

17/83

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

THE ATTORNEY GENERAL OF HONG KONG Appellant

- and -

FIREBIRD LIMITED Respondent

CASE FOR THE APPELLANT

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1. This is an appeal by leave of the Court of Appeal of Hong Kong given on the 19th day of March 1982 from an order of the Court of Appeal of Hong Kong (Leonard, V.P., Cons and Zimmern, J.J.A.) dated the 27th day of November, 1981 allowing with costs the Respondent's appeal from an Order of Bewley, J. in the High Court of the Supreme Court of Hong Kong dated the 8th day of July, 1981 whereby he dismissed the application for declarations in the Respondent's Originating Summons. The Court of Appeal granted the first declaration sought by the Respondent in the Originating Summons and refused the second.

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P.71

pp.36 and 37

pp.18 and 19

pp.36 and 37

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2. The declarations sought by the Respondent were:-

"(1) A declaration that on the true construction of the Buildings Ordinance, Cap.123 the Building (Planning) Regulations and the Building (Planning) (Amendment) Regulations, 1979, the Building Authority was not on October 19, 1979, empowered to reject the plans for building works at New Kowloon Inland

pp.1 and 2

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Lot Nos. 3688, 3689, 3690, 3691, 3692 and 3693, 26-36 Shun Ning Road, Kowloon submitted by the Plaintiff on September 8, 1979, on the ground that the site was a Class A site and not a Class C site within the meaning of regulation 2 of the Building (Planning) Regulations.

- (2) A declaration that the purported refusal by the Building Authority on October 19, 1979, of the said plans on the ground that the site was a Class A site and not a Class C site was null and void and of no effect." 10

p.50, line 3. The Respondent in the Court of Appeal 43 to p.51, sought a declaration in terms of (1) in paragraph line 1 2 hereof, and did not argue for declaration (2).

4. The following facts in this case were not in dispute :-

p.72, lines 27-29 (a) The Respondent is the leasehold owner of New Kowloon Inland Lots Numbers 3688, 3689, 3690, 3691, 3692 and 3693 known as numbers 26-36 Shun Ning Road, Kowloon. 20

p.20, lines 24-28; p.72, lines 30-38; pp.77-84 (b) The Respondent submitted building plans to the Building Authority pursuant to Section 14 of the Buildings Ordinance Chapter 123 Laws of Hong Kong on the 8th day of September 1979 for a composite building fourteen storeys in height with shops on the lower floors and residential apartments on the upper floors. 30

p.38, lines 24-27; p.77 (c) The Respondent's site fronts onto Shun Ning Road which is a road of over 4.5 metres in width, namely 18.29 metres wide. The site also adjoins on two sides service lanes each of which is less than 4.5 metres in width, namely 3.05 metres wide in each case. 40

p.38 line 31 (d) The plans for the building proposed to be erected on the Respondent's site were prepared on the assumption that the site was a Class "C" site under the Building (Planning) Regulations made under the Buildings Ordinance, Cap.123.

- (e) On the day that the Respondent submitted its plans, namely the 8th day of September, 1979 the Building (Planning) Regulations provided, inter alia:-

Regulation 2 :

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

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

"Class C site" means a corner site that abuts on 3 streets and also means an island site.

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

"Street" is also defined in the Buildings Ordinance as :

20 (" "street" includes the whole or any part of any square, court or alley, highway, lane, road, road-bridge, footpath, or passage whether a thoroughfare or not." ).

Regulation 16 (which was and is concerned with maxima of permitted height of proposed buildings) :-

30 " (4) For the purposes of this regulation - .... "street" means a street or service lane at least 4.5 m wide"

Regulation 19 :

40 "Where a site abuts on a street less than 4.5 m wide or does not abut on a street, the height of a building on that site or of that building, the site coverage for the building or any part thereof and the plot ratio for the building shall be determined by the Building Authority."

