

Attorney General - - - - - - - *Appellant*

v.

Mightystream Limited - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL DELIVERED THE 9TH MAY 1983

Present at the Hearing :

LORD DIPLOCK

LORD WILBERFORCE

LORD TEMPLEMAN

SIR JOHN MEGAW

SIR WILLIAM DOUGLAS

[*Delivered by LORD WILBERFORCE*]

This is an appeal from a decision of the Court of Appeal of Hong Kong, dated 21st January 1982, reversing a decision of Fuad J. in the High Court of Hong Kong, dated 8th October 1981.

The respondent is the owner (lessee) of Inland Lot No. 2232 at 12 Bowen Road, Hong Kong, and desires to redevelop it by erecting a building of 28 storeys. In accordance with the Buildings Ordinance and Regulations, the extent to which redevelopment may be effected depends upon whether the respondent's site is a "Class A site" or not. If, as the respondent contends, the site is a Class A site, the permissible development limits are those prescribed in the First Schedule to the Building (Planning) Regulations, and the respondent's plans would comply with those limits. If the site is not a Class A site, then the Building Authority is entitled to determine the height, the site coverage, and the plot ratio of the proposed building. The Building Authority, in fact, by letter dated 20th June 1980, rejected the respondent's proposals and purported to fix maximum development limits which would prevent the respondent's plans from being carried out.

The definition of a Class A site is provided by the Building (Planning) Regulations, regulation 2(1):

“ ‘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 ”.

The site in question is not a Class B site or a Class C site so the critical question is whether it abuts on a street not less than 4·5 m. wide.

A rough plan of the site is contained in the judgment of Cons J. in the Court of Appeal. From this it appears that there are two possible "streets" on which the site might be said to abut, namely Borrett Road, and a small bridge which connects the site to Borrett Road. Borrett Road is clearly a street more than 4·5 m. wide, but the site is separated from it by a nullah. The learned trial judge inspected the location and formed the view that the nullah was a very substantial natural feature separating the site from Borrett Road, that it must be a matter of fact and degree whether in such a case the site could, nevertheless, be said to abut on the road, and that in this case it did not. The Court of Appeal did not consider it justifiable to disagree with the judge's findings.

The respondent invited their Lordships to disagree with the decision of the trial judge and to hold that the site does abut on Borrett Road, but their Lordships do not consider that they would be justified in reversing what is in effect a finding based upon observation and local knowledge which appears to be a reasonable conclusion on the facts. There remains the question whether the site can be said to abut on the bridge.

In order to decide this question it is necessary to consider the definitions of "street" which appear in the legislation:

(1) In the Buildings Ordinance (Cap. 123), section 2(1):

"In this Ordinance, unless the context otherwise requires—

'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."

(2) In the Building (Planning) Regulations, made under the Buildings Ordinance, regulation 2(1):

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

.....

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

(3) In the Interpretation and General Clauses Ordinance (Cap. 1 (1975 Ed.)), section 2(1):

"Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance or instrument, the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such other Ordinance came or comes into operation before or after the commencement of this Ordinance, and to any instrument made or issued under or by virtue of any such Ordinance."

Section 3.

"'street' and 'road' mean—

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

(b) (not material)."

Two points appear from these definitions. In the first place, if the definition in the Interpretation and General Clauses Ordinance has to be taken account of at all, it does not support the appellant's case. By, evidently, equating "street" with "road", it does not lend support to an argument that "street" bears a limited meaning requiring the existence of houses on one side or both sides. But in their Lordships'

opinion, the explicit definitions in the Buildings Ordinance and the Building (Planning) Regulations supersede this definition and alone have to be considered.

