17/83

No.17 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

ATTORNEY GENERAL — Appellant (Defendant)

10 -and-

FIREBIRD LIMITED — Respondent (Plaintiff)

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 November 27, 1981, allowing an appeal by the Respondent from a Judgment of the High Court (Bewley, J.) dated July 8, 1981 refusing to grant the Respondent declaratory relief to the effect that the Building Authority was not on October 19, 1979, empowered to refuse approval of plans for building works at 26-36 Shun Ning Road in Kowloon submitted by the Respondent on September 8, 1979, in so far as such refusal of approval was on the ground that the site was a Class A site and not a Class C site within the meaning of the Building (Planning) Regulations.

p.71
pp.38-68
pp.20-32

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The site here in question

2. The Respondent's site is a corner site that abuts on three streets.

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Site classification 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.

4. 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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5. The position with class A, B and C sites is different. 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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6. The permitted site coverage and plot ratio (and therefore permitted building volume) for class B sites exceed that for class A sites while that for class C sites exceed that for class B sites. Thus, the most favourable classification is class C followed by classes B and A, in that order. Even having his site classified as no more than a class A site is preferrable to a property owner having his site brought within the operation of regulation 19.

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7. The definitions of class A, B and C site (which are contained in regulation 2(1) of the Building (Planning) Regulations) were recently amended. Until such amendment they read as follows:-

' "class A site" means a site that abuts on one street or on more than on street, not being a class B site or a class C site;

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"class B site" means a corner site that abuts on 2 streets;

"class C site" means a corner site that abuts on 3 streets and also means an island site- '

Following such amendment they read as follows:-

' "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 4.5 m wide or on more than one such street;

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"class B site" means a corner site that abuts on 2 streets neither of which is less than 4.5 m wide;

"class C site" means a corner site which abuts on 3 streets none of which is less than 4.5 m wide; '

As can be seen, the classification of a site is based on the number of streets which it abuts; and under the amended definitions the streets must be at least 4.5 metres wide.

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The coming into operation of the amendment

8. Bewley, J. and all three members of the Court of Appeal held that the amendment referred to above came into operation prior to the Building Authority's refusal to approve the plans in question (which refusal was on October 19, 1979). The Respondent does not urge Your Lordships' Board to take a different view from that of the local Courts on this matter.

p.26 lines 42-44
p.40 lines 31-34
p.53 lines 26-33
p.63 lines 2-3

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Was the Respondent's site a class C site prior to the coming into operation of the amendment?

9. For the reasons given in their Judgments, Bewley, J. and all three members of the Court of Appeal held that under the old definitions referred to above the Respondent's site was a class C site. In Cheong Ming Investment Co. Ltd. v. Attorney General (unreported) July 6, 1979, Trainor, J. had adopted a similar construction of the Building (Planning) Regulations; and his

p.26 lines 6-9
p.47 lines 23-25
p.52 lines 43-45
p.65 lines 41-45

Judgment has not been appealed. Instead the amendment in question was passed. In Cheong Ming Investment Co. Ltd. v. Attorney General (supra) and before Bewley, J. and the Court of Appeal in the present litigation the Appellant argued that even under the old law a street was to be disregarded for the purpose of site classification if it was less than 4.5 metres wide. It is unknown to the Respondent whether or not the Appellant will persist in this argument and urge Your Lordships' Board to adopt a construction different from that adopted by all the local Judges who have ever considered this matter. If the Appellant does and this issue remains open then the Respondent respectfully asks Your Lordships' Board to uphold the construction adopted by the Courts below as being plainly correct. 10

Accepting that the Respondent's site was a class C site prior to the coming into operation of the amendment, did the change in the law brought about by such amendment take away the Respondent's right to have the plans which it submitted prior to such change considered on the footing that they were plans for the development of a class C site? 20

10. This is the principal (and perhaps the only) question for Your Lordships' Board.

p.31 lines 37-45
p.47 lines 27-30
p.57 lines 31-36
p.67 line 45-p.68 line 7

11. Bewley, J. answered it in the affirmative against the Respondent. The Court of Appeal unanimously answered it in the negative in favour of the Respondent. 30

12. The consideration of this question necessitates looking at one authority and one statutory provision, namely, the decision of Your Lordships' Board in Director of Public Works v. Ho Po Sang (1961) A.C. 901 and section 23 of the Interpretation and General Clauses Ordinance, Cap.1.

