IN THE PRIVY COUNCIL No.14 of 1960

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N

THE DIRECTOR OF PUBLIC WORKS (First Defendant)
and KWONG SIU KAU (Second Defendant)
Appellants

- and -

63693

HO PO SANG, LEUNG TAK HING, CHAN SHUN, PANG SHIU KAI, TSE KI BIU, CHOW CHAK CHUN, FOK WAI MAN, CHAN HOK LIN, NGAN SHING YEUN trading as KWONG SHING TONG, MEI LA HAIR DRESSING SALOON, CHAN WAI SANG and LO KIN trading as HO KWONG FURNITURE & DECORATION CO. (First Plaintiffs)
CHAN YIU WING, LEUNG CHUEN KEE, LEE KI CHUNG, LEUNG NGAI MUI, TAM CHIU, WONG CHIU TAI, WONG WING CHEUNG, WONG YIU FONG, CHAN SHING, WONG TIM, NG SHU SHUI, TANG HO, MAN CHI, LAM KAM HING, KWAN KI NGONG, TSE SHEK, LI LAU, PANG YUK CHING, FUNG KING, LEE MAN FAI, CHAN SING, FUNG CHOI, HO WAH, AU YEUNG HOI, MAK HOI, MAK WING, MOK LAM, HO KWAI HOI, FUNG LAM, POON KAU, FU CHEUNG KAN, CHOW SHING KI, WONG CHING CHEUNG, HO HON NGUN, CHAN KAM CHOI, WONG SAI, CHAN CHI KIN, TANG YAM, MUI YING HUNG, trading as HUNG SHING HO, LEUNG NGAI MI trading as WAI KEE CIGARETTES, CHAN SAM MAN, NG CHIU KAU, CHAN MOON, NG CHAU CHI, CHAN KI, TANG KAM CHAN and LI KWOK CHOI
(Second Plaintiffs)
Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a Judgment of the Supreme Court of Hong Kong, Appellate Jurisdiction, consisting of Blair-Kerr J. and Mills-Owens J., dated the 31st December 1959, reversing a Judgment of Gregg J. delivered on the 13th July 1959 and dismissing the Respondents' action against the Appellants. App.p.23 App.p.13

Record

2. The First Respondents are tenants and the Second Respondents are sub-tenants of the Second Appellant of premises known as 230, 232, 234 and 236 Temple Street Kowloon (hereinafter called "the said premises"). The question at issue in this
App. p.72 appeal is whether or not a rebuilding certificate issued by the First Appellant, the Director of Public Works, to the Second Appellant, on the 12th October 1957 and certain notices to quit based thereon and subsequently given by the 2nd Appellant to the 1st Respondents, were valid and effectual documents notwithstanding that the provision pursuant to which they were issued, namely, Sections 3(A) and 3(E) of the Landlord & Tenant Ordinance, as amended by the Landlord and Tenant (Amendment) Ordinances, 1953 and 1954 had been repealed with effect from the 9th April 1957 by the Landlord and Tenant (Amendment) Ordinance, 1957. The Supreme Court of Hong Kong Appellate Jurisdiction held that such rebuilding certificate was not valid on two grounds which were, shortly
App.pp.45,46. stated, first, that the Second Appellant had not prior to the repeal of the 9th April 1957 acquired any such accrued right as would have survived such repeal and justified the issue to him thereafter of a rebuilding certificate, and
App.pp.45,58. secondly that the condition precedent to the issue of such rebuilding certificate under the said Section 3(A), namely the existence of a covenant to rebuild, did not exist in that the Agreement for a Lease under which the 2nd Appellant claimed to hold the said premises from the Crown subject to such covenant was void as being a "disposition of land" which under Article XIII of the Letters Patent of the Colony of Hong Kong was required to be executed by the Governor of the Colony in person and not, as in fact happened, by the First Appellant.

