Privy Council Appeal No. 45 of 1989

(1) Wharf Properties Limited and
(2) The Wharf (Holdings) Limited *Appellants*

v.

Eric Cumine Associates, Architects, Engineers & Surveyors (A firm) *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from an order dated 14th March 1989 of the Court of Appeal of Hong Kong affirming an order made on 16th December 1987 by Godfrey J. in the High Court whereby he dismissed the appellants' claim against the respondents for damages for negligence and breach of professional duty. The appellants, who for present purposes can be treated as a single entity and are conveniently referred to as "Wharf", are the Crown lessees under a lease granted in 1910 of a substantial area of land on the waterfront of Hong Kong at Tsim Sha Tsui where, for many years, they carried on the business of wharfingers and warehousemen. In 1963, however, they resolved to move that business to outlying areas, thus releasing the site (known as KML 11) for more lucrative development. In 1967 the site was gazetted under the relevant provisions of the Town Planning Ordinance as zoned for commercial, residential and warehousing use.

The respondents (conveniently referred to as "ECA") are a firm of architects, engineers and surveyors and were retained by Wharf in and about the planning and design and the supervision of the construction of the site of what is now one of the most prestigious commercial and residential developments of Hong Kong

comprising what is known as Ocean Centre and Harbour City.

The development has given rise to numerous complaints by Wharf against ECA and against various contractors and sub-contractors concerned with the development, all of which have been and some of which are still being ventilated in the action out of which this appeal arises. Their Lordships have, however, been concerned at this stage with only one aspect of the litigation, that is to say, Wharf's claim against ECA for professional negligence and breach of duty in the planning and design of the development and the advice tendered to Wharf in connection therewith. Broadly, the allegation against ECA is that they negligently either failed to appreciate or failed to advise their clients correctly with regard to the restraints imposed by the Building Regulations of Hong Kong upon the permitted density of the development with the result that very substantial areas on the site which could profitably have been developed and let remain undeveloped and have not in fact been turned to profitable use. This claim, which was against ECA alone, was directed to be tried as a separate action and it is this that has given rise to the present appeal.

This issue was tried over some 60 days before Godfrey J. who, after an exhaustive review of the evidence in the course of a lengthy reserved judgment delivered on 16th December 1987, held that ECA had not been guilty of professional negligence and dismissed the claim. From that dismissal Wharf appealed to the Court of Appeal. Their notice of appeal raised no less than 89 grounds of appeal. After a 20 day hearing and a further meticulous consideration of the evidence, the Court of Appeal unanimously upheld the decision of the trial judge and dismissed the appeal.

It has to be said at the outset that the appeal to their Lordships' Board raises no issues of law of any significance but is concerned solely with the trial judge's findings of fact - in particular his critical finding that there was no breach of ECA's professional duty - and with the inferences to be drawn from them and from the documents which were put before him in evidence. This is hardly an auspicious beginning for the appellants. Godfrey J., over the protracted hearing which took place before him, had the twin advantages of hearing and seeing those who were called as witnesses examined and cross-examined (some of them at considerable length) and, equally important, of being able to consider and review the whole of the evidence together and thus to obtain the "feel" of the case - advantages which, in the nature of things, are denied to an appellate tribunal. Even the Court of Appeal, during what Kempster J.A. aptly described as a "retrial on paper", had the opportunity of reviewing the evidence contained in the written record as a whole. Their

Lordships' Board, by contrast, during a hearing which has occupied some 11 working days, has been extensively referred to a large number of disconnected and necessarily selective extracts from the transcripts of evidence and the voluminous documents before the courts below and invited on this material to say that both the courts below misdirected themselves on critical issues of fact on which they made concurrent findings.

The practice of the Board of refusing to review the evidence for a third time where there are concurrent findings of fact in the courts below is one of long standing and is well established by a series of decisions of the Board culminating in the case of *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508. Granted that the rule is not inflexible, their Lordships can see nothing in the circumstances of the instant case which render it so unusual as to warrant a departure from the practice. Indeed, the case may be said to be almost a paradigmatic illustration of the wisdom of the general rule.

Godfrey J. and the Court of Appeal having concluded on a full review of all the evidence that ECA had not in any respect fallen short of the standards of reasonably competent and skilful architects in Hong Kong, this might in itself seem to be sufficient to dispose of the appeal. It is submitted, however, on behalf of the appellants that there are four particular areas in respect of which the decisions of the courts below are open to attack before the Board either because there are no concurrent findings of fact or because the circumstances are such as to justify the invocation of one or more of the exceptions adverted to in the judgment of the Board in the case referred to. Of the special circumstances thus enumerated as justifying a departure from the Board's ordinary practice only two can be material to the present appeal. These are set out in the judgment of the Board [1946] A.C. 508 at page 521 and are as follows:-

> " (4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.
>
> (5) That the question of admissibility of evidence is a proposition of law, but it must be such as to

affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice."

Although the matters argued so ably and so thoroughly by Mr. O'Brien Q.C., on behalf of Wharf are capable of being stated and approached as discrete points they cannot intelligibly be separated from the background of the evidence as a whole and it is, therefore, necessary as a preliminary and in order to explain them, to set out something of the statutory and practical restraints upon the development of land in the Colony and to say something of the history of the development and of the relationship between Wharf and ECA as the development progressed.

Building development in Hong Kong is controlled by a Director of Building Development ("the Building Authority") under the provisions of the Buildings Ordinance and regulations made thereunder. It is unnecessary for present purposes to do more than summarise, so far as relevant, the general effect of the Ordinance. Anyone desiring to carry out building works has first to appoint an "authorised person" to act as the co-ordinator of the building works whose duty it is to supervise the carrying out of the work and to ensure compliance with the Ordinance. An authorised person is a qualified architect, engineer, or surveyor approved by the Building Authority whose name is entered in a register maintained by the Authority. ECA are and were at all material times authorised persons. Thereafter, before any work is begun, it is necessary to obtain from the Building Authority approval to the documents submitted to him pursuant to regulations made under the Ordinance and his consent for works to commence in accordance with an approved plan. Section 16 of the Ordinance contains a specification of the grounds upon which plans may be disapproved by the Building Authority, the most obvious of which is that the plans do not comply with the regulations. The only other grounds relevant to be mentioned are that the development would contravene plans, either in draft or approved, under the Town Planning Ordinance; that the carrying out of the plans would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the site (section 16(1)(g)); and that "in the case of building works to be carried out on a site which in his opinion ought to be provided with streets having adequate connexion to a public street, he is not satisfied that such streets are or will be provided" (section 16(1)(p)). The last of these grounds was introduced by amendment in 1973.

Section 42 of the Ordinance empowers the Building Authority, on an application made in the prescribed form - in the event, form 29 - to authorise modifications of the provisions of the Ordinance.

Section 42(2) provides in terms that each such application is to be considered on its merits and that the Building Authority is not required to take account of exemptions granted in the past. Section 21 prohibits an occupation of a building save pursuant to a permit issued by the Building Authority. Finally, there should be mentioned another matter which assumed some significance at the trial. Part 6 of the Ordinance provides a procedure for challenging decisions of the Building Authority by means of an appeal to an Appeals Tribunal appointed by the Governor in accordance with the provisions of the Ordinance.