13. This section reads:- 40

' Where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect;
(b) affect the previous operation of any Ordinance so repealed or anything duly done or suffered under any Ordinance so repealed;
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Ordinance so repealed;
(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any Ordinance so repealed; or
(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Ordinance had not been passed.'

14. The Respondent's argument on this question (which was rejected by Bewley, J. but unanimously accepted in the Court of Appeal) can be shortly stated thus: Upon submitting its plans to the Building Authority for approval (which it did on September 8, 1979, and therefore before the change in the law) it had an accrued right to have such plans considered on the basis of the law then in force and the Building Authority had a corresponding incurred obligation to so consider such plans.

15. Bewley, J. accepted but the Court of Appeal unanimously rejected the Appellant's argument that the question was whether or not the Respondent had a right to have its plans totally approved. The Court of Appeal correctly recognised, it is respectfully submitted, that the Respondent was only asserting a right to have its plans considered on the basis that the site in question is a class C site, as it was when the plans were submitted.

p.31 lines 37-45
p.48 lines 20-30
p.55 line 44-p.56 line 39
p.68 lines 1-7

16. In Director of Public Works v. Ho Po Sang (1961) A.C. 901 Your Lordships' Board held that an accrued right survived a repeal while a mere hope did not. In that case there was no more than a hope to the thing there in question, namely, a rebuilding certificate. In delivering the Advice of Your Lordships' Board, Lord Morris of Borth-y-Gest said (at p.920):-

> 'Had there been no repeal the petitions and cross-petition would in due course have been taken into consideration by the Governor in Council. Thereafter there would have been an exercise of discretion. 10
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> The Governor would have directed either that a certificate be given or not given, and the decision of the Governor in Council would have been final. In these circumstances their Lordships conclude that it could not properly be said that on April 9 the lessee had an accrued right to be given a rebuilding certificate' 20

At p.922, His Lordship said:-

> 'The question was open and unresolved. The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects.'

17. Whether or not a site is a class C site is not a matter of discretion; it is a matter of law. If a site is in law classified as a class C site then the owner thereof who submits plans for its development on the footing that it is a class C site acquires an accrued right to have those plans considered on such footing, and that right is not affected by any change in the law subsequent to the submission of those plans. 30

The absence of a certificate from the Director of Fire Services 40

18. It is unknown to the Respondent whether or not the Appellant will seek to contend before Your Lordships' Board that no declaration should be granted in favour of the Respondent because the Respondent's plans were not endorsed with or accompanied by a certificate from the Director of Fire Services and such absence is a ground for

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rejecting plans under Section 16(1)(b) of the Building Ordinance, Cap.123. This contention was rejected at first instance and unanimously in the Court of Appeal.

p.35 lines 17-18 & 32-33
p.47 line 31-p.48 line 31
p.57 line 37-p.58 line 22
p.68 lines 8-27

19. It had been contended on behalf of the Respondent at first instance that the short comings which had led to the withholding of such certificate could and would be easily remedied and that it was the practice of the Building Authority not to require a fresh application when the certificate was forthcoming. Counsel for the Appellant was not in a position to confirm or deny this contention when it was made at first instance, nor was he in a position to confirm or deny it when the matter was before the Court of Appeal. In these circumstances, the local Courts rightly rejected the Appellant's contention without coming to a final conclusion at this stage as to whether or not a fresh application was indeed required in law. If necessary, the Respondent will advance arguments to show that no fresh application is required, and will point to, inter alia, regulation 29 of the Building (Administration) Regulations which provides that in two specified instances (which do not apply here) a fresh application is deemed. No such deeming provision would be necessary if the Appellant is correct on this point.

Conclusion

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

R E A S O N S

(1) BECAUSE

(a) the Respondent's site was a class C site at the time plans for the development thereof were submitted;

(b) upon such submission of plans the Respondent acquired a right to have those plans considered on the footing that its site was a class C site and Building Authority incurred a corresponding obligation to consider those plans on such footing and

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(c) such right and obligation are not affected by a subsequent change in the law.

(2) BECAUSE it was right to grant the Respondent the declaration it obtained in the Court of Appeal.

(3) BECAUSE the Judgments in the Court of Appeal were right.

W.A. MACPHERSON 10

KEMAL BOKHARY.

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-and-

FIREBIRD LIMITED — Respondent (Plaintiff)

CASE FOR THE RESPONDENT

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