3. The Landlord and Tenant Ordinance as amended as stated above by the Landlord and Tenant (Amendment) Ordinance 1953, and the Landlord and Tenant (Amendment) Ordinance 1954 (and hereafter as so amended called "the Principal Ordinance") provided before the above-mentioned repeal of the 9th April 1957 (inter alia) as follows:-

"3A. (1) Whenever any person becomes liable to the Crown under a building covenant compliance wherewith involves the demolition of premises subject to this Ordinance of which premises such person is in law or equity the lessee of the Crown, vacant possession of such premises shall, subject to the provisions of this section and of

Record

sections 3B, 3C, 3D and 3E, be recoverable by such lessee upon the expiration of two months from the giving of a certificate by the Director of Public Works (in this Ordinance referred to as a re-Building certificate) that in the opinion of the Director of Public Works it is reasonable that such building covenant should be complied with and that such person should be given vacant possession of the premises.

(2) After due consideration of an application for a re-Building certificate, the Director of Public Works shall deliver written notice to the applicant of his intention either to give or not to give such certificate.

(3) No re-Building certificate shall be given until the applicant has proved to the satisfaction of the Director of Public Works that he has complied with section 3B, nor until after the time for any appeal provided for by that section has expired nor, in the event of any such appeal being made, until it has been determined.

3B. (1) Where, pursuant to the provisions of sub-section (2) of section 3A, the Director of Public Works gives notice of his intention to grant a rebuilding certificate, the applicant may, within three weeks after receipt of such notice, serve.....notice in the prescribed form upon each tenant in occupation of the premises to which his application relates of the intention of the Director of Public Works to give a rebuilding certificate.

(2) Any such tenant may, within three weeks after service upon him of such notice, appeal by way of petition to the Governor in Council against the proposal of the Director of Public Works to give a rebuilding certificate, and any tenant so appealing shall, within the said period, serve upon the applicant a copy of his petition.

(3) Any applicant for a rebuilding certificate who is served with a copy of a petition pursuant to the provisions of sub section (2), may, within fourteen days after such service, present a cross-petition to the Governor in Council, and in such event shall serve a copy of such cross-petition upon the tenant who has so appealed.

3D. (2) No person lodging a petition or cross-petition as aforesaid shall be entitled to appear before the Governor in Council, but every

Record

petition and cross-petition lodged in due time shall be taken into consideration by the Governor in Council who may direct that a rebuilding certificate be given or be not given as he may think fit in his absolute discretion.

(3) The decision of the Governor in Council shall be final.

3E. (1) Within one month after the giving of a rebuilding certificate by the Director of Public Works, it shall be lawful for the lessee, notwithstanding any contractual tenancy, to serve in manner specified in section 32 a notice in the prescribed form calling upon all persons in occupation of the premises peaceably to quit the same on or before the expiration of the prescribed period of two months from the giving of the said certificate:

(2) Upon the expiration of the prescribed period the person who is in law or in equity the lessee of the Crown shall be entitled to vacant possession of the premises to which the rebuilding certificate relates in like manner and with the like remedies as if an order for possession thereof had been made under section 18, and the provisions of section 24 shall apply upon production of the rebuilding certificate and of a statutory declaration that the provisions of subsection (1) have been complied with, in like manner as they apply upon production of a copy of an order of a tribunal under section 24.

Section 18 provided that it should be lawful for a tenancy tribunal on the application of a landlord to make an order for the recovery of possession from or the ejectment of various categories of tenants such as one who has failed to observe any stipulation of his tenancy agreement.

Section 23 provided "An order for ejectment made against any principal tenant shall not, unless the tribunal so directs, operate as an order for ejectment of any sub-tenant of such principal tenant, but immediately upon the making of such an order such sub-tenants shall be deemed to be tenants of the immediate landlord of the principal tenant in like manner as is provided by subsection (3) of section 12 and such immediate landlord shall undertake towards them the obligations theretofore undertaken by the principal tenant."