The provisions which are of critical importance to this appeal are those contained in the Building (Planning) Regulations made under section 38 of the Ordinance and, in particular, those regulations which control the density and site coverage of the building developments in the Colony. It is unnecessary to set out the *ipsissima verba* of the regulations, save in respect of certain definitions, and it will be sufficient, in general, to summarise their effect. To begin with sites are classified as class A, class B or class C according to whether they abut upon one, two or three streets of a specified width. Within that classification a site is accorded an authorised "site coverage" and a "permitted plot ratio" in accordance with regulations 20 and 21 of the Regulations. "Site coverage" means "the area of the site that is covered by the building that is erected thereon and, when used in relation to a part of the composite building, means the area of the site on which the building is erected that is covered by that part of the building". The meaning of what might at first appear to be a somewhat delphic definition becomes plain when reference is made to regulation 20 and the First Schedule. Regulation 20 classifies buildings according to whether they are designed for domestic or non-domestic uses. A "composite" building is one which is in part domestic and in part non-domestic. KML 11, or the relevant part of it, was a class A site and regulation 20(1)(a) and the First Schedule provide that on such a site the site coverage of a domestic building or the domestic part of a composite building of a height between 55 and 61 metres shall not exceed 34% of the site. Regulation 2(a), again in conjunction with the First Schedule, restricts the site coverage of non-domestic buildings or the non-domestic part of a composite building of the same height to 60%. There is, however, an important qualification to both paragraphs (1) and (2) of this regulation which is contained in paragraph (3). Up to a height of 15 metres (50 feet) above ground level, the permitted site coverage may be exceeded, so that, up to that level, it is permissible to construct a podium covering the whole of the site. Above that level tower blocks erected on or within the podium must comply with the provisions of paragraphs (1) and (2) and the

First Schedule according to whether they are designed for domestic or non-domestic purposes.

Density - that is to say, the permitted aggregate floor area of a building to be erected on the site - is regulated by regulation 21, again in conjunction with the First Schedule. Like site coverage, it depends upon the height of the building, the classification of the site and the use for which the building is designed. The plot ratio is ascertained by dividing the gross floor area of the building by the area of the site on which it is or is to be erected. In the case of a domestic building of a height between 55 and 61 metres on a class A site the permitted plot ratio is 6.8. The corresponding permitted plot ratio for a non-domestic building is 12.2. Paragraph (2) of the regulation contains a somewhat complicated formula for calculating the permitted plot ratio of a domestic part of a composite building.

The regulations contain provisions, which do not matter for present purposes, restricting the height of buildings by reference to street shadow area, but there is a further important restriction in relation to the part of Hong Kong in which KML 11 is situate. It is common ground between the parties that because of the proximity of the site to the airport the height of any building erected on the site is limited to 200 feet above ground level.

The regulations also contain important qualifications of the calculation of site coverage and permitted plot ratio in certain cases. Regulation 22 relates to what has been described as "the dedication bonus". Its effect is that where a building is set back from the boundary of the site which abuts on a street and the site owner, with the consent of the Government, dedicates that portion of the site which is not built upon to the public, the site coverage may be exceeded by a certain percentage and, more importantly for present purposes, the plot ratio may be exceeded by, in effect, five times the area dedicated.

Regulation 23 relates to what have been referred to as "the exemptions". Paragraph (3) enables the Building Authority, in determining the gross floor area for permitted plot ratio, to leave out of account floor space intended solely for parking vehicles or loading or unloading or occupied solely by lift, air conditioning or heating machinery or equipment or "any similar service", an expression which leaves considerable scope for argument.

In addition to compliance with the Building Ordinance and the regulations made under it, a developer in Hong Kong has necessarily to be concerned with any restrictions contained in the lease under which the development site is held. In the case of KML 11 Wharf's lease contains restrictions, in what

has been referred to as "the Taverners Clause", against carrying on of offensive trades, including those of "victualler" or "tavern-keeper". These restrictions could be construed as preventing the construction on the land of a hotel.

More important in the present context are the extra-statutory restrictions and concessions which the Building Ordinance Office sought to impose or allow. At the time when ECA was first instructed in relation to the development of KML 11 it had long been the practice for the Director of Public Works to issue circulars for the guidance of the architects' profession indicating the way in which his office proposed to administer and apply the regulations. For instance, on 1st April 1966, Mr. A.M. Wright, the then Director of Public Works, issued a circular letter to all architects outlining a Government policy restricting the density of residential properties in different zones of the city and indicating that control would be exercised either by means of the lease conditions or by the exercise of powers under the Building Ordinance. Its significance for present purposes is that, in one of the notes (5(c)) to the schedules circulated with the letter, a reference was made to the imposition of further controls where "internal roads are necessary, e.g. in large sites". On 20th May 1971 Mr. J.J. Robson, the then Director of Public Works, issued a further circular letter (referred to throughout these proceedings as "circular 58"). It is this letter which is at the heart of the principal dispute between Wharf and ECA and in view of the importance which it has assumed the relevant parts of it require to be set out verbatim. It was addressed to all authorised architects, was headed "Density Zoning", and was, so far as material, in the following terms:-

> "Density Zoning plans and schedules were first issued in 1966 under cover of Mr. Wright's letter dated 1.4.66 to all authorised architects and to other interested parties. This was at a time when little real estate development was in progress, and consequently developers and their professional advisers may have overlooked the implications of para. 5 of the notes to the schedules. In particular Note 5(c) refers to the further restrictions which would apply to large sites and it is felt that the considerations adopted by the P.W.D., in dealing with applications in respect of large sites should now be circulated to all interested parties.
>
> In respect of this note I advise you that any site exceeding 40,000 sq.ft. in area is regarded as a large site and for such sites certain additional controls reducing the density below the standards scale may be applied in all Zones. In certain cases, and at my discretion, the area of existing or proposed roads within the site may be deducted from the site area and the extent of development of the remaining area calculated on the standard scale.

> The intention is to ensure that there shall not be an abnormal density of development on large sites where normal road patterns do not exist, and any relevant lease conditions, or provision of the Buildings Ordinance will, at my discretion, be applied in pursuance of this intention. Generally, in the case of development of sites exceeding 40,000 s.ft. in area, early enquiry should be made at the Crown Lands & Survey Office in order to ascertain the density permitted. It is to be noted that the considerations under Note 5(b) and 5(c) are now applicable to sites in Zone 1 as well as Zones 2 & 3."

Accompanying this letter were appendices containing tables indicating the scale of the restrictions to be applied and, in particular, Appendix 2. It is unnecessary to refer to the tables in any detail. What they indicated was that in any site in Zone 1 whose area exceeded 100,000 sq.ft. (which KML 11 did by a factor in excess of 4) the maximum permitted site coverage and the plot ratio would be 60% of those permitted by schedule 1 of the Regulations. Translated into the appropriate figures for domestic and non-domestic buildings this resulted in a site coverage of 20.4% and a plot ratio of 4.08 for domestic buildings and a site coverage of 36% and a plot ratio of 7.32 for non-domestic buildings.

It is not disputed by ECA that, throughout the planning and execution of the development of Harbour City, it was their view that circular 58 represented Government policy and, whether by strictly legal means or otherwise, that the Building Authority was able to ensure compliance with its terms if it chose.

It will be convenient, at this point and before turning to the historical background of the litigation, to mention two other matters which have assumed some significance in the course of the argument. The first concerns the designation by a developer of a site. In general, the owner of land which he desires to develop is at liberty to designate as his site the whole of any part of the land which he owns, including land which already has existing buildings on it, although, of course, the floor area of the existing buildings will have to be taken into account in determining whether any new buildings planned will exceed the permitted plot ratio. This may seem almost self-evident but if authority is needed for the proposition it is contained in the decision of the Board in the unreported case of *Attorney General v. Cheng Yik Chi* (Privy Council Appeal No. 32 of 1982 - judgment delivered 21st June 1983) in which Lord Fraser of Tullybelton, delivering the judgment of the Board, observed:-

> "Their Lordships are of the opinion that the land which forms a 'site' for the purposes of the regulations must be ascertained as a question of

fact in the case of each development. It means, in addition to the land on which it is proposed to erect buildings, any land which the developer *bona fide* proposes to include in the development. It can only include land which he owns or which he has a realistic prospect of controlling. The additional land must be at least sufficient to enable the proposed building to comply with the regulations and it must, of course, not have been taken into account and, so to speak, used up in enabling some other existing building to comply with the regulations."

