned in the Respondent's Case.

20 (a) In the Appellant's Case (Paragraph 15(d) at page 7) it is said that, although Leonard V.-P. thought otherwise, the Appellant did argue that the bridge was an access road. The Appellant's counsel are mistaken. Although they argued the point at first instance, Leading Counsel for the Respondent has a note of the Appellant's Leading Counsel's argument in the Court of Appeal which includes a statement that the Appellant was not asking the Court of Appeal to find that the bridge was an access road.

30 (b) In Paragraph 16(h) (i) at page 11 the Appellant seeks leave to raise a point of construction which was not raised by the Appellant in either court below.

The Access Road Point

2. Access road is defined in section 2(1) of

the Buildings Ordinance thus:-

"access road" means a road on land held under lease, licence or otherwise from the Crown or on land over which the Crown has granted a right of way, providing access only to buildings used or intended to be used wholly or mainly for purposes of habitation, and which is not a street'.

3. The definitions of street in the Buildings Ordinance and the Building (Planning) Regulations have remained unchanged from the time when the said Ordinance and Regulations came into force on June 1, 1956. 10

4. The concept of access roads was introduced into such legislation in 1959 by amendments to the said Ordinance (see section 16(2)(d); item 2 of column A set out in section 17; and section 24(4)(b) of the said Ordinance). These amendments required of course that the term access road be provided with a definition and, by the amending legislation which introduced the amendments to sections 16, 17 and 24 referred to above, the definition quoted in paragraph 2 hereof was provided. 20

5. It can be seen from such definition that a thing can only be an access road if it is not a street. If something is a street - as it had been prior to the enactment of the definition - it can never be an access road. The argument put forward by the Appellant clearly begs the question. 30

The New Interpretation Point

6. It is generally accepted by the Courts in Hong Kong that the Building (Planning) Regulations are highly unsatisfactory. Thus, in Aik San Realty Ltd. and Others v. Attorney General 1981 H.K.L.R. 561 C.A., Sir Alan Huggins V.-P. when construing another of the Regulations said at page 562 at G, "Like others of these regulations (the regulation) could have been better expressed; it is by no means clear to what structure the words 'that building' can possibly refer"; while in the instant case in the Court of Appeal, when Leading Counsel for the Respondent apologised for bringing yet another case under the regulations before the court, Leonard V.-P. replied that it was the Regulations which should stand up and apologise for themselves. It is not surprising to find that something in these regulations does not make complete sense and it is submitted that the Appellant's argument, that it is impossible to 40 50

draw Line C in Regulation 16(4) and that this provides "a strong indication" in favour of his argument (Page 13 of his Case), is not correct. It is simply another example of unfortunate drafting in these Regulations, which Regulations simply do not always lend themselves to processes of reasoning of the sort which the Appellant is seeking to rely upon for the purposes of his argument.

- 10 7. The legislative purpose of Regulation 16 is to prevent massive buildings too close to streets, thereby darkening them. Hence, the requirement that the street shadow area of a building should be less than the area specified by application of the formula in sub-regulation (2).

20 Since a street shadow area is defined as meaning "an area on the surface of a street contained by", some buildings will have no street shadow area at all. This will occur if the building is set sufficiently far back from the street so that the 76° projection described in sub-paragraph (a) of the definition will not reach the street.

This can be seen from the Appellant's exhibit D if the building was set back further from the street.

- 30 8. However, there are cases in which a street shadow area cannot be drawn even if the 76° projection reaches the street. For example, this is so in cases in which the street is a square, a circle, a triangle or any very irregular shape, because in such cases the street has no centre line.

There are two possible solutions in such cases. First, to adopt a notional centre line e.g. in the case of a square, one could say that it has two centre lines (see Appendix A).

- 40 9. The Building Authority has always proceeded and rightly proceeded on the basis that a site does abut a street which runs into it. Had the suggestion that a site does not abut such a street been made in the courts below, the Respondent would have adduced evidence, if necessary, of the basis on which the Building Authority has always proceeded. Among the examples to which the Respondent would have pointed is 29-31 Kennedy Road, Hong Kong ("the Kennedy Road site"), where the site was treated as abutting a street which ran
50 into it and street calculations in respect of that site in relation to that street were submitted to

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and accepted by the Building Authority. These calculations cannot be illustrated save by reference to the building plans there in question. If Your Lordships' Board are minded to entertain the new interpretation point and feel that it would be of assistance to have such calculations illustrated, this can be done by an affidavit or production of an agreed bundle of documents or otherwise as may be directed. At this stage, the Respondent takes this matter no further than it has beyond saying that the Kennedy Road site is very much like the example given by the Appellant in its printed Case and that what the Appellant says could not be done had in fact been done.

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10. The other solution is to say that if a street shadow area cannot be calculated, then, as in cases of buildings set back from the street, there is no street shadow area. This does not result in the site owner being able to build a more massive building than would otherwise be the case, because the building will be subject to the limitations of plot ratio and site coverage contained in other regulations which, together with Regulation 16, form Part III of the Regulations. In such situations the absence of a street shadow area does not result in any mischief which the street shadow provisions are designed to prevent.

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11. Of course, the Building Authority, which is for practical purposes the Appellant in this case, is constantly concerned with matters arising in connection with these Regulations. It is respectfully submitted that if the Appellant's argument is valid, the point would have been made in the courts below.

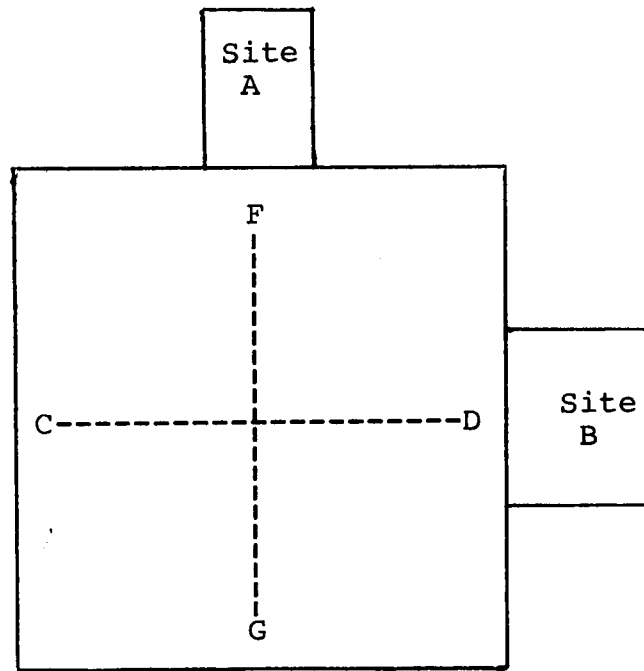
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DATED the 14th day of February 1983.

MICHAEL OGDEN

KEMAL BOKHARY

Appendix A



The centre line relating to site A would be C - D and for site B, F - G.

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SUPPLEMENTAL CASE FOR THE RESPONDENT

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