- (f) Section 14 of the Buildings Ordinance provides:-

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- "(1) Save as otherwise provided, no person shall commence or carry out any building works or street works without having first obtained from the Building Authority -
- (a) his approval in the prescribed form of documents submitted to him in accordance with the regulations; and 10
  - (b) his consent in the prescribed form for the commencement of the building works or street works shown in the approved plan.
- (2) Neither the approval of any plans nor the consent to the commencement of any building works or street works shall be deemed - 20
- (a) to confer any title to land;
  - (b) to act as a waiver of any term in any lease or licence; or
  - (c) to grant any exemption from or to permit any contravention of any of the provisions of this Ordinance or of any other enactment."
- (g) Section 15 of the Buildings Ordinance provides :- 30
- "(1) Where an application is made in the prescribed form for the Building Authority to approve plans or to consent to the commencement of building works or street works, he shall be deemed to have given his approval or consent, as the case may be, unless within the period prescribed by the regulations he has notified his refusal to give his approval or consent, as the case may be, in writing setting out the grounds for such refusal, and where one of such grounds is 40

that further particulars and plans are required, he shall specify such plans and particulars.

10 (2) The grounds set out for any refusal to approve plans shall not be treated as being exhaustive, and no such refusal shall be construed as implying any approval of any part of such plans."

(h) Section 16(1) of the Buildings Ordinance provides :-

"(1) The Building Authority may refuse to give his approval of any plans of building works where -

20 ... (b) the plans are not endorsed with or accompanied by a certificate from the Director of Fire Services certifying either -

30 (i) that, having regard to the purpose to which the building is intended to be put (which purpose shall be stated in the certificate), no fire services installation or equipment is necessary in connection with the building that will result from the carrying out of the building works shown on the plans; or

40 (ii) that the plans have been examined and are approved by him as showing all such fire service installations and equipment as in his opinion, having regard to the purpose to which the building is intended to be put (which purpose shall be stated in the certificate), comprise the minimum fire service installations and equipment necessary for

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such building in accordance with a Code of Practice published from time to time by the Director of Fire Services;

...(d) the carrying out of the building works shown thereon would contravene the provisions of this Ordinance or of any other enactment, or would contravene any approved or draft plan prepared under the Town Planning Ordinance." 10

(i) The Building (Planning) Regulations were amended by Order of the Governor in Council dated the 9th day of October 1979 and published in the Hong Kong Government Gazette on the 12th day of October 1979. The effect of the amendment was to revoke in Regulation 2(1) the definitions of Class A, B and C sites and to substitute new definitions therefor. 20

The substituted provisions provided:-

"Class A site" means a site, not being a Class B site or Class C site, that abuts on one street not less than 4.5 m wide or on more than one such street; 30

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

"Class C site" means a corner site that abuts on 3 streets none of which is less than 4.5 m wide.

pp.75 and  
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(j) By letter dated the 19th day of October, 1979 the Building Authority notified the Respondent that he had refused to approve its plans on the grounds that : "elementary checking has disclosed that:- 40

(a) The permitted plot ratio and site

coverage are exceeded - Regulation 20 of Building (Planning) Regulations. In this connection, please note that the above site is a Class A site within the meaning under Regulation 2(1) of the Building (Planning) Regulations as amended by Building (Planning) (Amendment) Regulations 1979.

- 10 (b) The plans are not endorsed with or accompanied by a certificate from the Director of Fire Services - Section 16(1)(b) of the Buildings Ordinance.

A copy of comments from the Director of Fire Services is enclosed herewith, and your proposal therefore is disapproved."

- 20 5. The main dispute between the parties is whether or not the Building Authority was entitled in law to refuse to approve the plans on the basis of the amended Regulations or whether he was obliged to approve or refuse those plans on the basis of the law prevailing on the date that the plans were submitted on the 8th of September, 1979. The other main dispute is upon the question of the date that the amended Regulations took effect.

- 30 6. Regulation 30(3)(a) of the Building Administration Regulations provides:-

"(3) For the purposes of section 15 of the Ordinance, the period after which the Building Authority shall be deemed to have given his approval of plans submitted to him shall be -

- 40 (a) in relation to plans which are submitted for the first time to the Building Authority for approval, 60 days from the date on which the plans were submitted."

7. Section 38 of the Buildings Ordinance gives power to the Governor in Council to make regulations for a number of matters, and subsection 5 thereof provides:-

"Such regulations shall be published once in

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the Gazette at least 3 weeks before coming into operation. Provided that where the Governor in Council deems it expedient such publication may be dispensed with."

