Case no. 10/92

Lot Nos. 1410A and 1410B etc.

in D.D. 114, Kam Tin, Yuen Long, New Territories.

Panel : Mr Robert TANG Ching, QC, JP (Chairman),
Mr David C DaSilva, MBE,
Mrs Alice Piera LAM LEE Kiu-yue, JP, and
Mr Jason YUEN King-yuk.

Date of hearing : 25th August 1992 and 2nd October 1992

Date of decision : 13th October 1992

The appellant appealed against the Town Planning Boards's decision on review to reject the application for planning permission on grounds as communicated to Toco Planning Consultants Limited by the Town Planning Board's letter dated the 15th May 1992.

No effective appeal under section 17(B) from the Decision of the Town Planning Board dated 15th May 1992.

V Patel for the Town Planning Board
Messrs. Wong, Hui & Co., Solicitors for the appellant

D E C I S I O N

1. On 15th July 1992, Wong, Hui & Co., solicitors, acting on behalf of Treasure Base Development Limited ("Treasure Base") lodged a Notice of Appeal under s.17B of the Ordinance against a Decision of the Town Planning Board given on review under s.17 of the Ordinance.

2. The Decision was communicated by a letter dated 15th May 1992 transmitted by fax to Toco Planning Consultants Limited ("Toco"), who acted for Treasure Base in the original s.16 application as well as the s.17 review.

3. If the fascimile transmission was indeed sent and received by Toco, and that it was a sufficient notification under s.17B, the Appeal was out of time because it was received by the Secretary to the Appeal Board on the 61st day after such notification.

s.17B(1) provides

"(1) An applicant who is aggrieved by a decision of the Board on the review under s.17 may appeal by lodging, within 60 days after notification of the Board's decision under s.17(6), a notice of appeal setting out the grounds for the appeal and such other particulars as may be prescribed"

4. Accordingly we decided to convene a hearing to determine the validity of the Appeal as a preliminary issue.

5. In correspondence before the hearing, Wong, Hui & Co., in their letter of 20th August 1992 stated that

"According to our inquiry with Mr. Ted Chan of Toco Planning Consultants Limited, he has not seen any fax copy of the letter from the Town Planning Board to his company dated 15th May 1992; nor has he been able to trace a fax copy of such letter among the files which he has kept on the matter or other papers in his office. His conclusion therefore is that the fascimile transmission of the said letter dated 15th May 1992, if it was despatched by such transmission to his office, was not so received"

6. However, at the hearing before us, amongst the papers in Mr. Chan's file, there was found a copy of the letter dated 15th May 1992 which showed quite clearly that it was faxed to and received by Toco on 15th May 1992 at about 12:35 p.m. Because of the discovery, Mr. Wong conceded that the notification of the Decision of the Town Planning Board was indeed faxed to and received by Toco on 15th May 1992.

7. However, Mr. Wong submitted that notification to Toco is not sufficient for the purpose of s.17B. He submitted that notification should have been given directly to the party aggrieved, namely, the applicant, Treasure Base. In this connection, he referred by way of analogy to s.8 of the Interpretation and General Clauses Ordinance and Order 65, Rule 5(2) of the Rules of the Supreme Court.

Order 65, Rule 5(2) provides

"(2) For the purposes of this rule, and of s.8 of the Interpretation and General Clauses Ordinance (Cap.1), in its application to this rule, the proper address of any person on whom a document is to be served in accordance with this rule shall be the address for service of that person, but if at the time when service is effected that person has no address for service, his proper address for the purpose aforesaid shall be -

(a) in any case, the business address of the solicitor (if any) who is acting for him in the proceedings in connection with which service of the document in question is to be effected, or

(b) in the case of an individual, his usual or last known address, or

(c) in the case of individuals who are suing or being sued in the name of a firm, the principal or last known place of business of the firm within the jurisdiction, or

(d) in the case of a body corporate, the registered or principal office of the body"

8. Mr. Wong submitted that because Treasure Base is a corporation, notification of the Decision of the Town Planning Board should have been sent to its registered office.

9. However, Mr. Wong accepted that the s.16 application to the Town Planning Board was submitted to the Town Planning Board and signed by Toco on the applicants' behalf. Toco was described in the application as the agent to whom correspondence should be sent and that all communication from the Town Planning Board in connection with the s.16 application had been addressed to Toco without any objection by Treasure Base or by Toco. Also, the s.17 review was lodged by Toco on Treasure Base's behalf. That being the case, we are of the view that if Order 65, Rule 2 is applicable by way of analogy, the address of Toco can be compared to the business address of a solicitor who is acting for a party in proceedings in the Supreme Court, (see Order 65 Rule (2)(a)), and the notification to Toco is a sufficient and proper notification.

10. Mr. Wong then argued although Toco was stated to be the agent to receive communications in the s.16 application notification should nevertheless have been given to Treasure Base direct. That is because s.17B did not come into operation until 18th November 1991 whereas the s.16 application was dated 1st November 1991. With respect, this overlooks the fact that Toco applied for review under s.17 on behalf of Treasure Base on 13th January 1992. Moreover, under s.17B(1) time runs from notification of a decision under s.17(6), s.17B(1) does not prescribe a new mode of notification. s.17(6) was in force on 1st November 1991.

s.17(6) provides:

"On a review under this section, the Board may, subject to section 16 (4), grant or refuse to grant the permission applied for and may exercise the powers conferred by s.16(5)"

11. s.17(6) does not specify by what means a Decision of the Board under review must be communicated. Since Toco acted for Treasure Base in the s.16 application as well as in the s.17 review, in our opinion, the letter dated 15th May 1992 addressed by the Secretary of the Board to Toco is a sufficient compliance with s.17(6) of the Town Planning Ordinance. That being the case, time began to run from the notification to Toco and Treasure Base had 60 days within which to appeal. The fact that s.17B(1) did not become operative until 18th November 1991 is, in our view, irrelevant.

