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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
(1st Defendant)
and KWONG SIU KAU
(2nd Defendant) .. .. Appellants

- and -

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 YUEN trading as KWONG SHING TONG, MEI LA HAIR DRESSING SALOON, CHAN WAI SANG and LO KIN trading as HO KWONG FURNITURE & DECORATION CO.
(1st 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
(2nd Plaintiffs) .. .. Respondents

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.
Solicitors for the
Appellants.

A. KRAMER & CO.,
40, Portland Place,
London, W.1.
Solicitors for the
Respondents.

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
(1st Defendant)
and KWANG SUI KAU
(2nd Defendant) .. .. Appellants

- and -

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

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

EXHIBITS

Exhibit Mark	Description of Document	Date	Page
"A"	Agreement and Conditions of Renewal	7th June 1955	61
"B.1"	Letter Director of Public Works to Kwong Siu Kau	12th October 1957	71
"B.2"	Rebuilding Certificate	-	72
"C.1"	Letter Supt. of Crown Lands & Surveys to Kwong Siu Kau	20th July 1956	68
"C.2"	Certificate of Intention to give Re-building Certificate	20th July 1956	69
"D"	Letter Acting Director of Public Works to C.Y. Kwan & Co.	20th March 1957	70

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

No.	Description of Document	Date
1	Notice of Motion for leave to appeal to Her Majesty in Council	12th January 1960
2	Affidavit of William Christopher Robert Carr in support	12th January 1960
3	Affidavit of Allan Inglis in support	13th January 1960
4	Order granting conditional leave to appeal to Her Majesty in Council	26th January 1960
5	Certificate of Registrar as to compliance with conditions	8th March 1960
6	Certificate as to contents of Record	8th March 1960
7	Notice of Motion for final leave to appeal to Her Majesty in Council	10th March 1960
8	Affidavit of Graham Rupert Sneath in support	9th March 1960

BETWEEN:

Ho Po Sang, Leung Tak Hing, Chan Shun, Pang Shiu Kai, Tse Ki Biu, Chow Chak Cheun, Fok Wai Man, Chan Hok Lin, Ngan Shing Yuen trading as Kwong Shing Tong, Mei La Hair Dressing Saloon, Chan Wai Sang and Lo Kin trading as Ho Kwong Furniture & Decoration Co. 1st 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 Hun 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 2nd Plaintiffs

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
(1st Defendant)
and KWONG SUI KAU
(2nd Defendant) .. .. Appellants

- and -

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

RECORD OF PROCEEDINGS

No. 1

AMENDED WRIT OF SUMMONS

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 1

Amended Writ of Summons, 10th December 1957.

Amended as in red ink pursuant to Orders by The Honourable Mr. Justice James Reali Gregg, Puisne Judge in Chambers dated the 26th day of September 1958 and 24th January 1959 respectively.

Sd. P.R. Springall
Deputy Registrar

27.1.59.

Action No.464 of 1957.

IN THE SUPREME COURT OF HONGKONG

Original Jurisdiction

BETWEEN:

Ho Po Sang, Leung Tak Hing, Chan Shun, Lo Kin trading as Ho Kwong Furniture & Decoration Co., Pang Shiu Kai, Tse Ki Biu, Fok Wai Man, Chow Chak Chuen, Chan Hok Lin, Kwong Shing Tong (representative Ngan Shing Yuen) Mei La Hair Dressing Saloon and Chan Wai Sang and Sub-tenants and all occupants Plaintiffs

- and -

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 1

Amended Writ of Summons, 10th December 1957 - continued.

The Director of Public Works — 1st Defendant
Kwong Siu Kau — 2nd Defendant

ELIZABETH II, by the Grace of God, of Great Britain, Ireland and of the British Dominions beyond the Seas, QUEEN, Defender of the Faith.

To The Director of Public Works, Public Works Department, Government Offices, Lower Albert Road, Victoria in the Colony of Hong Kong, and Kwong Siu Kau of No.786, Nathan Road, 3rd floor Kowloon in the said Colony of Hong Kong.

WE command you that within eight days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of Ho Po Sang, Leung Tak Hing, Chan Shun, Lo Kin trading as Ho Kwong Furniture & Decoration Co., Pang Shiu Kai, Tse Ki Biu, Fok Wai Man, Chow Chak Chuen, Chan Hok Lin Kwong Shing Tong (representative Ngan Shing Yuen) Mei La Hair Dressing Saloon and Chan Wai Sang and Sub-tenants and all occupants all of 230, 232, 234 and 236 Temple Street in the Dependency of Kowloon in the said Colony of Hong Kong, traders and take notice that, in default of your so doing the Court may give leave to the Plaintiff to proceed ex parte.