It was made known to Wharf by ECA that if, for instance, Wharf wished to avoid circular 58 and to maximise the use of KML 11 by, for instance, covering it with high-density residential blocks, this could be done by dividing it into sub-sites of less than 40,000 square feet. That option was rejected.

The second matter concerns what has been referred to as "the hotel bonus", an expression which embraces two different concepts, both outlined in circular letters from the Director of Public Works. Circular letter no. 45 issued on 17th October 1968 deals with three separate concessions which the Building Authority would be "prepared to consider sympathetically" in the case of the erection of a *bona fide* hotel, viz.:-

(a) space at ground level set aside for setting down and picking up guests, for loading and unloading and for waiting vehicles would, although not dedicated to the public, be treated as if it was so dedicated so as to attract the provisions of regulation 22(1) (i.e. addition of five times the area so set aside without infringing plot ratio maximum);

(b) space provided in basement areas for whatever purpose would be disregarded in calculating plot ratio of the buildings; and

(c) although hotel bedrooms are "domestic", site coverage up to the permitted maximum for a non-domestic building would be permitted so long as the permitted plot ratio was not exceeded.

The third of these concessions was elaborated upon in a further circular (no. 48) on 20th September 1969 which set out how the "envelope" of a building planned as a hotel ought to be calculated. The first step in this calculation is the determination, in accordance with the First Schedule to the regulations, of the permissible site coverage and plot ratio of a theoretical composite building in a commercial/residential project. The second step is to apply to that theoretical building the non-domestic site coverage in accordance with the concession. But since the plot ratio already determined

has to be adhered to, this inevitably means that the height of the theoretical building has to be reduced because the aggregate floor area (the plot ratio) has to remain the same. The third step is to add any bonus available under the other concessions so as to increase the height again within permissible plot ratio limits.

It is against the background of these concessions and of the restrictions and regulations already referred to that the history of ECA's involvement with the development falls to be considered.

ECA were first instructed to act for Wharf in relation to the development of KML 11 on 5th January 1970 by a letter of that date from Mr. Forsgate, who was then Wharf's general manager and who remained in that post until the summer of 1979. Mr. Forsgate and Wharf's financial manager, Mr. McLuskie, who succeeded him in the post of general manager, were both intimately concerned with the development as it progressed. It is material to note that KML 11 was not the first development with which Wharf had been associated. They owned the adjacent Ocean Terminal, which had opened in 1966, and prior to 1969 they had been engaged in the development of the adjoining Hong Kong hotel which had opened in that year.

The chronology is fully set out in the judgment of Godfrey J. and it is unnecessary for present purposes to pursue it in detail. Following discussions and the preparation of a feasibility study, it was decided to commence the development by the erection on the southern part of the site, adjoining the Ocean Terminal and the Hong Kong hotel, of a new hotel, originally intended to be known as the Marco Polo. Plans were prepared for the erection of a building in the general shape of a wine glass. Numerous discussions and negotiations with the Building Development Office ensued to which it is not now necessary to refer and the project of a hotel on this part of KML 11 was finally abandoned in February 1974 when Wharf resolved to proceed with an alternative office/shopping complex on the site. It was decided that this should be fitted within the wine glass envelope which had been designed for the hotel even though this involved what Mr. McLuskie described as "a lavish use" of the land by Hong Kong standards.

Before their Lordships' Board, complaints about this part of the development have not been pressed. Indeed it is evident that Wharf were clearly informed and were content to accept that, having regard to the need to integrate the development with Wharf's existing development on the adjoining land and the undesirability of building to a density which would detract from the amenities of those developments, the proposals did not make the maximum possible use of the land. The importance of this phase of the planning by

ECA, however, lies in a number of events which occurred during the period of this development and which have a bearing on both Wharf's and ECA's knowledge and intentions in relation to the development of the remainder of KML 11.

Wharf's primary complaint in relation to this latter part of the development (known as Merrylea and developed in three phases, enumerated I, III and IV) is that ECA throughout based their plans, their approach to the Building Authority and their advice to Wharf upon the practical or legal enforceability of the large site restrictions set out in circular 58. At an early stage, in December 1971, they had suggested the possibility of submitting plans for the whole of KML 11 (including Ocean Centre) as a single site and calculating the plot ratio on that basis. That had been rejected by Wharf and it was not until February 1973 that ECA submitted a preliminary report and recommendations for the site comprised in phases I, III and IV. Following circular 58 they had been told in a letter dated 4th August 1971 addressed to all architects by the Hong Kong Society of Architects that "D.P.W. (the Department of Public Works) does not have statutory powers to restrict the density in Development of Zone 1 sites, apart from control by means of lease conditions or any relevant provisions of the Building Regulations and Ordinance".

The possibility of control by the use of powers under the Building Regulations was, however, severely limited as a result of a decision by the Appeals Tribunal on 24th November 1972 in a case concerning a section of a site known as NKIL 53 in New Kowloon. Whilst NKIL 53 as a whole was a large site and so fell within circular 58, it had in fact been sub-divided so that section (c) was of dimensions which placed it outside the control envisaged in the circular. Nevertheless the Building Authority had sought to reject the plans in reliance upon the non-conformity objections contained in section 16(1)(g) of the Buildings Ordinance. It was found as a fact that the Authority's real objection had nothing to do with conformity but was to the density proposed, which was within that permitted by the First Schedule. Accordingly the decision was quashed.

It might not appear to be difficult to deduce from this that at least one important method of enforcing the policy outlined in circular 58 had gone and that, apart from any lease conditions which might enable the Government to restrict density, circular 58 could be ignored. That does not, however, appear to have been the impression of the architect's profession in Hong Kong as a whole. That is, perhaps, not as surprising as it may seem, since, in a decision over a year later in relation to a site in Robinson Road, the Appeal Tribunal itself indicated that any architect submitting plans which did not conform with circular 58 would be

inviting rejection under section 16(1)(g), although they expressed the view that whether such rejection would be a proper exercise of the powers under the section was "debatable".

Moreover, the Building Authority continued to assert the continued application of circular 58 and although he appreciated the doubtful legality of the density requirements, Mr. Cumine, the senior partner of ECA, also appreciated (as he put it in a note in February 1973) that "in any dealings with Public Works Department, the obstructive value of their delays is tremendous and not worthwhile incurring". There was, therefore, quite plainly ample material for the trial judge to conclude, as he did, that he was "satisfied that it would have been reasonable for a competent architect to take the view, at this time ... that his client would be well advised to respect the provisions of circular 58". He added that "much wider commercial considerations were also involved".

That decision having been upheld by the Court of Appeal, the appellants very properly recognise that they are faced with very considerable difficulty in asserting successfully before their Lordships that ECA were negligent up to this time in advising preparation and submission of plans for phases I, III and IV on the basis of circular 58. It is in what occurred next that they seek, by raising what is said to be a point of law, to escape from the concurrent findings of fact with which they are faced.

On 19th April 1973 a formal licence for the erection of a hotel on KML 11 was granted, that being the only restriction contained in the lease which might have enabled the Building Authority to enforce the policy of circular 58. There remained, for what it was worth, reliance upon the powers in the Building Ordinance and in August 1973 that Ordinance was amended by the addition of ground (p), already referred to, to section 16(1). However fragile a reinforcement that may appear, there remained, of course, the Building Authority's ability to encourage compliance with its wishes by obstruction and delay, the need to avoid which was stressed in a letter dated 20th February 1974 to Mr. Forsgate from Mr. Roberts, the partner in ECA immediately concerned with the project.