8. Section 39 of the Buildings Ordinance provides:-

"(1) Any regulations made under this Ordinance may provide that where plans of building works, street works, lift works or escalator works are submitted to the Building Authority within such period from the coming into operation of the regulations as may be prescribed therein, he may approve any such plans which comply with the provisions of the law before the coming into operation of such regulations and may give consent to the commencement of the works shown therein; and the provisions of sub-section (2) shall apply to such works and to any building which may be erected, any street or access road which may be formed, constructed or laid out or any lift or escalator installed in consequence thereof. 10 20

(2) Where at the date of the coming into operation of any regulations made under this Ordinance any building works, street works, lift works or escalator works are being carried out or consent to their commencement has been given the provisions of the law prior to the coming into operation of such regulations shall apply to such works:- 30

Provided that in the exercise of his powers under Section 20 the Building Authority may require compliance with such regulations coming into operation since the giving of his consent to the commencement of the works in respect of which he is exercising such powers." 40

9. Section 3 of the Interpretation and General Clauses Ordinance Chapter 1 provides, inter alia:

" "Ordinance" and "enactment" mean -

- (a) any Ordinance enacted by the Governor by and with the advice and consent of the Legislative Council;
- (b) any proclamation made by the British Military Administration on or between the 1st September 1945 and the 1st May 1946; and
- (c) any subsidiary legislation made under any such Ordinance or proclamation."

10 and Section 19 provides :

"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

and Section 20 provides :

"Every Ordinance shall -

- (a) be published in the Gazette; and
- 20 (b) come into operation on the expiration of the day next preceding the day of such publication or, if it is provided in the Ordinance or in some other law that such Ordinance shall come into operation on some other day, then it shall come into operation on the expiration of the day next preceding such other day."

and Section 23 provides :

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

- (a) revive anything not in force or existing at the time at which the repeal takes effect;
- (b) affect the previous operation of any Ordinance so repealed or anything duly done or suffered under any Ordinance so repealed;
- 40 (c) affect any right, privilege, obligation or liability acquired, accrued or

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incurred under any Ordinance so repealed;

- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any Ordinance so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Ordinance had not been passed."

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10. The full text of the Building (Planning) (Amendment) Regulations 1979 provides:-

L.N. 249 of 1979

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BUILDINGS ORDINANCE

(Chapter 123)

BUILDING (PLANNING) (AMENDMENT) REGULATIONS  
1979

Made by the Governor in Council under section 38 and in pursuance of the power conferred by the proviso to section 38(5)

- 1. These regulations may be cited as the Building (Planning) (Amendment) Regulations 1979.
- 2. Regulation 2(1) of the principal regulations is amended by deleting the definitions of "class A site", "class B site" and "class C site" and substituting the following -

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"Class A site" means a site, not being a class B site or class C site, that abuts on one street not less than 4.5 m wide or on more than one such street;

"Class B site" means a corner site that abuts on 2 streets neither of which is

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less than 4.5 m wide;

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

J. A. FROST,  
Clerk of Councils.

COUNCIL CHAMBER,  
9 October 1979

Explanatory Note

- 10           The Building (Planning) Regulations classify sites by reference to the streets on which sites abut. These amending regulations make clear that in classifying sites for the purposes of the regulations streets of less than 4.5 m wide are to be disregarded.
11. The questions raised by this appeal are :-
- (a) On what date did the Building (Planning) (Amendment) Regulations, 1979 come into effect?
- 20           (b) Did the Respondent, on the 12th of October, 1979 (if that be the date the amending Regulations come into force) or earlier (if the date of the Regulations taking effect be earlier) have an accrued right to have its plans approved by the Building Authority?
- (c) Would the relief prayed for, in the form in which it is sought, serve any useful purpose or should it be refused in the discretion of the Court since the Building Authority refused his approval of the Respondent's plans on two grounds, one of which has not been challenged?
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12. In the High Court and the Court of Appeal the Appellant argued that the Building (Planning) (Amendment) Regulations, 1979 were only declaratory of the existing law and that the decision of Trainor, J. in Cheong Ming Investment Coy v The Attorney General (unreported) (High Court Action No. 250 of 1979, judgment dated 6th of July, 1979) which decided otherwise was incorrectly decided. The Appellant will not
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pursue this argument before the Judicial Committee.