WITNESS, The Honourable Mr. Justice Michael Joseph Hogan, C.M.G., Chief Justice of Our said Court, the 10th day of December 1957

(L.S.) (Sd.) P.R. Springall

Deputy Registrar.

STATEMENT OF CLAIM

1. The Plaintiffs as tenants of Nos.230, 232, 234 and 236 Temple Street (ground, 1st and second floors), Kowloon in the Colony of Hong Kong claim a declaration that on the 12th October 1957 the 1st Defendant was no longer empowered to issue a re-building certificate under the provisions of Section 3A (now repealed) of the Landlord and Tenant Ordinance Cap. 255 and in respect to the premises Nos.230, 232, 234 and 236 Temple Street Kowloon aforesaid, and an Order that he shall withdraw the said Certificate.

2. The Plaintiffs further claim an injunction against the 2nd Defendant as landlord and Crown Lessee of the said premises to restrain him from acting on any such certificate issued by the 1st Defendant and a declaration that the premises are controlled under the Landlord and Tenant Ordinance Cap.255 and a further injunction to restrain the 2nd Defendant from proceeding in the manner prescribed by Section 3E (now repealed) of the aforesaid Ordinance.

3. Alternatively against both Defendants a declaration that the said certificate is null and void and an Order for its destructions.

4. The Plaintiffs also claim such further or other relief as to this Honourable Court shall seem just.

(Sd.) P.H. SIN & CO.

Solicitors for the Plaintiffs.

This writ was issued by P.H. SIN & CO., Loke Yew Building, 50-52, Queen's Road Central, Solicitors for the Plaintiffs, who reside at ground, 1st and 2nd floors respectively of No. 230, 232, 234 and 236 Temple Street, Kowloon, traders.

(Sd.) P.H. SIN & CO.

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 2

Amended Statement of Claim, 9th October 1958.

No. 2

AMENDED STATEMENT OF CLAIM

Amended as in red ink the 28th day of November 1958 pursuant to Order of The Honourable Mr. Justice James Reali Gregg Puisne Judge in Chambers.

Dated the 15th day of November 1958.

28.11.58. (Sd.) P.R. Springall

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION NO.464 OF 1957

BETWEEN:

Ho Po Sang, Leung Tak Hing, Chan Shun, Pang Shiu Kai, Tse Ki Biu, Chow Chak Chuen, Fok Wai Man, Chan Hok Lin, Ngan Shing Yuen trading as Kwong Shing Tong, Mei La Hair Dressing Saloon, Chan Wai Sang and Lo Kin trading as Ho Kwong Furniture & Decoration Co. 1st Plaintiffs

Chan Yiu Wing, Leung Chuen Kee, Lee Ki Chung, Leung Ngai Nui, 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 2nd Plaintiffs

and

The Director of Public Works 1st Defendant
Kwong Siu Kau 2nd Defendant

STATEMENT OF CLAIM

1. The 1st Plaintiffs are the Tenants of Nos.230,

232, 234 and 236, Temple Street, Kowloon in the Colony of Hong Kong. The 2nd Plaintiffs are the Sub-tenants of the said premises.

2. The 1st Defendant is the Director of Public Works of the Colony of Hong Kong who was formerly empowered to do certain acts under the former Sections 3A, B, C, D and E of the Landlord and Tenant Ordinance, Cap.255.

3. The 2nd Defendant is or was the Crown Lessee of the aforesaid premises and as such is or was the direct landlord of the 1st Plaintiffs. The 2nd Defendant has however purported to surrender the said Crown Lease and the 1st Defendant has purported to agree with the 2nd Defendant that the said Crown Lease will be renewed subject to the payment of a premium of $70,800.00 or the annual sum of $3,930.00 for a period of 40 years and that the land should be developed by the erection thereon of buildings valued at not less than $200,000.00.