In the second place, it appears to their Lordships quite plain that the two definitions, those in the Ordinance and the Regulations, have to be considered together. The appellant argued that the latter alone has to be applied, and the learned trial judge so decided, but the wording of regulation 2(1), cited above, shows beyond doubt that the definition in the Regulations is supplementary to, and not in replacement of, that in the Ordinance. If any doubt existed on the introductory words (cited above) it would be removed by the fact that the express definition of "street" is in the inclusive form, and clearly shown to be so intended by the fact that all other definitions contained in regulation 2 are prefaced by the word "means". The Court of Appeal did not support the learned judge's reasoning on this point and their Lordships must agree with their opinion.

On the basis that this is correct and that the Ordinance definition of "street" is to be applied, the case for the respondent is a simple one; it is that the bridge connecting the site with Borrett Road is a "road-bridge", that the site abuts on it and so qualifies as a Class A site. The appellant endeavours to answer this in two ways.

First, while conceding as he must, that, as a matter of physical characteristic, the bridge falls within the description of "road-bridge", he contends that it does not qualify as a "street" unless it possesses the ordinary quality of a street. A street at common law, and in normal parlance, must, it is said, have buildings on both sides, or at least on one side. In support of this argument, the appellant relied on the decision of the English Court of Appeal in *Attorney General v. Laird* [1925] 1 Ch. 319, where on a definition of "street", which was similar to that contained in the Buildings Ordinance, it was held by Pollock M.R. that a "highway", though mentioned in the definition of "street", was not a street unless there were houses with some degree of continuity and proximity at least on one side.

If this was the effect of the judgment of Pollock M.R. their Lordships cannot, with respect, follow it in this case. It was not, in terms, concurred in by the other members of the Court of Appeal, who put their decisions on other grounds, is difficult to reconcile with the opinion of Lord Selborne L.C. in *Robinson v. Barton-Eccles Local Board* (1883) 8 App. Cas. 798, and appears to negate the explicit terms of the definition of "street", which includes a number of things which would not be "streets" in the common law sense. In particular, as pointed out by Leonard V-P., it would have the result that development on "roads" which were not common law streets, would be controlled by the discretion of the Building Authority, a conclusion which the learned judge considered to be unacceptable. In the result their Lordships reject this part of the appellant's argument.