13. In outline, the submissions made on behalf of the respective parties were :-

(a) The Appellant

- (i) The Building (Planning) (Amendment) Regulations, 1979 came into force on the 12th of October, 1979. The Governor in Council exercised his powers under the proviso to section 38(5) of the Buildings Ordinance to dispense with publication "at least three weeks before (the) coming into operation (of the Regulations)." The words "such publication" in the proviso refer to publication three weeks before the coming into force of the Regulations. Even if he was empowered to dispense with publication altogether, the Governor in Council did not on this occasion purport to do so as the Regulations were published in the Gazette; 10  
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- (ii) Whether the 1979 amending Regulations changed or declared the existing law, the Appellant did not, on the 12th of October, 1979, have any "accrued rights" for the purposes of section 23(c) of the Interpretation and General Clauses Ordinance; 30
- (iii) The "accrued right" contended for by the Respondent was actually an accrued right to have its plans approved on the basis of the law prevailing on the day the plans were submitted for approval; 40
- (iv) Under section 15 of the Buildings Ordinance plans can only be approved either by express approval by the Building Authority or by operation of law after the expiry of the statutory time limit, imposed by Regulation 30(3) of the Building (Administration) Regulations, of

sixty days. As neither event had occurred on the 12th of October, 1979 the Respondent's plans had not been approved so that no accrued right then existed. The Respondent's claim of entitlement to have the plans "considered" on the basis of the then law existing on the 8th of September, 1979 is tantamount to a claim of entitlement to have the plans approved on that basis;

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(v) No issue of retrospectivity of legislation arises here as the amending Regulations took effect from the 12th of October and governed all plans not approved before that date;

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(vi) On the 12th of October, 1979 the decision on whether to approve or disapprove the Respondent's plans was "open and unresolved" and "rested in the future"; the submission of the plans for approval on the 8th of September, 1979 was but a "procedural step taken prior to the repeal" which did not of itself create rights : Director of Public Works v Ho Po Sang and Others /1961/ A.C. 901 (P.C.); In re Joseph Suche and Co.Ltd. (1875) 1 Ch. D. 48;

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(vii) Section 23(e) of the Interpretation and General Clauses Ordinance is not applicable as there was no existing right to form the basis of an "investigation" (etc.): Director of Public Works v Ho Po Sang and Others /1961/ A.C. 901, at 922;

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(viii) The 1979 amending Regulations were merely declaratory of the then existing law and did not change it. Cheong Ming Investment Coy Ltd. v The Attorney General (supra, para 12) was incorrectly decided;

(ix) In any case the Respondent's plans were refused approval on two

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grounds, firstly because the site was a Class "A" site and secondly because the plans were not endorsed with or accompanied by a certificate from the Director of Fire Services which is a ground for refusal under Section 16(1)(b) of the Buildings Ordinance. The Respondent has only challenged the first ground of refusal but not the second. The Court should refuse to grant the declaration(s) sought as no useful purpose would be served by making it.

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(b) The Respondent (In the Court of Appeal)

(i) The Building (Planning) (Amendment) Regulations came into force three weeks after their publication in the Gazette, namely on the 31st of October, 1979 which was after the Building Authority's purported refusal of approval of the plans on the 19th of October, 1979. Thus the refusal of approval was invalid;

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(ii) Section 38(5) of the Buildings Ordinance allows the Governor in Council to dispense with publication of new Regulations. If he does not dispense with publication then the Regulations come into effect three weeks after publication;

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(iii) Alternatively, if the amending Regulations took effect from the 12th day of October, 1979, they did not have retrospective effect and the Respondent was entitled to have his plans considered under the law prevailing on the 8th of September, 1979. The amending Regulations did not take away the Respondent's right to have his case governed by the old Regulations because of section 23 of the Interpretation and General Clauses Ordinance;

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(iv) The Respondent on the 8th of September, 1979 asserted its right to develop its site as a Class "C" site which thereupon became an accrued right to approval so far as site classification (only) was concerned. The Building Authority could not thereafter reject the Respondent's plans on the basis that it had a site other than a Class "C" site