4. By Section 3A of the Landlord and Tenant Ordinance 1947, as amended by Section 4 of the Landlord and Tenant Amendment Ordinance No.22 of 1953, and subject to the following Sections 3B, C and D thereof, the 1st Defendant claims to have been enabled to issue a document entitled a re-building certificate and by virtue of Section 3A and E thereof, the 2nd Defendant, in relation to the premises the subject matter of these proceedings, would become entitled to recover possession of the said premises from the Plaintiffs herein by virtue of the said re-building certificate.

5. By the Landlord and Tenant Amendment Ordinance 1957, which is deemed to have had effect as from the 9th day of April 1957, the aforesaid Sections 3A, B, C, D and E of the Landlord and Tenant Ordinance are repealed.

6. By reason of the repeal of the aforesaid Sections the authority or entitlement of the 1st Defendant to issue a re-building certificate was terminated as from the 9th day of April 1957.

7. On or about the ~~18th June, 1957,~~ 12th October 1957, the 1st Defendant wrongfully and without legal authority purported to issue a rebuilding certificate under the aforesaid Sections 3A to D of the Landlord and Tenant Ordinance, and the 2nd

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 2

Amended Statement of Claim, 9th October 1958 - continued.

Defendant by virtue of the said certificate has purported to proceed in accordance with the terms of Sections 3A and 3E aforesaid and is relying upon the said re-building certificate to obtain possession of the premises from the Plaintiffs.

8. Further or in the alternative, the purported agreement between the 1st and 2nd Defendants for the renewal of the Crown Lease was null and void and of no effect in that it was contrary to Clause 13 of the Letters Patent of the Colony of Hong Kong being a disposition of land not under the hand of His Excellency the Governor and the 1st Defendant was in truth and in fact at no time authorised by Section 3(a) of the Landlord and Tenant Ordinance 1947 to issue a re-building certificate.

9. In the final alternative, if, which is denied, the re-building certificate was validly issued by the 1st Defendant, the 2nd Plaintiffs continue to be protected against ejectment under the provisions of the Landlord and Tenant Ordinance, and under Section 23 thereof have become direct Tenants of the 2nd Defendant. The Plaintiffs claim :-

(a) A Declaration that on the 18th June 1957, the 1st Defendant was no longer empowered to issue a re-building certificate as aforesaid.

(b) Alternatively, a declaration that at no material time was the procedure under Sections 3A, B, C and D of the Ordinance applicable to the premises the subject matter of this Action.

(c) An Order that the 1st Defendant do withdraw the said certificate.

(d) An injunction against the 2nd Defendant to restrain him from acting on the said certificate or any certificate purporting to be a re-building certificate and issued by the 1st Defendant after the 9th day of April 1957.

(e) A declaration that the premises the subject matter of this ction remain controlled under the Landlord and Tenant Ordinance Cap.255.

(f) A further injunction to restrain the 2nd Defendant from proceeding in the manner prescribed by Section 3E of the Landlord and Tenant Ordinance (now repealed).

(g) A declaration that the certificate issued by the 1st Defendant on or about the ~~18th June 1957~~ 12th October 1957 is null and void and an Order for its destruction.

(h) A declaration that in the alternative the 2nd Plaintiffs are protected from ejectment under the terms of the Landlord and Tenant Ordinance and have become direct Tenants of the 2nd Defendant by virtue of Section 23 thereof.

(i) Costs, and such further or other relief as to this Honourable Court shall seem just.

Dated the 9th day of October 1958.

(Sd.) Brook Bernacchi

Counsel for the 1st and 2nd Plaintiffs.

In the Supreme Court of Hong Kong, Original Jurisdiction.

No. 2

Amended Statement of Claim,

9th October 1958 - continued.

No. 3

No. 3

Amended Statement of Defence of 2nd Defendant,

26th November 1958.

AMENDED STATEMENT OF DEFENCE OF 2ND DEFENDANT

Amended as in red ink pursuant to the Order dated the 23rd day of May 1959 before The Honourable Mr. Justice Alwyn Denton Scholes in Chambers.

Sd. D'Almada e Castro
Registrar
2.6.59.

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION NO.464 OF 1957.

BETWEEN: Ho Po Sang, Leung Tak Hing, Chan Shun, Pang Shiu Kai, Tse Ki Biu, Chow Chak Chuen, Fok Wai Man, Chan Hok Lin, Ngan Shing Yuen trading as Kwong Shing Tong, Mei La Hair Dressing Saloon, Chan Wai Sang and Lo Kin trading as Ho Kwong Furniture & Decoration Co.