Record

4. Article XIII of the Letters Patent of the Colony of Hong Kong reads as follows:-

"The Governor in Our name and on Our behalf, may make and execute, under the Public Seal of the Colony, grants and dispositions of any lands which may be lawfully granted and disposed of by US. Provided that every such grant or disposition be made in conformity either with some law in force in the Colony or with some Instructions addressed to the Governor under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, or with some regulations in force in the Colony....." It has been conceded throughout by the Appellants that there is no specific provision whether in the Letters Patent or elsewhere authorising the Governor to delegate his said power to make and execute grants and dispositions of land. It has also been conceded throughout by the Appellants that the position between the 1st Appellant as a Departmental head and the Governor bears no similarity to the position of a junior officer in a Department acting for and in the name of his superior officer. App.pp.31,52

5. The 2nd Appellant held the said premises under a Crown lease for 75 years from the 25th December 1876 which expired by effluxion of time on the 24th December 1951. He held over thereafter during lengthy negotiations for a renewal of his lease until there was executed an Agreement in writing (hereinafter called "the said Agreement") dated the 7th June 1955 and made between the Second Appellant of the one part and the First Appellant who was expressed to agree "for and on behalf of the Governor" of the other part. The said Agreement provided that the Second Appellant should surrender Kowloon Inland Lot No. 63 Sec. A.R.P. and should be entitled to a Lease of Kowloon Inland Lot No. 6516 subject to and on the terms and conditions therein contained. The said two lots were identical and consisted of the said premises. The said Agreement contained General and Special Conditions. By the combined effect of General Conditions 2 and 3 and Special Condition (b) the Second Defendant became liable to pay to the Government of Hong Kong a premium of $70,800.00 with interest at 5 per cent per annum by 40 annual instalments of $3,930.00 and an annual rental of $270.00. By General Condition 4(a) it was declared that provided the conditions contained in the said Agreement had been complied App.p.61. App.p.67. App.pp.61,62, 66. App.p.62.

Record

with to the satisfaction of the Director of Public Works and the Land Officer, the Second Appellant should be entitled to a Lease of the said premises for a term of 150 years commencing
App.p.62. as from the 25th December 1876. General Condition 4(c) provided that pending the issue of such new Lease the tenancy of the new Lot should be deemed to be upon and subject to and such new Crown Lease when issued should be subject to and contain all Exceptions Reservations Covenants Clauses and Conditions as were contained in the existing lease or agreement for tenancy under which the same was held as varied modified or extended by the Conditions
App.p.63. contained in the said Agreement. By General Condition 6(a) it was provided that the Second Appellant should develop the said premises by the erection thereon of buildings in a certain manner such buildings to be completed before the expiration of 24 calendar months from the date of the said Agreement and that the Second Appellant should expend thereon a sum of not less than
App.p.64. $200,000.00. General Condition 6(b) provided that the fulfilment by the Second Appellant of his obligations under the General and Special Conditions should be deemed to be a condition precedent to the grant or continuance of tenancy thereunder. The said Agreement was duly registered under the provisions of the Land Registration Ordinance.

App.p.27. 6. After the execution of the said Agreement the Second Appellant made payments of the premium and rent thereby reserved and including back rent as
App.pp.14,27 from 25th December 1951. On the 11th June 1956 he applied under Section 3A of the Principal Ordinance for a rebuilding certificate and on the
App.p.69 20th July 1956 pursuant to Section 3A(2) thereof the First Appellant gave the Second Appellant notice of his intention to give such a certificate. The Second Appellant duly gave notice to the Respondents of the said intention. Pursuant to Section 3B(2) the Respondents petitioned to the Governor in Council against the proposal of the First Appellant to give such rebuilding certificate and the Second Appellant cross-petitioned under Section 3B(3). A considerable time before this "appeal" by petition and cross-petition was determined by the Governor in Council the Landlord and Tenant (Amendment) Ordinance, 1957 was enacted repealing Sections 3A - E of the Principal Ordinance with effect from the 9th April 1957. In the meanwhile
App.p.70. there was granted on the 20th March 1957 by or on

behalf of the First Appellant to the Second Appellant an extension of time until the 28th June 1958 in which to fulfil what was described as the Building Covenant in respect of the said premises. Record