ECA continued thereafter to proceed with the scheme of development on the footing that circular 58 applied and proposals were submitted to the Building Authority on the basis of an overall (i.e. commercial and non-commercial) plot ratio of 8 which was somewhat in excess of the strict limits of circular 58. At the same time, the proposals for the office/commercial development on the site of what had previously been planned as the Marco Polo Hotel and had been renamed "Ocean Plaza" were revised and submitted also on the

basis of compliance with circular 58, showing site coverage and plot ratio of 60% of those allowed by the First Schedule. In August 1974 a problem had been identified in the design proposed which assumed some importance at the trial in the light of the evidence given by Mr. Roberts. This was that although the internal floor space of the fifth floor of the proposed building complied with the site ratio restrictions the design catered for an additional area of covered terrace on the roof of the fourth floor which protruded a few feet above the 50 foot level at which a 100% site coverage was permitted. This gave rise to an excess of site coverage of some 23,000 sq.ft. At a meeting held on 20th September 1974 at which representatives of Wharf were present it was reported that the plans had been submitted in this form and that if problems were encountered the elimination of the covered section would be recommended. In fact Mr. Roberts was called in by the Building Authority to discuss the plans and a meeting took place on 9th November 1974 with a Mr. Lau, at that time a building surveyor in the Buildings Ordinance Office.

Mr. Lau gave evidence at the trial and he was not cross-examined. It is not in dispute that the decision not to challenge his evidence in cross-examination was taken advisedly and it is this circumstance that is advanced as the point of law upon which the judgments both of the trial judge and the Court of Appeal are said to be open to attack.

Before considering the submission and the conclusion to which, if correct, it may lead, it is convenient to state in summary form the purport of the evidence. Perhaps not altogether surprisingly Mr. Lau, giving evidence in July 1987 with regard to a meeting which had taken place over 13 years before, was unable to recollect anything about it and his evidence consisted, in substance, of what he recollected his practice to be and what he thought that he would have said to Mr. Roberts. Documentary evidence established that a plan of the development of this part of the site had been submitted in July 1974 which showed calculations of site coverage and plot ratio based on circular 58. Additional site coverage was claimed on the basis of a dedication of part of the site to public passage. This plan bore a number of corrections undoubtedly made by Mr. Roberts and subsequently admitted to have been made by him following his meeting with Mr. Lau. What these amounted to in effect was an increase of site coverage and permitted gross floor area to the scale permitted by the First Schedule and the elimination of the dedication area. Mr. Lau had also before him the Building Ordinance Office file which contained his contemporary notes and, in particular, a note which read "Mr. Roberts called a.m. at my request to amend plans in regard to deletion of area of dedication as large site factor does not apply". An earlier entry on

4th November contains the legend "spoken with CBS" (i.e. Chief Building Surveyor). "Circular letter 58 now invalid". Another note which he had made for his own convenience contained an entry "site coverage exceeded" followed by the words "okay SL 58 cancelled". His evidence was that he knew at this time that circular letter 58 was no longer operative and that there was no secret about it in the office but he could not recall whence he got his information. He was able to say that his normal practice was to explain the reason for any suggested amendment of the submitted plan and that he "would have said that the large site reduction factor does not apply and he could use the calculations as stated under the Planning Regulations". He could not, however, remember why the dedication area would have been deleted. Asked by the judge whether he could recollect what happened, he answered with commendable frankness "No, I am sorry, I can't remember anything at all".

Mr. Roberts' recollection of the purport of the meeting was quite different from that which might be gathered from Mr. Lau's note. His recollection was that he was called in to discuss the 23,000 sq.ft. excess coverage at fourth floor level. Clearly this was not a point which had escaped Mr. Lau because point 7 of his private note already referred to reads "site coverage exceeded on fourth floor?" Mr. Roberts' evidence was that it was thought that a formal application on form 29 for a modification under section 42 might set an undesirable precedent and that to avoid this it was suggested that the proposal be amended, as it were, as a one-off exercise, by applying the schedule 1 percentages instead of those in circular 58. Mr. Roberts did not, as the judge observed, display a high degree of clarity of thought and there are obvious difficulties about this, first, because section 42(2) makes it clear that no grant of modification can be taken as a precedent and, secondly, because the site coverage did not in any event exceed the schedule 1 percentage and a form 29 would not have been appropriate for a relaxation of circular 58 which is anyway expressed in discretionary terms and was clearly thought by Mr. Lau at that time to be inoperative. However, on the really crucial point - namely whether Mr. Roberts was told in terms that circular 58 was no longer operative at all - there could not be said to be a "conflict" since Mr. Lau simply could not remember anything at all.

In the event, Godfrey J. preferred to accept the recollection of Mr. Roberts and it is submitted by the appellants that he was wrong in law to do so, that he should have treated the omission to cross-examine Mr. Lau as, in effect, an admission by the respondents of the whole of his evidence and that it was a necessary inference from Mr. Lau's recollection of his normal practice that Mr. Roberts was told in terms that circular 58 was no longer operative, so that the failure

of ECA thereafter to inform Wharf and to plan the further development of phases I, III and IV on the basis of First Schedule densities must necessarily have been negligent.

Their Lordships have been referred to a number of authorities relating to the need, where the court is invited to reject the testimony of a witness, and to accept evidence to a contrary effect, to put the conflicting evidence to the witness whose testimony is attacked. *Browne v. Dunn*, reported only in an obscure series known as "The Reports" in 1894 is cited as authority for a proposition which is stated thus in the headnote:-

> "If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story, or (per Lord Morris) the story is of an incredible and romancing character."

The principle is, of course, of particular importance in criminal cases (see *R. v. Hart* [1932] CAR 202; *R. v. Fenlon* [1980] CAR 307) but this is not, in any event, a case in which it was being suggested that Mr. Lau was not telling the truth as to his recollection, which was minimal. Godfrey J. was entitled to and did receive Mr. Roberts' evidence as to the interview and he was both entitled and bound to assess the reliability of that evidence, once given, in the light of all the facts and documents laid before him, including the not unimportant fact that only a week after the meeting, Mr. Bell, the acting Director of Public Works, was writing to ECA in terms which quite clearly indicated the continued application of circular 58. This evidence was given without objection and if it was desired to assert that all or part of it ought to have been put to Mr. Lau, there was every opportunity for the appellants to apply to the judge for leave to recall him. No such application was made. It might have been better and have made the judge's task easier if the substance of Mr. Roberts' evidence had been put to Mr. Lau in cross-examination, but their Lordships are as unpersuaded by the argument that Godfrey J. erred in law in receiving and accepting it as was the Court of Appeal. There is, in their Lordships' view, no point of law here and no ground therefore for departing from the Board's ordinary practice as regards concurrent findings of fact.

The second area in which it is suggested that the concurrent findings of the trial judge and the Court of

Appeal cannot or ought not to be supported lies in the evidence adduced and the findings made regarding an incident which occurred in September 1978.

The position at that time was that the development of the Ocean Plaza site (now known as "Ocean Centre") had been completed and an occupation permit in respect of the building had been granted in November 1977. The proposals for the development of the Harbour City site had received the general approval of the Building Ordinance Office. These proposals had been designed on the supposition that permitted density fell to be regulated by circular 58 and had been submitted following the acceptance by the Office of an overall plot ratio of 8, a figure which was below the ratio permissible on a strict application of Schedule 1 but above that which could have been insisted upon under a strict application of the terms of circular 58. The scheme proposed and agreed to by Wharf comprised 3 curved residential blocks facing the harbour and 6 office blocks facing the Canton Road with a 600 room hotel at the north end, the whole designed to a plot ratio of 7.9. Plans for phase I of this development, consisting of the first residential block, half of the second block and 3 of the office blocks, had received first approval in February 1978 and the contractors had commenced the work of site preparation. In the course of the summer of 1978, a prominent Hong Kong shipping magnate, Sir Y.K. Pao, either personally or through companies controlled by him or by members of his family, had acquired a substantial share interest in Wharf - an interest subsequently, in 1980, enlarged into a controlling interest - and on 5th September 1978 he and his son-in-law, Mr. Peter Woo, were appointed directors of Wharf.