1st Plaintiffs

Sd. C. D'Almada e Castro Registrar 2.6.59. (L.S.)

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 3

Amended Statement of Defence of 2nd Defendant, 26th November 1958 - continued.

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 — 2nd Plaintiffs

and

The Director of Public Works — 1st Defendant

Kwong Siu Kau — 2nd Defendant

Amended Statement of Defence of 2nd Defendant

1. It is admitted that the 1st Plaintiffs are the tenants of Nos. 230, 232, 234 and 236 Temple Street Kowloon in the Colony of Hong Kong. The 2nd Defendant has no knowledge as to whether the 2nd Plaintiffs are the sub-tenants of the premises as alleged.

2. Paragraph 2 of the Statement of Claim is admitted save that the 2nd Defendant says that in respect of applications made to the 1st Defendant before the 9th day of April 1957 to do the said acts the 1st Defendant has at all material times been and still is empowered to do them.

3. Paragraphs 3, 4, and 5 of the Statement of Claim are admitted.

4. Paragraph 6 of the Statement of Claim is admitted save that the 2nd Defendant says that the 1st Defendant's authority to issue a re-building certificate has not by the said repeal or otherwise ~~terminated in respect of applications made to him~~

before the 9th day of April 1957 for the issue thereof.

5. In answer to Paragraph 7 of the Statement of Claim, save that the date set out therein should be the 12th day of October 1957 and not the 18th day of June 1957 and save that it is denied that the issue of the said rebuilding certificate by the 1st Defendant was wrongful and without legal authority, Paragraph 7 of the Statement of Claim is admitted.

6. Paragraphs 8 and 9 of the Statement of Claim are denied.

7. In the premises, the Plaintiffs are not entitled to the relief claimed or any part thereof or at all.

1. In answer to Paragraph 1 of the Statement of Claim, it is admitted that the 1st Plaintiffs are the tenants of Nos.230, 232, 234 and 236, Temple Street, Kowloon, in the Colony of Hongkong. The 2nd Defendant has no knowledge as to whether the 2nd Plaintiffs are the sub-tenants of the premises as alleged or at all and the same is not admitted.

2. Paragraph 2 of the Statement of Claim is admitted save that the 2nd Defendant says that in respect of applications made to the 1st Defendant before the 9th day of April 1957 to do the acts therein referred to the 1st Defendant has at all material times been and is still empowered to do the same.

3. In answer to Paragraph 3 of the Statement of Claim, it is admitted that the 2nd Defendant has at all material times been and still is the Crown Lessee of the said premises and the direct landlord of the 1st Plaintiffs. The Crown Lease under which the 2nd Defendant originally held the said premises expired on the 24th day of December 1951. Prior to the said date of expiration, the 2nd Defendant had applied on or about the 9th day of April 1959 for a renewal of the said lease. Pursuant to the said application, negotiations were conducted between the Crown and the 2nd Defendant until about the 21st day of October 1954 when the particulars and conditions for the grant of a new Crown Lease to the 2nd Defendant were

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 3

Amended Statement of Defence of 2nd Defendant, 26th November 1958 - continued.

agreed. The said particulars and conditions were reduced to writing on the 7th day of June 1955 and signed by the 2nd Defendant on the one hand and by the Director of Public Works on behalf of the Crown on the other whereby it was agreed that the 2nd Defendant should be entitled to a new lease subject to the terms and conditions contained therein. Save as hereinbefore admitted, Paragraph 3 is denied.

4. Paragraphs 4 and 5 of the Statement of Claim are admitted.

5. Paragraph 6 is admitted save that the 2nd Defendant says that the 1st Defendant's authority to issue a re-building certificate has not by the said repeal or otherwise been terminated in respect of applications made to him before the 9th day of April 1957 for the issue thereof.

6. Paragraph 7 of the Statement of Claim is admitted save that it is denied that the issue of the said re-building certificate by the 1st Defendant was wrongful and without legal authority.

7. Paragraphs 8 and 9 of the Statement of Claim are denied.

8. In further answer to Paragraph 8 of the Statement of Claim and in the alternative, the 2nd Defendant is a lessee in equity in respect of the said premises and is entitled to have a new Crown Lease duly made out in his favour by reason of the following.