7. The Governor in Council after the 9th April 1957 dismissed the Respondents' "appeal" and directed that a rebuilding certificate be given. App.pp.15,28.
Pursuant thereto the First Appellant on the 12th October 1957 issued to the Second Appellant a certificate that it was reasonable that the Building Covenant relating to the said premises be complied with and that the Second Appellant should be given vacant possession of the said premises. It is with the validity of this certificate that this appeal is concerned. App.p.72.
Shortly thereafter the Second Appellant served notices to quit on the Respondents. In support of the validity of such notices the Second Appellant relies upon the repealed Section 3E(1) and (2) of the Principal Ordinance and Section 10(b)(c) and (e) of the Interpretation Ordinance (Cap. 1) which read as follows:- App.pp.15,28

"The repeal of any enactment shall not -

(b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed or

(e) affect any investigation, legal proceeding or remedy in respect of any such right".

The above provisions of the Interpretation Ordinance are in identical terms to those of Section 38(2)(b)(c) and (e) of the Interpretation Act, 1889 of the Imperial Parliament. On the 10th December 1957 the Writ in this action was issued by the First Respondents and by later amendment the Second Respondents as sub-tenants of the said premises, claiming (inter alia) a declaration that the First Appellant was on the 12th October 1957 no longer empowered to issue a rebuilding certificate and that the certificate which he did issue was null void and of no effect and that the Respondents were still tenants of the premises protected from ejectment under App. p.1.

Record

the provisions of the Landlord & Tenant Ordinance.

8. The Respondents' principal contentions are three fold.

(a) That the repeal of Sections 3A - E (inclusive) of the Principal Ordinance before the Governor in Council had completed the executive task of deciding whether to allow the Respondents' petition against the First Appellant's proposal to issue a rebuilding certificate disentitled the First Appellant from thereafter issuing such a certificate.

(b) That the said Agreement is or purports to be a disposition of land since, if valid and registered pursuant to the Land Registration Ordinance, it would be binding on the whole world. It was not executed by the Governor in person and is therefore invalid. Accordingly the Second Appellant was not at any material time entitled to rely upon it as containing a building covenant such as to justify the issue of a rebuilding certificate.

(c) That, even if, contrary to the Respondents' contention, the First Appellant had power to issue a rebuilding certificate on the 12th October 1957, the notice to quit thereafter served by the Second Appellant pursuant to Section 3E(1) of the Principal Ordinance was only effective against the First Respondents, the tenants of the Second Appellant and was not effective against the Second Respondents, his sub-tenants, since Section 3E(2) of the Principal Ordinance provides that the lessee of the Crown shall be entitled to vacant possession in like manner and with the like remedies as if an order for possession had been made under Section 18. Section 23 which is applicable to orders for possession under Section 18 provides that an order for ejectment made against any principal tenant shall not unless the Tribunal so directs operate as an order for ejectment of any sub-tenant or such principal tenant.

App.p.13. 9. The action was tried before Mr. Justice Gregg, Senior Puisne Judge who delivered judgment on the 13th July, 1959, dismissing the
App.p.18. Respondents' action. Mr. Justice Gregg held that the said Agreement was not technically an express "grant or disposition" of land as was contemplated by Article XIII of the Letters Patent but was rather in the nature of a binding

Record

preliminary agreement for a lease of Crown land which gave no right of assignment. It did not therefore require to be signed by the Governor himself or under the Public Seal of the Colony. He further held that the rebuilding condition in General Condition 6 of the said Agreement was a covenant for the purposes of Section 3A of the Principal Ordinance. Notwithstanding the repeal of Sections 3A to E he was of the opinion that the Second Appellant's position was preserved by section 10 of the Interpretation Ordinance on two grounds. First, he held that the application for a rebuilding certificate was something duly done under the repealed sections. Secondly, he held that the Second Appellants' application amounted to an acquired right under sub-section 10(c). It followed that the rebuilding certificate was valid. Finally, he was of the opinion that the order for "possession" under section 18 referred to in Section 3E of the Principal Ordinance could only mean, having regard to the wording of sections 3E and 3A, an order for vacant possession, which must mean an order ejecting all tenants including sub-tenants.