The incident which, it is submitted, demonstrates that the trial judge misdirected himself in law and justifies a departure from the Board's practice in relation to concurrent findings of fact, was a meeting which took place between Mr. Woo and Mr. Cumine and in view of the importance attached to this by the appellants it will be convenient to set out verbatim the judge's finding, prefacing it only with the observation that, in making it, he had clearly failed to appreciate that Mr. Woo had, by the date of the meeting, already been appointed a director of Wharf. Godfrey J. found as follows:-

> "Towards the end of September 1978, Mr. Cumine discussed the Harbour City development with a Mr. Peter Woo. Mr. Woo gave evidence before me, which I accept. Mr. Woo was about to become a member of the Board of Wharf. He regarded it as important to find out more about Harbour City. Mr. McLuskie told him of the 'negotiated' plot ratio of 8 which was the maximum; and suggested to Mr. Woo that a new negotiation might produce less. Mr. Woo was anxious to discuss with the architects the following questions (among others):

(1) Was it too late to make a change if so advised?

(2) Could the plot ratio be increased?

He met with Mr. Cumine to discuss these questions. He told Mr. Cumine he did not have any particular plans to change the development, but that he did want to know whether it was too late to change if required. Mr. Cumine answered in the negative, but said it would be regrettable. He had worked a long time with the Government on it. Mr. Woo told Mr. Cumine that he understood the plot ratio was 8, and asked Mr. Cumine about it. Mr. Cumine replied that the figure had been specially negotiated with the Government and that Wharf was lucky to get a plot ratio of 8. He said the design was very special. It was a composite development: office/shopping/apartment/hotel. Mr. Cumine said that to change now would be to jeopardize what had been negotiated. He confirmed that on a negotiation Wharf might obtain less. His advice on these matters was quite unequivocal. After the meeting, Mr. Woo felt the plot ratio point could not usefully be pursued. Mr. Woo told Mr. Cumine that he wanted the earning potential of the site maximized. Mr. Cumine's response was that the plan was as far as Wharf could go. If Mr. Woo had been told that the use had not been maximized, Mr. Woo would have put this before the Board of Wharf with a view to obtaining a Board decision that more should be added. Mr. Woo would have expected the Board to take such a decision."

A curious feature at this meeting is that it did not, either in the pleadings or at the trial, assume the significance which has since been attached to it by the appellants both in the Court of Appeal and before their Lordships' Board. In the pleadings it emerged only in the particulars and then simply as evidence of the repetition of advice previously given in February 1974 that the maximum permitted plot ratio of the Harbour City site (by reason of circular 58) was 4.56 for domestic and 7.5 for non-domestic development and that ECA would, accordingly, seek to negotiate an acceptance of an overall plot ratio of 8. Godfrey J. treated it simply as part of the history of the continuing conduct of ECA which was alleged by the appellants to constitute negligence and it does not appear that he was invited to treat it as a discrete matter which, in itself and of itself, gave rise to a new and separate liability for breach of professional duty. Having stated the facts that he had found he expressed no separate conclusion with regard to them and his finding in relation to the allegation of negligence is contained in the following passage from his judgment:-

"These are the facts. I have reached the clear conclusion upon them (leaving aside for the moment

> the matter of exemptions) that the architects did nothing to justify the reproach that they exhibited any want of reasonable skill and care in the discharge of their duties. Indeed, in my judgment they deserve rather to be commended for their achievement. I find that Wharf was at all times anxious to get on with the development of KML 11 with the minimum of delay, at the same time keeping all its options open as far as possible. It wanted to maintain its wharfing operations on KML 11 as long as it suited itself to do so. It wanted to maintain the integrity of KML 11 and keep the praya within KML 11 under its own control. It wanted to avoid the constraints which it feared, reasonably, the Government might try to impose on it if it got into a confrontation with the Government over density of development. And it wanted the sort of development which would do it credit even if it involved (to borrow the words of Mr. McLuskie) 'by Hong Kong standards a lavish use of land'. In all this Wharf, with the assistance of the architects, succeeded."

In the Court of Appeal, however, it was submitted, as it has been before their Lordships, that had Godfrey J. properly evaluated the evidence of Mr. Woo and his own findings regarding the meeting, he must necessarily have arrived at the conclusion that Wharf's case against ECA was established. The evidence as regards this meeting was fully considered by Fuad V.-P., in the course of his careful judgment. He concluded:-

> "I entertain no doubt at all that the Woo/Cumine meeting did nothing whatever to advance Wharf's claim. This must have been the view of the judge and explains why he contented himself by merely giving an account of the meeting. The judge had made it very clear at the beginning of his judgment that the duty of an architect was a continuing one (see his 'principle' No.3).
>
> I will add that I am quite unable to accept the submission that what Mr. Woo told Mr. Cumine at this meeting amounted to 'instructions to maximise'. With very great respect, such a contention seems to me to be quite fanciful."

This, taken in conjunction with Godfrey J.'s finding, is as clear a concurrent finding of fact as could be imagined and before their Lordships' Board the appellants have been driven to contend, in effect, that both findings of the courts below were, having regard to the whole history of the matter, perverse. The submission has not been advanced in quite such bold terms, but their Lordships have been invited to conclude that the facts found regarding what actually occurred at the meeting, taken in conjunction with the transcript of Mr. Woo's evidence, in effect precluded any conclusion other than that liability for negligence is established.

It comes as a startling proposition to their Lordships that they should be invited, without having heard the witnesses and after a meticulous consideration of the evidence and the merits by two courts in the jurisdiction from which this appeal comes, to reject the assessment of those courts and to hold on the written record a claim of £150 million established on the basis simply of an account of a conversation of which there was no contemporary record, which took place nine years before the evidence was given and in relation to which the witness, on his own showing, could not recall exactly what was said. What is said is that from the trial judge's findings as to the content of the conversation it is demonstrable that ECA were not only wrong but negligently wrong in the advice given by Mr. Cumine to Mr. Woo.

Their Lordships are quite unable to accept this. It is said first of all that Mr. Cumine was wrong to say that the plot ratio of 8 had been specially negotiated with the Government because the evidence showed and Godfrey J. found that there was no "negotiation" in the strict sense because the figure had been accepted by the Buildings Ordinance Office without demur. But nothing, in their Lordships' view, turns upon this. The figure was clearly intended to represent an overall compromise between the ratio which, it was thought, would result from a strict application of circular 58 and the maximum permitted under the First Schedule and which Mr. Cumine, rightly, supposed that the Government could be persuaded to accept. Whether that can strictly be termed a "negotiation" is really neither here nor there.

Then it is said that Mr. Cumine was misleading and negligent in saying that Wharf were "lucky" to get a plot ratio of 8, because, even allowing for his belief as to the applicability of circular 58, there were no other sites where it had been applied to produce comparable plot ratios. It has, however, to be remembered that KML 11 was a very exceptional site, both as regards size and position. Before proceeding to consider the Woo/Cumine meeting Fuad V.-P. had, in an earlier part of his judgment, conducted a review of other more or less comparable sites while considering whether ECA's advice fell short of accepted architectural practice in Hong Kong - a contention which he rejected. Their Lordships can see no reason to differ from his conclusion that Mr. Cumine was not negligent in expressing a view that Wharf had been lucky to obtain a plot ratio of 8 for KML 11 and had done as well as they were likely to do.