12. Mr. Wong next submitted that in any event notification of the Board's Decision by fascimilie transmission is not a sufficient notification under s.17(B). He said the fascimile transmission was only a fore-warning to Toco of the Decision which was also sent by post to Toco. If the copy which was sent by post was the only operative notification then the appeal would have been within time. So we have to consider

whether a notice by fax is a sufficient notification. As we have said earlier, the copy which was in Toco's file showed the fascimile transmission was successful and Toco received a legible copy of the notification dated 15th May 1992 on 15th May 1992.

13. We are of the opinion service by fascimile transmission actually received in a legible form is valid notification. We believe that to be common sense and in keeping with advances in technology. We note with interest that the Court of Appeal in England decided in Hastie and Jenkerson v McMahon 1990 1 W.L.R. 1575 that transmission by fax was an alternative mode of service to modes of service specified in Order 65, Rule 5(1) of the Rules of the Supreme Court, provided that the sender was able to prove receipt in clearly legible form.

14. Mr. Wong also submitted that the notification by letter dated 15th May 1992 was misleading because it contained the phrase "by fax and by post". This, Mr. Wong submitted led Toco to believe that the faxed copy was only a "precursor" and that the original letter sent by post was the effective notice. We do not agree and gave an example of documents sent "by hand and by post". We do not believe one could say the copy delivered by hand was inoperative. Nor do we believe, that Toco was ever misled because Toco and Mr. Wong must have regarded the faxed copy as being possibly operative otherwise they would not have taken the trouble to allege (wrongly as it turned out) that it was never received.

15. Mr. Wong also referred us to A/S Rendal v Arcos Limited 1937 3 A.E.R. 577 as authority that communication to an agent is only prima facie evidence of notice to the principal which can be rebutted. Here, no evidence of rebuttal was adduced though Mr. Wong told us that the applicant was not told of the decision until 13th July 1992! That seems surprising since we understand after the notification of the decision on 15th May Toco was actively preparing for the applicant another s.16 application. It is the more surprising because the result was well publicised by the media. In view of the mistake over the allegation that the faxed copy was not received, if any such evidence had been adduced, we would be obliged to examine such evidence carefully. But, in any event, A/S Rendal v Arcos Limited is distinguishable. There the House of Lords was dealing with the position of a mercantile agent. Here we are dealing with an "agent" who was responsible for the s.16 application and the s.17 review. An agent who in the s.16 application made it clear that all correspondence should be addressed to it. It has not been suggested that Toco had no authority to act for the applicant. Nor could any such suggestion be made, because the only application was the one made and signed by Toco on its behalf. Here, the position of Toco can be compared to the position of an agent for service. In that case service on the agent is service on the principal. In passing, we note that in the appeal to us, Toco was described as the agent on which service should be effected.

16. Lastly, we do not agree with Mr. Wong's argument that although Toco was empowered to receive correspondence on the applicant's behalf, such correspondence would not include a letter communicating the decision of the Town Planning Board.

17. Mr. Wong also submitted that the Ordinance should be construed strictly in favour of the applicant and referred us to Pioneer Aggregates Limited v Environment Secretary 1985 A.C. 132

at 140H to 141C. We need only repeat what Lord Scarman said at 141C

> "As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole"

18. We regard it our duty to give effect to the intention of the legislature as evinced by the Town Planning Ordinance. In construing the Ordinance, we will not be technical or legalistic. We cannot believe that to be the intention of the legislature.

19. The effect of Mr. Wong's submission, as he frankly admitted, is that under s.17B(1), notification of the Board's decision under s.17(6) must be served on and received by the applicant and that service on an agent, even one who is duly authorised to receive service is not sufficient. We believe such a construction of s.17B(1) to be unduly restrictive and with respect, are unable to agree.

20. Two hearings were held over this preliminary issue. On the first occasion, we had a full board of 5. However, on the second occasion, when Mr. Wong wished to return to make further submission, the Hon. Mr. Howard Young was out of Hong Kong. With Mr. Wong's agreement, the Board was reduced to 4. That is because we did not want the hearing of the substantive appeal, if any, to be delayed. Thus, this decision is a decision of a Board of 4.

21. Miss Patel who appeared for the Town Planning Board submitted that because the Appeal Board is a creature of statute and there is nothing in the Town Planning Ordinance which permits an extension of time, if the appeal was lodged out of time then the Appeal Board has no power to grant an extension of time. Mr. Wong, whilst not prepared to concede the point, frankly admitted that he was unable to find any authority which would indicate that the Appeal Board has power to extend time. We are of the opinion that we have no power to extend time.

22. To conclude, we find that the Notice of Appeal lodged on 15th July 1992 was out of time and accordingly there is no effective appeal under s.17(B) from the Decision of the Town Planning Board dated 15th May 1992.

23. It remains for us to thank Mr. Wong and Miss Patel for their careful and persuasive submissions.