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Hitchcock v Way (1837) 112  
E.R. 360  
In re Joseph Suche and Co.Ltd.  
(1875) 1 Ch. D. 48  
The Colonial Sugar Refining Co.  
Ltd. v Irving /1905/  
A.C. 369  
Hamilton Gell v White /1922/  
2 K.B. 422  
Director of Public Works v Ho  
Po Sang /1961/ A.C. 901  
Free Lanka Insurance Co.Ltd. v  
Ranasinghe /1964/ A.C.541

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(v) The Building (Planning) (Amendment) Regulations, 1979 amended the pre-existing law to overcome the decision of Trainor, J. in Cheong Ming Investment Coy.Ltd. v The Attorney General (supra, paragraph 12) which case was correctly decided;

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(vi) The "fire services certificate" point is a makeweight. The Attorney General should confirm or deny the Respondent's Counsels' assertion that the Building Authority would not have rejected the plans solely on this ground. The first declaration sought by the Respondent should be granted if his case is made out as the Respondent considers that it will be helpful and it can do no harm to the Building Authority.

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14. In his judgment on the 8th day of July, 1981 pp.20-32  
Bewley, J. held that :-

(a) The decision of Trainor, J. in Cheong

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pp.22-26 p.25 lines 1-9	<u>Ming Investment Coy Ltd. v The Attorney General</u> was correct - Regulation 23(1)(c) of the Building (Planning) Regulations only governs the word "street" in Regulation 23(1)(a);	
p.26	(b) The discretion of the Governor in Council to dispense with publication of the Building (Planning)(Amendment) Regulations, 1979 under section 38(5) of the Buildings Ordinance was a discretion to dispense with publication "at least 3 weeks before coming into operation". The Governor in Council here dispensed with such publication and brought the Regulations into effect forthwith;	10
p.26, lines 41-44	(c) The Building (Planning)(Amendment) Regulations 1979 were not retrospective to a date, prior to their introduction, when pending plans were lodged;	20
p.31, lines 32-35	(d) "The present case has an affinity with <u>Ho Po Sang</u> in the sense that the latter was dependent upon further action by another person, the Governor in Council";	
p.31, lines 37-45	(e) "It seems to me, bearing the above principles in mind, that the scrutineering process required of the Building Authority, followed by the exercise of his discretion, reduced the plaintiff's application, if not to a mere hope or expectation, at least to something short of an accrued right, as determined in the cases cited. The applicant is not entitled to approval, until the Building Authority has examined the application, with reference to the listed grounds of refusal";	30 40
p.31, line 46 to p.32, line 9	(f) The Respondent could not know whether his plans complied with all the other requirements that must be considered by the Building Authority;	
p.32	(g) Section 39(1) of the Buildings Ordinance allows the Governor in Council, when he sees fit, to exempt pending applications for approval of	

plans from the effect of new regulations which change the law.  
"This is a matter of policy."

p.32,line 36

(h) "For these reasons both declarations are refused with costs."

p.32,line 39

15. Section 39(1) of the Buildings Ordinance was not invoked by the Governor in Council when the Building (Planning)(Amendment) Regulations, 1979 were made.

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16. By a Notice of Appeal dated the 17th day of August, 1981 the Respondent appealed to the Court of Appeal in Hong Kong. In the Notice of Appeal the Respondent took issue with Bewley J.'s decision that the amending Regulations took effect on the 12th of October, 1979 and suggested that : "as a matter of law the (Respondent) was entitled to have the said plans considered under the law prevailing at the time they were submitted to the Building Authority for his approval."

pp.33 and 34

p.33,line 30

p.34,line 1

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17. The Appellant filed a Respondent's Notice dated the 21st August, 1981 contending that the judgment of Bewley, J. should be affirmed on additional grounds, namely :-

p.35

(a) the amending Regulations were declaratory of the existing law and did not amend it, and

p.35,line 20

(b) it would be inefficacious to make the declarations sought as the refusal of approval of the plans would stand nonetheless because of the Fire Services certificate objection.

p.35,line 30

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18. The appeal came before Leonard, V.-P, Cons and Zimmern, J.J.A. Judgments in the Court of Appeal were delivered on the 27th of November, 1981. The appeal was allowed and the first declaration sought by the Respondent was granted, with costs in both Courts.