It is further asserted that Mr. Cumine was plainly wrong in saying that "to change now would be to jeopardize what had been negotiated". That in fact is Godfrey J.'s paraphrase of Mr. Woo's account of the conversation, and it is asserted that it is in fact

nonsense because, the plot ratio of 8 having already been approved, there is no provision enabling the Buildings Ordinance Office to withdraw that approval. That may well be so, although their Lordships have not been shown any evidence that demonstrates it as a matter of law. But what Mr. Woo actually said was that Mr. Cumine told him "if we re-negotiate we might end up with less" and that that was what Mr. McLuskie had also told him. That is saying no more than that a revised scheme might well only be approved by the Government on the basis of a lower plot ratio than 8 - a conclusion which could permissibly be drawn from Mr. Cumine's view of the continued applicability of circular 58 as representing Government policy.

The real substance of the appellants' complaint about this conversation lies in Mr. Cumine's statements (a) that the plot ratio of 8 was the maximum that Wharf could get and (b) that the scheme maximised the earning potential of the property. As to the former, it is said that this was not only wrong but was negligently wrong because Mr. Cumine himself knew that circular 58 had no statutory backing as a matter of law. It was, therefore, to his knowledge legally possible to propound a scheme based on the First Schedule plot ratios and to challenge any rejection of such a scheme by the Buildings Ordinance Office in reliance on circular 58, even though this might have entailed a contest with the Government and involved a great deal of delay at a time when contractors were already on the site. He should, it is said, have told Mr. Woo this and thus accorded him the option of taking that course if he so desired. Their Lordships find nothing at all in this point. Mr. Woo knew perfectly well already, as he admitted in his evidence, that a ratio of 8 was not the statutory maximum and he could not therefore possibly have concluded that Mr. Cumine was expressing a legal opinion or giving him anything more than his judgment of what he regarded as the practical maximum with which Wharf was confronted in the light of the state of the development then reached. It was argued by the appellants that Mr. Woo's acceptance of his knowledge that 8 was not the statutory maximum did not involve acceptance that he knew 8 to be below the statutory maximum. He might, it is suggested, have thought that it exceeded the maximum. In their Lordships' judgment this is merely fanciful, for if that had been what he contemplated he could hardly have asked whether it could be improved upon. All other considerations apart Wharf, as opposed to Mr. Woo personally, was perfectly well aware that circular 58 did not represent a statutory code. As long ago as July 1971, Mr. Madar, Wharf's property manager, had been sent a copy of a circular letter from the Hong Kong Society of Architects pointing out, in terms, that circular 58 was issued "as a guide" and that the Public Works Department did not have statutory powers to restrict density, apart from control by means of lease

conditions or through the exercise of powers under the Buildings Ordinance. Mr. Madar's evidence was, indeed, that he had discussed it with Mr. Forsgate, Mr. McLuskie and Mr. Roberts and had suggested challenging the Government.

As regards the maximisation of the earning potential of the site and Mr. Cumine's response that "the plan was as far as Wharf could go", this is, again, a paraphrase of what Mr. Woo actually said in his account of the meeting (which Mr. Woo himself had introduced with the words "to paraphrase what happened"). It is quite clear from a perusal of Mr. Woo's evidence that the question of maximisation was being raised in the context of whether Mr. Cumine thought that he had got the maximum plot ratio. Moreover it is perfectly clear from the documentary evidence of a meeting of the directors which took place subsequently regarding the use of exemptions and hotel bonus that Wharf were aware that there was additional space within the development which was capable of being profitably employed - as, indeed, some of it subsequently was.

A further argument advanced as a demonstration that Mr. Cumine was both wrong and negligent is that he was aware - although it was said that Mr. Woo was not - that the existing development of Ocean Centre had not fully utilised the available gross floor area within the plot ratio agreed for that development. This was a point which it had been suggested in discussions between Mr. Forsgate and Mr. Cumine might be used as an argument for obtaining the Building Ordinance Office's agreement to the plot ratio of 8 which ECA was suggesting for the Harbour City Development. Both before Godfrey J. and before the Court of Appeal the omission to obtain, in the development of Harbour City, a compensatory increase in gross floor area and plot ratio by reason of the under-development of the Ocean Centre site was unsuccessfully advanced as a separate claim in negligence quite apart from the Woo/Cumine meeting. That is not a matter which has been independently pursued before their Lordships, but specifically in relation to the Woo/Cumine meeting it is said that, when Mr. Woo spoke of maximising the potential, Mr. Cumine should have recalled those discussions and that, even though Wharf had previously rejected in terms the option of submitting plans for the development of the whole of KML 11 as one single site, he should have thought of and told Mr. Woo about the possible expedient of re-submitting plans for a single composite site comprising the whole of KML 11, including the Ocean Centre, so that unused gross floor area in Ocean Centre could have been used elsewhere on the enlarged site without infringing the overall plot ratio of 8. It will be remembered that the decision of the Board in *Attorney General v. Cheng Yik Chi*, already referred to, establishes the right of a

developer to fix the site of a development according to his wishes. Leaving aside the disruption and delay that this would be likely to have involved when planning had been proceeding for some 4 years on the basis that Harbour City was treated as a separate site, the context of the discussions was the enquiry whether Mr. Cumine felt that the maximum practical plot ratio had been obtained. The rejection by the trial judge of the contention that the conversation ought properly to be construed as "instructions to maximise" is evident from his rejection of the claim in negligence after a consideration of his specific findings of fact relating to this conversation. That construction was rejected also by Fuad V.-P. as "quite fanciful" and their Lordships are not persuaded that any grounds have been shown for rejecting the assessments of both the courts below.

Their Lordships find that Godfrey J.'s conclusion as to negligence was, on the evidence to which they have been referred, one which it was perfectly permissible for him to reach and they find it unsurprising that the Court of Appeal declined to interfere with that conclusion or to attach to the Woo/Cumine meeting the significance urged by the appellants. They accept and adopt Fuad V.-P.'s conclusion in his judgment.

The third area in respect of which it is claimed that the trial judge and the Court of Appeal misdirected themselves in law concerns what have been styled "the exemptions", which are referred to in the passage already cited from Godfrey J.'s judgment and which were dealt with separately in his judgment. These exemptions are the service areas which, although forming part of the actual floor area of the building, are, under regulation 23, permitted to be treated as excluded from the gross floor area for the purpose of calculating the permitted plot ratio of the building. In his statement of the architect's duties (which is accepted by both sides as correct) Godfrey J. referred in terms to the architect's duty to advise his client with reasonable competence regarding any exemptions claimable.

This was a claim the major part of which surfaced at a very late stage in the proceedings, being brought in by amendment only shortly before the trial. As has already been mentioned, the reference in regulation 23 to "any similar service" leaves scope for argument as to whether any particular given area of a development not specifically mentioned in the regulation (for instance, stairways, laundry areas and the like) is or is not to be treated as an exempted area. Areas which Wharf claimed as set aside for "similar services" and therefore exempt but in respect of which no exemption had been claimed by ECA were originally disputed by ECA in the proceedings and were set out in a Scott Schedule. At the trial, however, ECA elected not to challenge the detail of the exemptions but rested solely on the

submission that the omission to claim them accorded with accepted architectural practice. The result is that the case had and has to be approached on the footing that there were substantial areas which could have been but were not claimed.

