

19/83

IN THE PRIVY COUNCIL

NO.32 OF 1982

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

THE ATTORNEY GENERAL

APPELLANT

and

CHENG YICK CHI

ABERDEEN DEVELOPMENT
CORPORATION LIMITED

LU SIU WAN

FIVE UP INVESTMENT COMPANY
LIMITED

MAK SIU CHUN

RESPONDENTS

SUPPLEMENTAL CASE FOR THE RESPONDENTS

Declarations (a) and (b) - leave to re-open

1. The Respondents submit that the Appellant should not be permitted to contend that Declarations (a) and (b) are wrongly made in that this constitutes an appeal against Declarations (a) and (b) when such appeal was expressly abandoned and never argued before the Court appealed from; when no leave has been obtained from the Court of Appeal of Hong Kong for such appeal to Her Majesty in Council; and when special leave to appeal has not been sought by Petition or

has not been sought without the least possible delay in accordance with the Judicial Committee Rules.

2. Prior to the hearing of the appeal before the Court Appeal of Hong Kong, by a letter dated 6th November 1981 from the Appellant to the Respondents' Solicitors and copied to the three members of the Court of Appeal of Hong Kong, the Appellant stated :- p 118

"We do not intend to address the Court on Grounds of appeal Nos.(i) and (ii) (which grounds relate to Declarations (a) and (b)). You may take it that these two grounds have been abandoned."

3. The Respondents submit that the test laid down in previous decisions of the Judicial Committee of the Privy Council is that new points will not be entertained unless there are very exceptional circumstances; this applies even when no new facts are required. The Respondents will refer to the following amongst other cases : United Marketing Co v Hasham kora (1963) 1 WLR 523, Pillai v Comptroller of Income Tax (1970) A.C. 1124 and Kabaka's Government v A.G. of Uganda (1966) A.C. 1. The Respondents submit that the reasons advanced in paragraph 17 of the Appellant's case do not constitute very exceptional circumstances.

4. The Respondent further submits that if the Appellant is allowed to re-open Declarations (a) and (b), and if the judgment of the lower court is reversed, it will materially reduce the site coverage and plot ratio of the proposed building without arguments having been advanced to the Court of Appeal and without the Judicial Committee of the Privy Council having had the benefit of the opinion of the Court of Appeal on this point.

Submissions on Declarations (a) and (b)

5. If, contrary to the above, the Appellant is permitted to appeal against Declarations (a) and (b) or to contend that they were wrongly made, the Respondents' submissions will be as follows :-

(1) Regulation 23(2) not only refers back to Regulation 22, as relied upon by the Appellant, but also to Regulations 20 and 21. It provides : "In determining for the purposes of Regulations 20, 21 or 22, the area of the site on which a building is erected :-

(a) no account shall be taken of any part of any street or service lane and

(b) there shall be included any area dedicated to the public for the purposes of passage"

It will be noted that such reference is made in the alternative. The Appellant's argument appears to completely ignore that Regulation 23(2) applies to Regulations 20 and 21 as well as 22.

(2) The Appellant accepts that the unbuilt portion is an area dedicated to the public for the purposes of passage but contends that it is not within Regulation 23(2) (b) as the Regulation is restricted to future dedication and does not include past dedication. Such construction necessitates additional words being read into the plain and literal meaning of the words in the Regulation. This is against one of the cardinal rules of statutory interpretation. The Respondents further submit that when Regulation 23(2)(b) is read with Regulation 20 or 21, it is obvious that area dedicated in the past, such as the unbuilt on portion in this

case should also be included in the area of the site.

- (3) There is no unresolvable conflict between sub-paragraphs (a) and (b) of Regulation 23(2) as contended by the Appellant. The Respondents accept that the unbuilt on portion falls within the very wide definition of "street" in the Ordinance and Regulations but contend that it is not a street in the context of certain regulations, for example, Regulations 16 and 23(2)(b).

6. The Respondents submit that the Appellant's Appeal against Declarations (a) and (b), if permitted, should be dismissed with costs for the following among other

REASONS

- (a) BECAUSE the judgment of Liu J. of the High Court of Justice Hong Kong is right
- (b) BECAUSE the unbuilt portion is clearly an area dedicated to the public for the purposes of passage within the plain and literal meaning of Regulation 23(2)(b)
- (c) BECAUSE there is no context or reason in the Regulations to restrict such plain and literal meaning by adding in extra words.
- (d) BECAUSE the Appellant's arguments to the contrary are wrong.

Factual errors in the Appellant's case

7. The case for the Appellant contains the following factual errors :

Record

- (1) The area under dispute is the unbuilt on portion in front of the 5 houses at Nos.5, 6, 7, 8 and 9 On Hing Terrace, and

not the whole of the On Hing Terrace.

On Hing Terrace includes the unbuilt portion as well as the portion built upon.

- (2) The Respondents refer to sub-paragraphs (1), (2) and (5) of paragraph 3 of the case for the Appellant.

As to sub-paragraph (1) :

The Respondents are the separate, not joint owners, of the five properties, not four, known as Sections A, B, D, K and the Remaining Portion of the Inland lot 617, as follows :-

The first named Respondent is the owner of Section D of Inland Lot 617 and the building thereon known as 5 On Hing Terrace.

p 51

The second named Respondent is the owner of Section K of Inland Lot 617 and the building thereon known as 6 On Hing Terrace.

p 55

The Third named Respondent is the owner of the Remaining Portion of Inland Lot 617 and the building thereon known as 7 On Hing Terrace.

p 69

The fourth named Respondent is the owner of Section B of Inland Lot 617 and the building thereon known as 8 On Hing Terrace.

p 73

The fifth named Respondent is the owner of Section A of Inland Lot 617 and

p 75

the building thereon known as 9 On Hing
Terrace.

As to sub-paragraph (2) :

(a) five lots are held by the Respondents,
not four

(b) Inland Lot 617 contains not only the p 12
aforesaid Sections but also Sections to
their south upon which other buildings stand.
Not all the houses on Inland Lot 617 have a
means of ingress and egress onto the unbuilt
on portion.

As to sub-paragraph (5) :

The Respondents propose to demolish the
five buildings (not four) presently upon
their five lots (not four).

Dated this 28th day of March 1983.

David Widdicombe, Q.C.

Oswald Cheung, Q.C.

Audrey Eu.

No. 32 of 1982.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

THE ATTORNEY GENERAL APPELLANT

and

CHENG YICK CHI

ABERDEEN DEVELOPMENT
CORPORATION LIMITED

LU SIU WAN

FIVE UP INVESTMENT COMPANY
LIMITED

MAK SIU CHUN

RESPONDENTS

SUPPLEMENTAL CASE FOR THE

RESPONDENTS