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19. The first judgment was delivered by Leonard V.-P. who held that :-

(a) The amending Regulations did not come into force on the 12th of October, 1979, as contended by the Appellant, nor on the 31st of October, 1979, as

p.40,line 35

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- p.40,  
line 31
- p.40,  
line 12
- p.40,  
line 16
- p.47,  
lines 16-23
- p.47,  
line 24
- p.40,  
line 42
- p.41,  
line 16
- p.41,  
line 42
- contended by the Respondent. They come into force on the 9th of October, 1979. The only power conferred by the proviso to section 38(5) of the Buildings Ordinance is a power to dispense with publication (simpliciter). That power was exercised here by the Governor in Council so that the Regulations come into force immediately they were made, namely on the 9th of October, 1979. The subsequent publication of the Regulations did not alter the date of their coming into force.
- (b) Cheong Ming Investment Co.Ltd. v The Attorney General was correctly decided. Regulation 23(1)(c) of the Building (Planning) Regulations governs "street" in Regulation 23(1)(a). At the time the Respondent submitted its plans for approval its site was a Class "C" site.
- (c) "The trial judge held that the new regulations were not retrospective to the date when pending applications were lodged, The (Appellant) does not challenge this finding by a respondent's notice and I see no reason to differ from it."
- (d) Section 16 of the Buildings Ordinance sets out 16 specified grounds for refusal of approval of plans. As the Building Authority is under a duty to enforce the Ordinance he must reject any plans which contravene the Ordinance: Section 16(1)(d).
- (e) "Under the <sup>New</sup> Regulations (the site~~s~~ became) a class "A" site and lost its favourable site coverage and plot ratio. When seeking to determine the nature of the (Respondent's) rights when he submitted the plans it is necessary to bear in mind that he was the owner of a site the value of which would vary in the open market depending upon whether it was a class A or a class C site. For the owner of a class C site had the right to develop it (subject to the approval of his plans) in a more advantageous

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manner than if it were a class A site."

10 (f) "The effect of submitting plans is to set on foot an enquiry by the Building Authority into sixteen matters ... He was obliged to refuse at the time of the submission of the plans if the site was in law a class A site but could not properly have refused for that reason if it was a class C site." p.42,line 3

20 (g) "I consider that in undertaking the laborious and not inexpensive process of having plans prepared and submitted for approval the appellant was asserting a right attaching to his ownership of the site so that the right became an accrued right and the Building Authority incurred an obligation not to reject plans on the ground that they were unsuitable for a class A site if they had been properly prepared and submitted when the site was a class C site." p.42,line 16

(h) The considerations applicable in D.P.W. v Ho Po Sang were quite different. p.42,line 24

30 (i) "In our case the Building Authority had to conduct an investigation into the question whether the appellant should have his plans passed after they had been submitted. Adequately to do so he had to consider whether the site involved was a class C site. This consideration was in my view an investigation in respect of a right given under the original Regulations. The amending Regulations took away this right. As I see it in each particular case that right given by the original Regulations accrued to a developer when he submitted plans, for the site then either was or was not so classified by the definition of "class C site" and plans to be submitted under the Regulations would have to be worked out (on that basis)." p.43,line 39

40 (j) "The investigation was an investigation "in respect of any such right" and because of paragraph (e) p.44,line 1

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of Section 23 the right was "unaffected and preserved". The investigation carried out by the Building Authority could not change the classification of the site ... "

p.44,  
line 10

(k) "It is true that the investigation was also to decide whether the plans should be approved but to determine that an investigation in respect of the right to enjoy a class C site was first necessary. I would, therefore, hold that the (Respondent) was entitled to the benefit of Section 23 of the Interpretation Ordinance."

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p.42,  
line 12

(l) "On a strict reading of the section (Section 16 of the Buildings Ordinance) he (the Building Authority) may also have been obliged to refuse if a certificate from the Director of Fire Services was not forthcoming, I will deal with this later."

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p.47,  
line 37

(m) The trial judge does not deal with the fire services certificate point, possibly because Counsel for the Respondent remarked that the certificate was a formality and the Building Authority would not require a new application for approval in cases which otherwise complied with the Regulations. Counsel for the Appellant did not confirm or deny this assertion.

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p.47,  
line 46

p.48,  
line 4

p.48,  
line 20

(n) "In my view he (the Respondent) owned a class C site and had an accrued right to have his application considered on that basis. The Building Authority denied that his site was a Class C site and denied that he had that accrued right. I think the denial entitles him to a declaration."