The judge heard a number of expert witnesses whose views as to the normal architectural practice in relation to exemptions were not identical. The architect immediately concerned with the later stages of the development of Harbour City was a Mr. Penman. His evidence was that the propensity of clients to request modifications of and, frequently, additions to the project as designed rendered it desirable to preserve a degree of flexibility by keeping exemptions in reserve so as to enable alterations to be accommodated without infringing the plot ratio restrictions and thus without the necessity of extensive re-planning. His practice, therefore, which was supported by ECA's expert witness, Mr. Haffner, was to design without claiming the exclusions from gross floor area of all the possibly exempt areas, which, in any event, tended to alter as the development progressed and the design requirements of specialist contractors crystallised. In this way the client's requirements for additional floor space could be met without expensive and extensive re-planning.

The alternative practice, preferred by Wharf's experts, was to design up to the maximum available square footage, making use of every potentially exempt area, whether obviously allowable or not, leaving it to the Building Ordinance Office to object and then to re-plan if the objections were persisted in and the plans rejected. Mr. O'Sullivan, Wharf's principal architectural witness, was not, however, prepared to say that there was anything fundamentally wrong with Mr. Penman's approach.

On this evidence, it was clearly a permissible conclusion that either approach was legitimate and it is therefore unsurprising that Godfrey J. declined to hold that ECA had been negligent in adopting the approach that they did and in keeping in reserve potentially exempt areas which were not in fact used. That conclusion was upheld by the Court of Appeal after a most careful consideration of the evidence and the arguments.

In substance, Wharf's argument on this part of the case is that the conclusion reached by both courts is unsustainable first, because a practice which involves failing to advise the client of the full extent of possibly exempt areas cannot be a reasonable practice and in any event conflicts with the judge's own statement of the architect's duty and, secondly, because even allowing the legitimacy of the practice, it could not be relied on in the face of express instructions to maximise lettable floor space.

As to the former of these submissions, it was pointed out by Fuad V.-P., in the Court of Appeal that there was substantially no direct evidence led by Wharf from the executives who were most intimately concerned with the development at all its stages. Neither Mr. Forsgate nor Mr. McLuskie was called as a witness and what Wharf's senior management knew or was told at various stages of a development which continued over a period of some 6 to 7 years had largely to be inferred from such documents as were available. What was evident from the documents and from the evidence of Mr. Penman was that at the time when exemptions became of importance in the development of phase IV, Wharf was perfectly well aware of the ability to claim them. The judge had before him evidence that Wharf were very anxious to press on with the development without delay - all other considerations apart there was what was evidently considered to be a rival development at Holt's Wharf which was already under way - and Mr. Penman gave evidence as to his reasons for submitting plans in which he claimed as exempt only the obviously exempt areas which contributed to the envelope of the building. As regards "express instructions to maximise", there was no witness who testified to such instructions. At the time of the planning of the Ocean Centre, indeed, in 1971 the express instructions were to the contrary. Moreover, against the background of ECA's suggestion, in agreement with Wharf, of a plot ratio of 8, the approval by Wharf in 1976 of plans for development up to a plot ratio of 7.8555 is wholly irreconcilable with instructions to squeeze every possible square inch of lettable space out of the development. As late as October 1979 the chairman of Wharf was stressing the need for a balanced development with adequate space for pedestrian circulation. In his judgment, Fuad V.-P. referred to certain passages in the evidence of Mr. Penman which clearly indicated that Wharf both knew of the possibility of obtaining further floor area by the use of exemptions and that it was concerned as much with the appearance of the buildings as with maximum utilisation of space. He concluded:-

> "There were many changes of plan during the development of Harbour City. Wharf were not tyros in the field of property development. I am unable to accept that in the absence of specific 'instructions to maximise', it was the duty of ECA to keep going back to Wharf to ask them if they wanted more or, indeed, to tell them that they should seek more. Wharf knew what they were doing; the designs were approved and the buildings went up."

It is said that Fuad V.-P. gave no weight to a telex which was sent by Mr. Penman to Skilling Helle, consulting engineers employed by Wharf, in February 1980 in which he said "as we have some surplus usable floor area, client wishes to maximise the plot ratio. ...". In that telex Mr. Penman set out certain

suggestions for incorporating further floor space in the design. In their Lordships' judgment nothing turns upon this telex which was in any event very late in the development and which merely reflects the knowledge on everybody's part that there were exemptions which were claimable and in respect of which additional ground floor space could be provided.

These questions were very fully explored before both courts below and it is neither practicable nor desirable that this Board, even were it minded to do so, should be invited to form, by reference to selected excerpts from the transcripts of evidence and a consideration of disconnected passages from the voluminous documents adduced in evidence, conclusions on matters of pure fact which are diametrically opposed to those reached by those courts. Their Lordships have found nothing in the evidence or documents to which they have been referred which convinces them that Godfrey J. could not properly have found the practice as to exemptions relied upon by ECA to be a legitimate practice or could not properly have concluded that they were not negligent in having followed it.

The fourth and final area in which it is sought to persuade their Lordships to differ from Godfrey J. and the Court of Appeal is that which has been classified as "bonuses and concessions". The allegations here are similar to those in relation to the exemptions properly so called. It will be recalled that under regulation 22 additional floor area may be developed without infringing the plot ratio restrictions, such area being calculated by reference to an area by which the building is set back from the public highway, if the intervening space is dedicated to the public and the dedication is accepted by the Government. Similarly, Circular 45 permits, in the case of a hotel, additional floor area calculated by reference to the space set aside for picking up, loading and waiting vehicles to be allowed by concession without infringing the plot ratio restrictions. What was alleged by Wharf was that although the development provided for the buildings facing the Canton Road to be set back from the boundary of the highway, ECA failed to advise them to apply for the dedication bonus. Had it been offered, the Government would, it is said, have been likely to accept it, so that substantial additional floor space could have been incorporated in the development even within the agreed plot ratio of 8. Additionally, it was claimed, ECA failed to advise Wharf to take full advantage of the hotel bonus in respect of the two hotels, the Marco Polo and the Prince, which were finally incorporated in the development.

Godfrey J.'s clear finding of fact, already referred to, that the architects did nothing to justify the reproach that they exhibited any want of reasonable skill and care in the discharge of their duties was reached after

receiving oral and documentary evidence with regard to both dedication and hotel bonus and after hearing argument from counsel directed to this issue. Neither matter was overlooked and both are, indeed, specifically referred to in his judgment although he did not refer to them individually when he came to state his conclusion. The appellants have, therefore, to face in relation to this issue the same difficulty as that which confronts them in relation to ECA's advice regarding Circular 58 and its consequences.

They seek, however, to escape from the difficulty by reference to the judge's rejection of Wharf's claim in negligence with regard to the exemptions. It is pointed out that the evidence relating to the two alternative views as to correct architectural practice was given solely in relation to the omission to claim the full benefit of all possible "exemptions" in the strict sense of that word and it is said that, in reaching his conclusion on this part of the case, Godfrey J. was using the word "exemptions" as covering not only exemptions strictly so called but also the hotel and dedication concessions. The consequences of this are, it is said, first, that the finding referred to above did not and could not have been intended to relate to the omission to claim hotel and dedication concessions and, secondly, that, since the evidence relied on by the judge in reaching his conclusion as to "exemptions" did not relate to these concessions, there was, as regards them, no sustainable finding of fact. In relation to them, therefore, the finding of the Court of Appeal was not, it is said, a concurrent finding but one based on a misunderstanding and a misinterpretation of the judge's judgment.

It has to be said that the argument derives some support from the loose way in which, in that part of his judgment in which Godfrey J. dealt with the assessment of damages, he used the word "exemptions" and from the way in which Kempster J.A. referred to this part of Wharf's claim in the Court of Appeal. After rejecting Wharf's claim on liability, Godfrey J. went on to consider the measure of damages if his conclusion should be wrong. In relation to this part of the claim he said:-

> "If the clients had succeeded on the claim about exemptions but had otherwise failed, I would have held that exemptions could have been claimed in relation to (1) non-accountable areas; (2) hotel bonus; and (3) dedication bonus as follows ..."

