

## What does “house” mean in Government Leases? It all depends on the context, says the Court of Final Appeal in *Fully Profit*.

### Summary

1. The Court of Final Appeal (“CFA”) handed down its long-awaited decision in *Fully Profit (Asia) Limited vs. The Secretary for Justice for and on behalf of the Director of Lands* (FACV 17/2012) on 13 May 2013. The appellant Fully Profit owns a site at Nam Kok Road, Kowloon City, comprising five lots held under five separate virtually identical Government Leases, each of which contains a restriction that the owner cannot erect or allow to be erected more than one house on the lot. The CFA reversed the unanimous decision of the Court of Appeal and held that a 26-storey building straddling the five lots cannot be a “house” within the meaning of the word in the Government Leases.
2. The CFA was of the opinion that in construing a contract, it is not helpful in most cases to refer to the “ordinary and natural meaning” of words. Context should be the starting point (together with purpose), rather than looking at what may be the natural and ordinary meaning of words. In this case, when the Crown Leases were issued in the 1960s, a “Chinese type house” had already been erected on each of the lots. The CFA held that in the context of this case, “house” must be taken to mean the type of house existing on the individual lots. The proposed 26-storey building straddling the five lots cannot be regarded as a Chinese type house and is therefore not permitted.
3. The result of *Fully Profit* is that a developer can no longer be certain of what he can or cannot build on his site where there is a “house” restriction in the Government Lease. The case creates uncertainty and is likely to lead to more litigation.

### Limitations of *Fully Profit*

4. The CFA stresses that it is fruitless to search for a free-standing meaning of the word “house” valid for all time in all circumstances. The decision of the CFA in *Fully Profit* is facts-sensitive. All that the CFA has decided is that, in the context of the specific facts of that case, a 26-storey building straddling five lots cannot be a “house” for the purpose of the “one house” restriction under the relevant Government Leases. The case is not an authority to the effect that a multi-storey building can never be a “house” whenever the word appears in a Government Lease. Each case would have to be decided on its own facts. In the light of *Fully Profit*, a developer can no longer be confident, when he acquires a piece of land, of what he can or cannot build on the land.

### The Facts and the Decisions

5. Fully Profit is the owner of five lots of land at Nam Kok Road in Kowloon City held under virtually identical Government Leases each containing a restriction that the owner shall not erect or allow to be erected more than one house on the lot. The lots were originally carved out of a single large “mother lot” which was subdivided into 20 separate lots and, on each of the subdivided lots, a “Chinese type house” (each having five storeys with a ground floor, a cockloft, three floors and a flat roof) was erected. Subsequent to the completion of the Chinese type houses individual Government Leases were entered into in the 1960s in relation to each of the five subdivided lots.

6. Fully Profit wanted to redevelop the five Chinese type houses by demolishing the houses and, in their place, construct a 26-storey composite building straddling the five lots with shops on the ground floor, utilities, sports and function rooms on the first floor, and residential units from the second to 26th floors.
  7. The Director of Lands contended that the proposed development would be in breach of the Government Leases because the 26-storey building is not a “house” within the meaning of the Government Leases and, in any event, if the building were a house, only part of the house will be erected on any one of the five lots, and that would be in breach of the “not more than one house” restriction.
  8. When the case came before the Court of First Instance, Deputy Judge Pow SC held that the 26-storey building was not a house, but if it were a house, it would not be in breach of the “no more than one house” restriction, as part of a house is still no more than one house and the covenant is not one “not to erect other than one house”.
  9. Fully Profit appealed to the Court of Appeal (“CA”) and the CA (Tang VP, Fok JA and Chu JA) unanimously ruled in favour of Fully Profit and allowed the appeal. The CA took into account the fact that the Conditions of Exchange of the “mother lot” provided that no factory building could be erected and industrial use was prohibited but, other than that, there was no restriction on the type of building which might be built. In this context, the CA considered that the word “house” in the Government Leases should be read synonymously with “building” or that the word should be construed as including what in common parlance is called a block of flats. Straddling is not an issue as the covenant was not to erect more than one house, and not a covenant not to erect other than one house.
  10. The approach adopted by the CFA (Ma CJ, Chan PJ, Ribeiro PJ, Bokhary NPJ and Hoffmann NPJ in a unanimous decision) in construing the meaning of the word “house” is as follows:-
    - a. A search for a free-standing meaning of the word “house” valid for all time and in all circumstances is fruitless.
    - b. The word “house” has a “distinct fluidity of meaning” and the word is best construed in relation to the context in which the word is found.
    - c. In the particular facts of *Fully Profit*, the meaning of “house” must have reference to those characteristics of the houses which were actually standing at the time when the Government Leases were entered into.
    - d. When the Government Leases of each of the five lots were entered into, there was already a “Chinese type house” on each of the five lots. In this context, the meaning of “house” must be taken to mean the type of house then existing on the individual lots. There was no question of going back to the previous state of affairs where the “mother lot” had not yet been sub-divided or built on. The CFA however seems to recognise that the position might be different if, at the time when the Government Leases were entered into, there were no buildings on the lots.
- Implications of *Fully Profit***
11. *Fully Profit* would have the following implications:-
    - a. The word “house” may have different meanings in different contexts.
    - b. In order to ascertain the meaning of “house” in any particular case, one would have to look at the context and the factual matrix surrounding the grant of the Government Lease. This may not be an easy exercise given that the documents registered in the Land Registry and available to the public may only form part of the relevant factual matrix.
    - c. A developer can no longer be certain of what he can or cannot build on his land where there is a “house” restriction in the Government Lease.
    - d. The Lands Department may demand a lease modification and payment of a substantial premium where there is uncertainty over the meaning of “house” in the Government Lease. The uncertainty created by the case is likely to lead to more litigation.
  12. It is interesting to note that *Fully Profit* may benefit an owner in certain circumstances. For example, if when the Government Lease (which contains a restriction that only one house may be erected on the lot) was entered into, an apartment block of European-type had already been erected

on the lot, the owner would have an argument that he is entitled to redevelop the building into another European-type apartment block. If lease modification is required for the redevelopment, the owner may be able to argue that the before value should be assessed on the basis that the “as of right” development is a European-type apartment.

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