Particulars

(a) Since the expiration of the original lease the 2nd Defendant was permitted to remain in possession of the said premises. On or about 11th June 1956 the 2nd Defendant made application to the 1st Defendant for a Re-building Certificate in respect of the said premises and on 20th July 1956 the 1st Defendant gave notice of his intention to issue a Re-building Certificate and on 12th October 1957 did so issue the said Certificate;

(b) Pursuant to the aforesaid agreement of the 7th day of June 1955, the 2nd Defendant has been

permitted to be and has been in possession of the said premises and has made the following payments to the Crown, namely, an increased rental at the rate of $270.00 per month as from the 25th day of December 1951, and annual instalments of $3,930 from year to year towards the total agreed premium of $70800 provided for under the said agreement. By inter alia accepting such rent and premiums as aforesaid the Crown represented to the 2nd Defendant that the Director of Public Works was the lawfully authorised agent of the Crown for and in respect of the said agreement; alternatively the Crown thereby ratified the agency aforesaid.

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 3

Amended Statement of Defence of 2nd Defendant, 26th November 1958 - continued.

9. Further and in the alternative, the Plaintiffs as such tenants and alleged sub-tenants as aforesaid are estopped from disputing the title of the 2nd Defendant in respect of the said premises.

10. In the premises, the Plaintiffs are not entitled to the relief claimed or to any part thereof or at all.

Dated the 26th day of November, 1958.

(Sd.) Patrick Yu

Counsel for the 2nd Defendant.

No. 4

No. 4

Statement of Defence of 1st Defendant, 2nd December 1958.

STATEMENT OF DEFENCE OF 1ST DEFENDANT

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION NO.464 OF 1957

Sd. P. R. Springall, Deputy Registrar. 3.12.58.

BETWEEN:

Ho Po Sang, Leung Tak Hing, Chan Shun, Pang Shiu Kai, Tse Ki Biu, Chow Chak Chuen, Fok Wai Man, Chan Hok Lin, Ngan Shing Yuen trading as Kwong Shing Tong, Mei La Hair Dressing Saloon, Chan Wai Sang and Lo Kin trading as Ho Kwong Furniture & Decoration Co. 1st Plaintiffs

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 4

Statement of Defence of 1st Defendant, 2nd December 1958 - continued.

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 — 2nd Plaintiffs

- and -

The Director of Public Works — 1st Defendant
Kwong Siu Kau — 2nd Defendant

Statement of Defence of 1st Defendant

1. Paragraph 1 of the Amended Statement of Claim is admitted.

2. Paragraph 2 of the Amended Statement of Claim is admitted, save that the 1st Defendant says that in respect of applications made to him before the 9th day of April 1957 to do the said acts, he is still empowered so to do.

3. Save that the 1st Defendant says that the surrender of the Crown Lease was a valid surrender thereof and that the agreement between the 1st Defendant and the 2nd Defendant to renew the said lease was a valid agreement, paragraph 3 of the Amended Statement of Claim is admitted.

4. Paragraph 4 and 5 of the Amended Statement of Claim are admitted.

5. Paragraph 6 of the Amended Statement of Claim is admitted, save that the 1st Defendant says that his authority or entitlement to issue re-building certificates has not been terminated in respect of applications made to him for the issue thereof before the 9th day of April 1957.

6. The 1st Defendant admits that on the 12th day of October 1957 he issued the re-building certificate mentioned in paragraph 7 of the Amended Statement of Claim, but denies that the same was issued wrongfully or without legal authority. The 2nd Defendant applied for a re-building certificate on the 11th day of June 1956 and the 1st Defendant gave notice of his intention to issue a re-building certificate on the 20th day of June 1957.

7. The 1st Defendant denies that the agreement referred to in paragraph 8 of the Amended Statement of Claim was null and void and of no effect as alleged or at all.

8. The 1st Defendant denies that the said agreement amounted to a disposition of land as alleged in paragraph 8 of the Amended Statement of Claim or at all and in so far as the allegations in the said paragraph are propositions of law the 1st Defendant does not plead thereto.

9. Inasmuch as paragraph 9 of the Amended Statement of Claim makes no allegation of fact but appears to propound a proposition of law, the 1st Defendant does not plead to it.

10. The 1st Defendant says that the Plaintiffs are not entitled to the relief as claimed or at all.

11. Save as is hereinbefore expressly admitted, each and every allegation of the Amended Statement of Claim is denied as if each were herein set out and traversed seriatim.

Dated this 2nd day of December, 1958.

(Sd.) Stewart Collier

Crown Counsel
for the 1st Defendant.