Then, after stating his reason for excluding from the area which, on the hypothesis that he was in error as to liability, should have been claimed as additional floor area a semi-basement which, in his view, could not in any event have qualified as a non-accountable area, he continued:-

"Subject to this point, I would have accepted the clients' case about exemptions in its entirety."

The appellants' primary submission about this is that it not only demonstrates that the hotel and dedication concessions were not embraced in Godfrey J.'s general finding as to liability but is in fact, as regards this part of the case, a specific finding of fact in their favour. Their Lordships find themselves wholly unconvinced by this argument. In the context in which it appears it is clear that the judge's reference to the "acceptance" of the clients' case is simply emphasizing the contrast between the concessions which were assumed to be capable of being claimed and the semi-basement area to which he had just referred and which clearly was not.

On the broader question, however, of whether the passage referred to shows that the judge had throughout been using the word "exemptions" to cover all areas which, whether by concession or otherwise, might have been left out of account in calculating gross floor area for purposes of compliance with plot ratio restrictions, the appellants' contention derives some support from the judgment of Kempster J.A. in the Court of Appeal. He said:-

> "The issue before us on the plaintiffs' alternative claim is whether or not the judge was right in holding that the defendants were under no duty to utilise all possible bonuses, concessions carry-overs and exemptions. He held as he did on the basis that one of several equally acceptable professional approaches to these questions, including that for which the plaintiffs contended, was to claim and utilise only such carry-overs, bonuses and exemptions as were needed in order to ensure that the design approved by the clients might be realised in terms of steel and concrete as quickly as possible. This, Mr. Penman stated, was what the defendants did. Mr. Haffner adopting, I think, the same broad brush as the judge when using the word 'exemptions' in answer to questions from the Court he said that this 'might well be described as the more normal practice'. Mr. O'Sullivan, called by the plaintiffs, said, at least in relation to exemptions in the strict sense of that word, that such an approach would not be fundamentally wrong. In this regard also the judge was entitled to rely upon the expert evidence to which he specifically referred."

By contrast, Fuad V.-P. with whom Clough J.A. agreed, was satisfied that Godfrey J.'s finding (which he upheld) in the passage already referred to, that Wharf had got the development that it wanted, applied as much to the alleged negligent failure to claim hotel and dedication concessions as it did to Wharf's principal case as regards circular 58. He said:-

> "I am not persuaded that the judge overlooked these matters. There was much evidence and argument about them. He had discussed the availability of hotel bonus earlier in his judgment and he later assessed the damages he would have awarded in respect of both hotel bonus and dedication bonus. As I understand the pattern of his judgment, when he said, at the foot of page 96: 'I return now to the matter of exemptions ...', he was indicating that this was the only issue on liability left to be determined. I have already set out the passage on the same page which occurs immediately before that observation and, which, it will be recalled, concluded with these words: '... and it wanted the sort of development which would do it credit even if it involved (to borrow the words of Mr. McLuskie) 'by Hong Kong standards a lavish use of land'. In all this Wharf, with the assistance of the architects, succeeded'. I am confident that this important finding, which was to the effect that Wharf had got what they wanted, embraces every 'lost' area except exemptions properly so called."

Their Lordships accept and adopt the view of the matter taken by the majority of the Court of Appeal. Whilst it is true that, when he came to assess damages, the trial judge used the word "exemptions" in a loose sense as embracing more than merely statutory exemptions in the strict sense, in this part of his judgment, he was concerned to assess a single separate sum of damages attributable to the whole of the alternative claim which had been advanced in paragraph 28.27 of the amended Statement of Claim, in which the original claim related to exemptions simpliciter, subsequently defined, by amendment, as "including what are sometimes referred to as 'concessions'". In that part of his judgment, however, in which he was concerned with liability and which he had expressly set aside for the consideration of exemptions, it is to be noted that the judge expressly referred only to those passages in the evidence in which the witnesses were dealing, in terms, with exemptions in the strict sense. The whole thrust of the argument was directed to what should or should not be claimed at the stage of the preparation and submission of plans and designs and being clearly available for exemption under the regulations as interpreted by the Building Authority and the judge referred in terms to the evidence of Mr. Haffner and Mr. O'Sullivan which was directed specifically to this point. Quite apart from the unlikelihood of a judge of Godfrey J.'s ability and experience either overlooking an obvious distinction or failing to consider a matter upon which he had received a considerable body of evidence and upon which Mr. Penman had been extensively cross-examined, the express references to the evidence of the two principal expert witnesses clearly shows that in this part of his judgment he was directing his mind only to exemptions properly so called.

Their Lordships are unpersuaded as was Fuad V.-P. that the matter of the hotel and dedication concessions was either confused with exemptions in the strict sense or was overlooked and they share the view of the majority that Godfrey J.'s earlier finding that Wharf had got what they wanted embraced, as Fuad V.-P. expressed it, every "lost" area except exemptions properly so called.

There was, moreover, ample evidence upon which that finding was open to the judge. As regards dedication, Mr. Madar had given evidence of the importance which Wharf attached to preventing the creation of public rights of passage over the "praya" on the seaward side of the development. No evidence was adduced by Wharf to suggest that there was ever any willingness to dedicate any part of the area of set-back on the Canton Road side to the public and Mr. Madar's evidence was that "this idea of dedicating is something that the Wharf Company never wanted to dedicate anything to anybody as long as it can get away with it (sic). They don't believe in giving up anything". In the end the submission as to dedication came down to this, that since the public would in any event have access to the set-back area, they would, in the fullness of time, acquire prescriptive rights so that the area might just as well be dedicated. That is an entirely unproven assumption which their Lordships are not prepared to accept without demonstration. They have not been referred to the law of Hong Kong as regards the prescriptive acquisition of public rights nor have they been told whether there are in the Colony any statutory provisions similar to those of section 31 of the English Highways Act 1980.

As regards the hotel concessions, it is clear that Wharf had been made aware of the existence of these at an early stage and Mr. Madar's evidence was that they were well-known in any property development context and that "anybody can follow the provisions of the regulations, should be able to work them through (sic)". As Fuad V.-P. observed, there was a mass of documentary evidence which indicates that Wharf knew all about hotel bonus. While it is true that Mr. Penman's evidence displayed a degree of confusion about how the concessions and the formula outlined in circular 48 would apply in relation to the adaptation to hotel use of an existing envelope in a mixed and complex development and, in particular, whether they could be employed without alteration of the existing envelope - a matter upon which the circular itself is far from clear - it is also fair to say that Mr. O'Sullivan's evidence was little more illuminating. Their Lordships remain entirely unpersuaded that the conclusion reached that ECA were not negligent in this respect, that Wharf were well aware of the concessions and that, with that knowledge, they got the development that they wanted was unwarranted by the evidence.

Their Lordships acknowledge with gratitude the detailed and sustained arguments of counsel by which they have been assisted over the many days occupied by the hearing of this appeal. It would, indeed, be very surprising if in a development of the magnitude and complexity of Ocean City and Harbour City planned and executed over many years, it was not possible, with the benefit of hindsight and the reassessment of the balance of commercial, aesthetic and social considerations, to point to aspects of the development which might ideally have been better or more advantageously planned or pursued. But that is a long way from establishing negligence and breach of professional duty on the part of those who planned and executed it. Despite Mr. O'Brien's able and helpful submissions, their Lordships remain in the end entirely unconvinced that any grounds have been shown for departing from the ordinary practice of the Board in not disturbing the concurrent findings of Godfrey J. and the Court of Appeal.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before the Board.