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20. Cons, J.A. also allowed the appeal of the Respondent and granted the first declaration sought. He held that :

p.50,  
line 45

(a) "Both (declarations sought) were to much the same effect and before us

Counsel is content to seek only the first."

- 10 (b) On the 9th of September, 1979 the Respondent's site was a class "C" site. Trainor, J. in Cheong Ming Investment Co.Ltd. v The Attorney General, and Bewley, J. below were correct to hold that Regulation 23(1)(c) of the Building (Planning) Regulations only applied to "street" in Regulation 23(1)(a). p.52, line 43  
p.52, lines 33-45
- 20 (c) The amending Regulations come into effect on the 9th of October, 1979. "If when the Governor in Council dispenses with the publication normally required, the regulations come into effect immediately, that effect cannot be retrospectively removed or stayed because the Governor in Council later gives notice of what he has already done." p.53, line 26
- 30 (d) "There can be no doubt that the decision of Bewley, J. in the present instance was correct if the only right which could have accrued to the Plaintiff's company was - as Counsel for the Attorney insists - a right to have its plans totally approved. That is squarely within the decision of Ho Po Sang." p.55, line 45
- (e) The Respondent has not sought to establish such a right but rather a right to have the plans considered on the basis that the site is a class "C" site, as it was when the plans were submitted. On the 8th of September, 1979 the Respondent did know that it had a Class "C" site. p.56, line 4  
p.56, line 11
- 40 (f) "The Authority was bound by those Regulations as much as was the plaintiff's company. Regardless of how he might exercise his discretion in relation to other matters which he had to consider, the Authority had no discretion whatsoever in relation to the class of site. In that particular respect, the company therefore did have an accrued right. That is all that is claimed." p.56, line 17

RECORD

p.56, lines  
25-39

(g) The Respondent merely seeks to have the Building Authority's miscategorisation of its site corrected, no more.

p.50, line  
40 to p.57,  
line 15

(h) Bewley, J. appears to have misread Section 39(1) of the Buildings Ordinance which only applies to plans submitted after a regulation has come into operation.

p.57, line  
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(i) "Section 14 deprives a person of his natural right to build what he likes on his own land, but it gives him a right to build to particular dimensions. Those dimensions are not, except in Regulation 19 cases, fixed at the discretion of the Authority. They are predetermined by the Regulations, that is, by the classification of the site in conjunction with the scheduled table. They do not stem from the exercise of a discretion, as did the Rebuilding Certificate in Ho Po Sang.

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It may be that on consideration of plans based on those predetermined dimensions the Authority will have good cause to reject them. And it may be that in some cases the exercise of that power will in fact result in a further restriction upon size. But that is a different question. The Authority has no right to interfere directly. The original dimensions are something given to the owner by law. If he asserts his claim before the law is changed, then in my view he has "accrued right" within the Interpretation Ordinance. With respect to the learned Judge I think he was wrong on this point."

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p.58, line  
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(j) "Counsel for the plaintiff's company is confident that if the declarations were granted the plaintiff's company would have no substantial difficulty in resolving the question of fire precautions or any other matter causing anxiety to the Authority. For my part I am prepared to let the company try."

21. Zimmern, J.A. also allowed the appeal of the Respondent and granted the first declaration sought. He held that:

(a) The amending Regulations changed the pre-existing law under which the Respondent had, prior to the 12th of October, 1979 a class "C" site. p.62,line 20

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(b) "The amending Regulations were expressly made under Section 38 and were so gazetted. I interpret that proviso to empower the Governor in Council, if he thinks it expedient in any given case, to dispense with publication in the Gazette at least three weeks before coming into operation. The proviso does not empower dispensation of any publication but only "such publication" under Section 38(5). The Governor in Council did so dispense with such publication. Accordingly I find the amending regulations come into effect on the 12th October, 1981." p.62,line 45

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(c) "... I am quite unable to give Regulation 23(1)(c) that element of elasticity by which it can stretch directly or indirectly to catch and affect the site classifications in the regulations. I would dismiss the Attorney General's cross appeal contending that the Cheong Ming Investment Co.Ltd. was wrongly decided and hold that on the date of submission of the plans the (Respondent) held a Class C site." p.65,line 38