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 4

Statement of Defence of 1st Defendant, 2nd December 1958 - continued.

No. 5

JUDGMENT OF MR. JUSTICE GREGG

No. 5

Judgment of Mr. Justice Gregg, 13th July 1959.

In this case the material facts are not in issue and all relevant documents, available, have been tendered by consent. The plaintiffs consist

In the Supreme Court of Hong Kong, Original Jurisdiction

No. 5

Judgment of Mr. Justice Gregg,

13th July 1959 - continued.

of two groups: (a) the 1st plaintiffs who are the tenants of the 2nd defendant in respect of premises known as Nos.230, 232, 234 and 236, Temple Street, Kowloon; and (b) the 2nd plaintiffs who are alleged to be sub-tenants of the 1st.

On the 7th of June, 1955, the 2nd defendant entered into an agreement (Exh.A) with the 1st defendant, the Director of Public Works, for the lease from the Crown of Kowloon Inland Lot No.6516 which includes the premises mentioned. This agreement contains a condition which requires the 2nd defendant to erect new buildings on the premises in question. On account of this condition the 2nd defendant applied to the Director of Public Works for a "re-building certificate" under section 3A of the Landlord and Tenant Ordinance, then in force, which provided, in effect, that when any person becomes liable to the Crown under a building covenant which involves the demolition of premises, subject to the Ordinance, he shall, as a lessee in law or in equity, be entitled, subject to certain statutory procedure, to recover vacant possession upon the expiration of two months from the giving to him of a "re-building certificate" by the Director of Public Works.

Prior to the execution of Exh. A, the 2nd defendant has been the lessee from the Crown of the land and premises in question; but his lease had expired on the 24th day of December 1951. On the expiration of his lease he remained on in possession and paid rent. On the 7th day of June 1955, following a period of negotiation, he entered, as already stated, into the agreement (Exh.A), for a lease from the Crown of the said premises with the Director of Public Works; and, in pursuance of the condition in this Agreement to erect new buildings, he applied, under section 3A on the 11th of June, 1956 to the Director of Public Works for a "re-building certificate" to enable him to obtain vacant possession. On the 20th day of July 1956 the Director of Public Works sent him a "notice of intention" (Exh.C2) to grant him a re-building certificate in accordance with section 3A(2) of the Landlord and Tenant Ordinance. After receipt of this "notice of intention" the 2nd defendant, in accordance with section 3B of the Ordinance, served the tenants in occupation of his premises with notice of the Director of Public Works' intention to grant him a re-building certificate. The

tenants then appealed to the Governor in Council, under the provisions of section 3B(2) against the said notice of intention; and, after hearing their appeal and a cross-petition from the 2nd defendant, the Governor in Council dismissed the appeal. Pending the determination of this appeal and cross-petition, section 3A to 3E inclusive, of the Landlord and Tenant Ordinance were repealed, with effect from April 9, 1957, by Ordinance No.14 of 1957. Nevertheless the Director of Public Works, following the determination of the appeal, issued a "re-building certificate" to the 2nd defendant on 12th October 1957. The 2nd defendant then served notice to quit on all his tenants in the prescribed form in accordance with section 3E of the Landlord and Tenant Ordinance then repealed. The plaintiffs now seek the following reliefs:

"(a) A declaration that on the 12th October 1957, the 1st Defendant was no longer empowered to issue a re-building certificate aforesaid.

(b) Alternatively, a declaration that at no material time was the procedure under Sections 3A, B, C and D of the Ordinance applicable to the premises the subject matter of this Action.

(c) An Order that the 1st Defendant do withdraw the said certificate.

(d) An injunction against the 2nd Defendant to restrain him from acting on the said certificate or any certificate purporting to be a re-building certificate and issued by the 1st Defendant after the 9th day of April 1957.

(e) A declaration that the premises the subject matter of this action remain controlled under the Landlord and Tenant Ordinance Cap.255.

(f) A further injunction to restrain the 2nd Defendant from proceeding in the manner prescribed by section 3E of the Landlord and Tenant Ordinance (now repealed).

(g) A declaration that the certificate issued by the 1st Defendant on or about the 12th October 1957 is null and void and an Order for its destruction.

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(h) A declaration that in the alternative the 2nd Plaintiffs are protected from ejectment under the terms of the Landlord and Tenant Ordinance and have become direct Tenants of the 2nd Defendant by virtue of Section 23 thereof".

