

Privy Council Appeal No. 31 of 1994

Cinat Company Limited

Appellant

v.

The Attorney General of Hong Kong

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
15TH NOVEMBER 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD MUSTILL
LORD WOOLF
LORD LLOYD OF BERWICK
LORD NICHOLLS OF BIRKENHEAD

[Delivered by Lord Keith of Kinkel]

In May 1976 a company called Mai Lee Enterprises Limited ("Mai Lee") owned an area of land lying between King's Road and Electric Road in Hong Kong and extending to 27,825.49 square feet. Included in it at the eastern end was a triangular area of 9,336 square feet adjoining King's Road. This area was reserved for the purpose of a Mass Transit Railway substation under the Town Planning Ordinance Cap. 131. Mai Lee desired to build on its land and proposed to the Building Authority that the triangular area should be included in the site area for the purpose of calculating site coverage and plot ratio. The Building Authority acceded to this and in due course Mai Lee submitted plans for a building development in which the triangular area was shown as included in the site but as remaining unbuilt on. The plans were approved by the Building Authority and the development, known as Carson Mansion, was completed in accordance with them, an occupation permit being granted on 28th June 1979. Carson Mansion used up, from the point of view of site coverage and plot ratio, the whole development potential, apart from 19 square feet, of the whole of Mai Lee's land including the triangular area. In the meantime, by Deed Poll dated 23rd May 1978, the triangular area had been divided off from the remainder of Mai Lee's land, and by

Agreement dated 2nd June 1988 it had been sold by a successor in title to Mai Lee to the present appellant for \$12 million. Subsequently the reservation of the triangular area for Mass Transit Railway purposes was withdrawn, because the intended route of the railway had changed, but not before an access shaft had been constructed on it.

On 28th September 1989 the appellant applied to the Building Authority for permission to construct a commercial building on the triangular area. This was refused on 23rd November 1989, on the ground that the permitted site coverage and plot ratio were exceeded on the plans submitted. A further application made on 15th August 1992, for permission to construct a 36 storey commercial/domestic building, was refused on 13th October 1992 on the ground that the permissible plot ratio and site coverage had been almost fully used up.

By originating summons dated 9th April 1992 the appellant applied for a declaration that the rejection of the building plans on 23rd November 1989 was unlawful. Later, on 1st December 1992, the appellant applied for leave to be granted for judicial review of the Building Authority's rejection of building plans on 13th October 1992. The proceedings were consolidated, and on 9th July 1993 Liu J. dismissed them with costs. An appeal by the appellant to the Court of Appeal was on 7th December 1993 dismissed by that court (*Macdougall V.-P., Bokhary and Mortimer JJ.A.*). The appellant now appeals to Her Majesty in Council.

The principal argument for the appellant is that the triangular area was not capable of being lawfully included in the site for the Carson Mansion development for two reasons: the first reason is said to be that a development site cannot include anything which is not to be within the curtilage of the buildings to be erected; the second reason is said to be that a development site cannot include an area which has been reserved by the Government under the Town Planning Ordinance for some particular purpose, the purpose in this case being that of the Mass Transit Railway. The first suggested reason is plainly unsound. "Site" is not defined anywhere in the Building Ordinance or in the Building (Planning) Regulations. Regulation 2 of the latter defines "Class A site", "Class B site" and "Class C site" by reference to the number of roads on which the site abuts, but that does nothing to cast light on the meaning of "site" as a general term. Regulation 20, dealing with permitted site coverage, lays down restrictions on the percentage part of the area of a site which may be covered by buildings. That makes clear the contemplation that some part of any development site will remain unbuilt on. Where a would-be developer owns a certain area of land in a particular locality there is nothing in the Ordinance or the Regulations to disentitle him from putting forward as the site of his proposed development either the whole or as much of the land as is required to enable him to obtain the site coverage and plot ratio which he desires. In order that he may do so

there must necessarily be some part of the land which will remain unbuilt on. There is no basis for assuming that the unbuilt on part is to be confined within some notional curtilage. In *Attorney General v. Cheng Yick Chi* (unreported) (Privy Council Appeal No. 32 of 1982 - Judgment delivered 21st June 1983) the relevant point at issue was whether or not an area which in the past had been dedicated to the public for purposes of passage was capable of being included in a site for the purpose of calculating site coverage and plot ratio. It was held that it was not. Lord Fraser of Tullybelton said, at pages 4 and 5 of the transcript:-

"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 thus recognised that a development site might include some particular area of land owned or controlled by the developer which was not intended to be built on but which was necessary to enable the proposed building to comply with the regulations. Here Mai Lee put forward as the site of the proposed development the whole of the land which it owned at this location. The proposed building was to be erected elsewhere than on the triangular area, but the triangular area had necessarily to be included to enable the proposed building to comply with the regulations. The Building Authority accepted the whole of the land as being the development site and it was in fact the development site.

As to the reservation for the Mass Transit Railway, the fact of the reservation did not have the effect that Mai Lee did not in 1976 own and control the triangular area. It was in a position to exclude others from the area. The use of it so as to utilise its site coverage and plot ratio potential for purposes of the Carson Mansion development was not inconsistent with the reservation. It may have been within the power of the Building Authority to refuse to allow the triangular area to be included in the development site, though that might have given rise to compensation problems. At all events the Building Authority did not do so. It is not at all clear what effect upon the construction of a Mass Transit Railway substation and access the inclusion of the triangular area in the development site might have had, but there are to

be noted the provisions of section 21(3) of the Mass Transit Railway Corporation Ordinance Cap. 270, namely:-

"The Building Authority may -

- (a) having regard to the exceptional nature of building or other works connected with the construction or operation of the railway; and
- (b) on such conditions as he may specify, either generally or in any particular case,

exempt from such of the provisions of the Building Ordinance as he thinks fit such of those works as he may specify, but save as aforesaid the Buildings Ordinance shall apply to any building or other works carried out by or on behalf of the Corporation."

Works connected with the construction of a substation and access for the railway might properly be regarded as peculiar to the railway and hence as being of an exceptional nature, and thus as qualifying for exemption from the regulations. Considerations as to the appropriate density for domestic and commercial buildings would obviously not apply to such works. So it was not necessarily to be taken that inclusion of the triangular area in the Carson Mansion site would prejudice the construction of the works, if and when it should take place.

It was argued finally for the appellant that in any event the triangular area in its hands was to be regarded as a site in its own right, and thus entitled to the site coverage and plot ratio provided for by the regulations. However, as Lord Fraser of Tullybelton recognised in the *Cheng Yick Chi* case, when once the development potential of an unbuilt on piece of land has been utilised for the purpose of calculating the site coverage and plot ratio of a permitted building, that potential is exhausted and cannot be relied on again. If it were otherwise any purchaser of the unbuilt on land, or even the original developer himself, would be in a position to claim that he was entitled to build on it in accordance with the regulations. That would defeat the whole purpose of the regulations, which is to secure that in a particular locality the density of commercial and domestic buildings is no greater than accords with the public interest. It is perhaps unfortunate that there is no public register in Hong Kong such as would enable potential purchasers of vacant land to ascertain whether or not its development potential has been used up as has happened in the present case. The consequences of that have to some extent been mitigated by the assurance given by the Building Authority that any inquiry made to it about the possibility of such a state of affairs in relation to particular land will result in appropriate information being given. It is clearly desirable that the availability of this service should become widely known to property interests in Hong Kong.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs before the Board.