App.p.19.

App.p.20

10. The Respondents appealed against the Judgment of the 13th July 1959 and the Appeal was heard by Mr.Justice Blair-Kerr and Mr.Justice Mills-Owens on the 7th, 8th, 9th and 10th December 1959 when judgment was reserved. Judgment was given on the 31st December 1959 when the appeal was allowed unanimously.

App.p.21.

App.p.23.

11. In his judgment Mr. Justice Blair-Kerr agreed with the judgment below in holding that sub-tenants as well as head tenants were bound by orders for possession under Section 18 referred to in Section 3E of the Principal Ordinance. On the question whether the Second Appellant had an accrued right at the date of the repeal on the 9th April 1957, he held first that the Governor in Council when exercising the powers conferred by Section 3D of the Principal Ordinance was exercising powers of an executive or ministerial and not a judicial character. He then examined numerous authorities on the effect of the repeal of an enactment on pending claims and proceedings. He concluded that the cases cited illustrated the kind of "rights" and "liabilities" which section 10 of the Interpretation Ordinance was intended to preserve but that none of these cases assisted the Appellants. Sections 3A - E of the Principal Ordinance had to be read together and no particular right was conferred by

App.p.32.

App.p.33.

App.p.44.

Record

Section 3A(1) alone. The existence of a building covenant gave a lessee no more than a privilege to apply under the procedure set out. The Interpretation Ordinance did not preserve such "rights" to apply because there was nothing to be preserved. He rejected the submission that once the procedure was started by an application for a rebuilding certificate the applicant had a "right" to have the procedure continued after a repeal. He said that when a right accrued there was usually a corresponding

App.p.45 liability, actual or contingent, but to the rhetorical question whether there was any corresponding obligation on any other person, if one assumed that there was a right of some sort vested in the Second Appellant at the time of his application, he answered that the tenants were under no obligation to quit the said premises nor the Governor in Council to grant a rebuilding certificate. At the date of the repeal the Second Appellant had no "right acquired" or "accrued" within the meaning of section 10(c) of the Interpretation Ordinance but only a hope or expectation that the rebuilding certificate would be issued to him. It was one thing to invoke a law for the adjudication of rights which had already accrued prior to the repeal of that law; it was quite another to say that, irrespective of whether any right existed at the date of the repeal, if any procedural step was taken prior to the repeal, then, the applicant was entitled after that repeal to have that procedure continued in order to determine whether he should be given the right which he did not have when the procedure was set in motion. Finally he stated that he concurred in the views expressed and the conclusions reached by Mr. Justice Mills-Owens on the question whether the said Agreement was or was not a "disposition of land" and whether it was competent for the First Appellant to enter into such agreements on behalf of the Governor.

App.p.46. 12. Mr. Justice Mills-Owens held that on the date of the repeal of the relevant sections, far from the Second Appellant having a vested right, he had a mere hope or expectation of obtaining a rebuilding certificate and thus of acquiring a right to vacant possession. He said that to suggest that a person who made an application which might or might not in the exercise of an executive discretion be granted was a person having a vested right to that which he would obtain if successful in his application was to

equate the application to the grant thereof. The suggestion that as the Second Appellant's application had been "put in suit" when the sections were repealed he had vested in him a right at least to have his application determined was to elevate the application to the decision thereon. Nor could the giving by the First Appellant of notice of intention to issue a rebuilding certificate improve the Second Appellant's position since this notice was merely a procedural device for securing the observance of the principles of natural justice in the determination of the landlord's application by providing a means of bringing the application to the notice of the tenants and enabling their views to be represented to the Governor in Council. He stated that prior to the enactment of the repealed sections in 1953 a landlord of protected premises who wished to rebuild could in general only secure vacant possession upon obtaining an exclusion order under Section 31 of the Principal Ordinance and such an order would invariably be conditional upon the payment of substantial compensation to the tenants. Since the repeal of the sections the pre-1953 position was restored and it was difficult to perceive the justification for the introduction of the repealed sections under which such compensation was denied.