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(d) "The question in the instant case is whether the (Respondent) had an accrued right at the date of submission of its plans and if it had what was the right. As I have said the (Respondent) was and is a Crown lessee of the land at law and subject to the Crown Lease and Ordinance it has a right to build on its land. To exercise that right the Buildings Ordinance requires it to submit its plans under Section 14 for investigation. The Building Authority is the statutory body appointed to investigate such p.67,line 10

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submissions and he has a statutory duty so to investigate for under Section 15, if he does not refuse and he can only refuse for cause though given a certain amount of discretion, 60 days thereafter the Building Authority will be deemed to have consented."

p.67, line  
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(e) "As I see the picture I find it impossible to say that at the date of submission the appellant did not have an accrued right to have its plans based on a Class C site investigated by the Building Authority. That right was unaffected by the Amending Regulations by reason of Section 23 of the Interpretation Ordinance. The Building Authority could only refuse for cause and under ground (a) he did not refuse for cause but on a wrong view of the law and with no disrespect I am unable to uphold the learned judge's conclusion on this issue."

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p.68, line 1

(f) Counsel for the Appellant misconceived the Respondent's case. The Respondent never claimed to have a right to have its plans approved as a Class "C" site but rather that: "the appellant had an accrued right at the date of submission to have its plans considered and investigated as a Class C site which it then was and remained unaffected by the amending regulations."

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p.68, line  
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(g) The Court has not been asked to concern itself with the second reason for refusal of approval of the plans by the Building Authority. "I would grant the first declaration sought with costs here and below."

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22. The Appellant will submit that the judgment at first instance was correct and the judgments of the Court of Appeal are not correct and that this appeal should be allowed with costs for the following amongst other :

REASONS

- (1) The Building (Planning) (Amendment) Regulations 1979 came into force on the 12th of October, 1979 as "such publication" in the proviso to Section 38(5) of the Buildings Ordinance refers to publication "once in the Gazette at least 3 weeks before coming into operation."
- 10 (2) Alternatively, the majority of the Court of Appeal were correct when they said that the amending Regulations came into force on the 9th of October, 1979, the day they were made, as publication had been dispensed with by the Governor in Council.
- (3) The Respondent had no accrued right viz a viz approval of his plans until they were either expressly approved or the 60 day period for consideration of them had expired. Neither event occurred here.
- 20 (4) The Respondent's only right was to have the Building Authority consider his plans according to the law. The claim that the Respondent was entitled to have his plans "considered as a Class C site" begs the question in issue which is whether or not the Respondent is allowed to build the proposed buildings drawn in his plans.
- 30 (5) To say that the Respondent is entitled to have his plans "considered" on a particular basis is to say that the Respondent is entitled to a partial approval inasmuch as the Building Authority cannot disapprove the plans on that particular ground. As the Buildings Ordinance gives the Building Authority 60 days in which to decide whether or not to approve the plans no such right as that contended for by the Respondent could have accrued before the 12th (or 9th) of October, 1979.
- 40 (6) The Respondent's "right to build" on its land was always subject to Section 14 of the Buildings Ordinance which restricts that right to cases where the Building Authority has approved the plans and the works of proposed buildings.
- (7) The Court of Appeal erred in distinguishing

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D.P.W. v Ho Po Sang which is applicable to this case. By lodging its plans the Respondent merely took a "procedural step.... prior to the repeal" and is not "entitled to have that procedure continued in order to determine whether (it) shall be given a right (it) did not have when the procedure was set in motion" : D.P.W. v Ho Po Sang (at page 922).

- (8) The only relevant action of the Building Authority in relation to the Respondent's "right to build" was to reject the plans. He did this on two grounds; one of which has never been challenged by evidence. Should the first ground have been invalid, the second ground (and therefore the rejection of the plans) remains. The declaration granted lacks utility. 10

Barrie Barlow  
(Counsel for the Appellant) 20

IN THE PRIVY COUNCIL

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ON APPEAL  
FROM THE COURT OF APPEAL OF  
HONG KONG

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B E T W E E N :

THE ATTORNEY GENERAL OF  
HONG KONG Appellant

- and -

FIREBIRD LIMITED Respondent

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CASE FOR THE APPELLANT

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