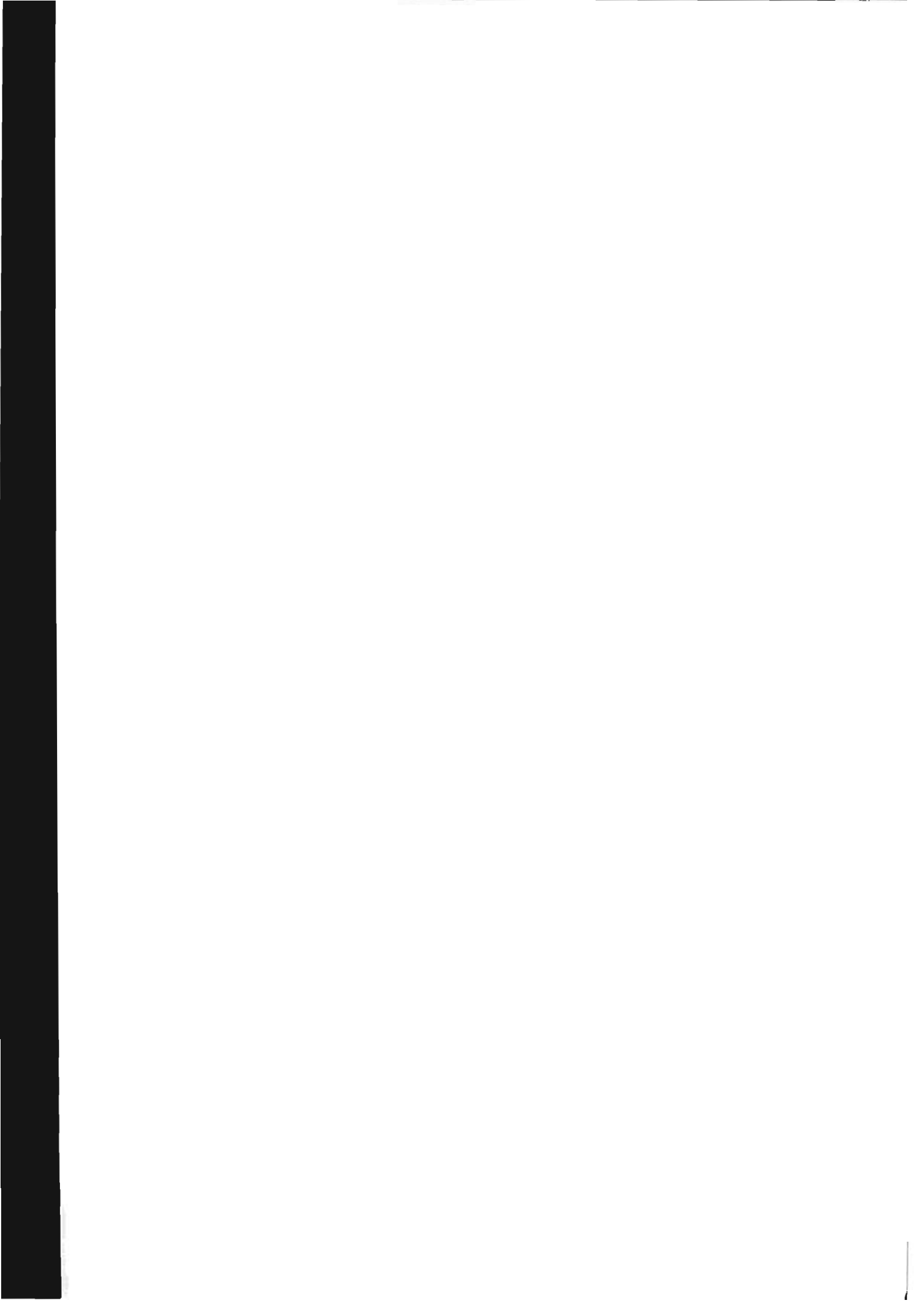
Two other contentions remain. First, it was said that the road-bridge was an access road. This is defined by a provision added to the Building Ordinance in 1959 as follows:—

“ ‘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.”

Their Lordships will assume that the road-bridge falls within the factual portion of this definition, though there seems to be some doubt whether it was so contended in the courts below; but even on this assumption they are unable to understand how it helps the appellant. It does not say that an "access road" is not a "street", but merely that a road, which fits the physical description, and *which is not a street*, is an access road. But whether it is a street or not must be ascertained from the definition of that word. At the very most, it may imply that the draftsman of this definition supposed that a street is not a "street" within the definition unless it is a common law street. But this is, in their Lordships' view, insufficient to displace the conclusion that the original definition did not have this effect.

Secondly, it was said that the road-bridge was less than 4.5 m. wide. The facts appear to be that for most of its length the usable carriage way is less than 4.5 m. wide, but that, if the stones on each side are included, it is of more than the specified width. From the photographs and from the affidavit of Mr. Holgate, a Chief Building Surveyor in the employ of the Government of Hong Kong, it appears that the stones in question are kerbstones, and their Lordships see no reason to disagree with the opinion of the Court of Appeal that the bridge itself exceeds the prescribed width. The appellant's arguments therefore, in their Lordships' judgment, fail. Their Lordships would only add that at the hearing before the Board the appellant sought to take a new point to the effect that a site cannot be said to "abut" on a street which leads to it, rather than running along its side, because certain lines which are required to mark out the "street shadow area" cannot in such a case be drawn. Their Lordships however considered that it would be impossible to do justice to any argument to this effect in the absence of the view of the courts in Hong Kong and refused leave for the point to be taken.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.



In the Privy Council

ATTORNEY GENERAL

v.

MIGHTYSTREAM LIMITED

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LORD WILBERFORCE**

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