Record

App.p.47.

App.p.47.

13. Mr. Justice Mills-Owens also agreed with the judgment below in holding that the Second Respondents as well as the First Respondents would have been bound by the notices to quit served by the Second Appellant if the rebuilding certificate had been validly issued. On the further question whether a building covenant within the meaning of section 3A(1) subsisted in favour of the Crown, he held that the matter turned substantially on whether the said Agreement was invalid as being contrary to the terms of Article XIII of the Letters Patent. It was not suggested either that the First Appellant had a specific instruction to sign the said Agreement on behalf of the Governor nor that such signature was one of that class of acts which might be effectively performed by officers subordinate to the Governor. He held that the receipt of instalments of the premium and rent paid by the Second Appellant was insufficient to amount to a ratification by the Governor of the said agreement if it was originally void. On the question whether the said Agreement was a disposition of land within Article XIII of the Letters Patent he adopted

App.p.50

App.p.51.

App.p.53.

Record

the definition proposed by Stirling J. in Carter v. Carter [1896] 1 Ch. 62 at 67.

"The Words 'dispose' and 'disposition' in the Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning, and where not limited by the context those words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created".

App.pp.55,56. Assuming that the said Agreement was valid the Second Appellant's rights under it by virtue of the rule in Walsh v. Lonsdale (1882) 21 Ch.D.9 consisted of the right to maintain his possession not only as against the Crown but as against all-comers, the right to a Crown Lease and the right to deal with the land in the
App.p.58. meantime. His rights would not merely have been contractual and personal. The said Agreement therefore was a purported "disposition" within Article XIII of the Letters Patent which it was not competent for the First Appellant to enter into on behalf of the Governor and accordingly the Second Appellant was not by virtue of the said Agreement a lessee in equity bound by the building covenant. Finally, he rejected the argument that there was vested in the Crown a right based on public policy to refuse to execute a Crown grant in pursuance of a contractual obligation and that for this reason the said Agreement was not a disposition of land.

14. The Respondents submit that the Judgment of the Court of Appeal was right and ought to be affirmed for the following among other

R E A S O N S

(1) BECAUSE the application of the Second Appellant for a rebuilding certificate conferred no right upon him which was preserved after the repeal of sections 3A- E inclusive of the Principal Ordinance but such application merely conferred the hope or expectation that the 1st Appellant and the Governor-in-Council would exercise his executive or ministerial discretion in his favour, and the 1st Appellant would thereafter issue a certificate.

(2) BECAUSE similarly the issue by the 1st Appellant of notice of intention to grant a rebuilding certificate to the 2nd Appellant conferred no right upon the latter which was

Record

preserved after such repeal, but merely instituted a procedure whereby the matter could be referred to the Governor-in-Council

(3) BECAUSE such repeal disentitled the 1st Appellant from thereafter issuing any rebuilding certificate where the matter had been referred by Petition to the Governor-in-Council but had not been determined by the Governor.

(4) BECAUSE the said Agreement was invalid and void in that it was not executed personally by the Governor or under the Public Seal of the Colony although it was or purported to be a disposition of land within the meaning of Article XIII of the Letters Patent.

(5) BECAUSE contrary to the decisions in the Courts below even if contrary to the Respondents' contention the issue of the rebuilding certificate to the Second Appellant was valid and effectual he was only thereby enabled to secure vacant possession against the First Respondents and not against the Second Respondents.

(6) BECAUSE the Order of the Court of Appeal and the reasons therefor (save as mentioned in (5) above) are correct and ought to be affirmed.

JOHN KNOX

No.14 of 1960

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B E T W E E N

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- and -

HO PO SANG and OTHERS (1st Plaintiffs) and CHAN YIU WING and OTHERS (2nd Plaintiffs) Respondents

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CASE FOR RESPONDENTS

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