On the facts it is clear that before the repeal of sections 3A, B, C, D and E of the Landlord and Tenant Ordinance the following steps had been taken:

(a) The 2nd defendant had entered into an agreement (Exh.A) for a lease from the Crown of the property in question with the Director of Public Works who acted ostensibly as agent for the Crown in that behalf. This agreement contained a covenant to demolish and re-build.

(b) In consequence of the said covenant the 2nd defendant had applied to the Director of Public Works for a re-building certificate, to enable him to obtain vacant possession of the premises in question.

(c) The 2nd defendant had been given, by the Director of Public Works, a notice of his (the Director of Public Works') intention to give him (the 2nd defendant) such re-building certificate (see Exh.C2).

(d) Notice of this intention had been served on the tenants.

(e) The tenants had appealed, following service on them of the said notice, to the Governor in Council.

(f) The 2nd defendant, following the tenants' appeal, had presented a cross-petition to the Governor in Council.

Thus, it is the contention of the 2nd defendant that in view of the action taken by him, before sections 3A - 3E were repealed, he had acquired a right, under paras (b) and (c) of section 10 of the Interpretation Ordinance (Cap.1), to have his case determined in accordance with the provisions of the repealed sections 3A - 3E of the Landlord and Tenant Ordinance. Paras (b) (c) and (e) of section 10 of the Interpretation Ordinance read as follows:

"10. 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;

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

Against this counsel for the plaintiffs has advanced the following contentions.

1. That Exh.A (the agreement for lease) is void and of no effect, as being contra to the provisions of Art. 13 of the Letters Patent, in that it is a disposition of Crown land; and, that being so, should have been executed by the Governor under the Public Seal of the Colony and not by the Director of Public Works.

2. That in any event the so-called demolition and re-building covenant in Exh. A (Clause 6(a)) is not a covenant within the meaning of section 3A of the Landlord and Tenant Ordinance; and that, furthermore, the so-called covenant was inoperative at the time the re-building certificate was issued.

3. That the mere application of the 2nd defendant to the Director of Public Works for a re-building certificate does not create an acquired or accrued right - within the meaning of sub-section 10(c) of the Interpretation Ordinance (Cap.1) - as it was simply an application to an executive officer for the exercise of discretionary executive act and conferred no right or privilege on the 2nd Defendant.

4. That the repeal of sections 3A - 3E with effect from April 9, 1957 made the re-building certificate issued by the Director of Public Works on October 12, 1957 void and of no effect.

5. That, even assuming an acquired or accrued right did exist in the 2nd defendant, the legislature in stating, under section 3E (2), that the

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lessee of the Crown shall be entitled to vacant possession of the premises to which the re-building certificate relates "in like manner and with the like remedies as if an order for possession had been made under section 18", overlooked the fact that this necessarily entails the application of section 23 of the Ordinance which provides inter alia that an order for ejectment against the principal tenant shall not, unless the tribunal so directs, operate as an order for the ejectment of any sub-tenant of such principal tenant, and that this protects the 2nd plaintiffs who must now be deemed to be tenants of the immediate landlord.

As regards point 1, I am satisfied having regard to the wording of Article 13 of the Letters Patent that the agreement for lease (Exh.A), while it confers an equitable interest upon the 2nd defendant, is not technically an express "grant or disposition" of land as is contemplated by Article 13 of the Letters Patent. In my view, Exh. A is rather in the nature of a binding preliminary agreement for a lease of Crown land which gives no right of assignment, and is one which may be lawfully executed by any duly authorised agent of the Governor in that behalf e.g. the Director of Public Works. That being so, it does not, as does a formal grant or disposition of Crown land, require to be signed by the Governor himself under the Public Seal of the Colony.

As regards point 2, I am of the opinion, having regard to the context, that the re-building condition in clause 6 of Exh. A is a "covenant" for the purposes of section 3A. Accordingly "covenant" as used in section 3A, includes "condition" or "agreement" and need not be under seal. I am also of the opinion that the period of 24 calendar months stipulated in clause 6 of Exh. A was, by the letter (Exh. D) dated March 20, 1957 extended to the 28th of June 1958. This letter (Exh. D) was signed ostensibly for the person then performing the functions of Director of Public Works; and must, in my opinion, be allowed to operate, at least in equity, in favour of the 2nd defendant.

As regards point 3, I am of the opinion that if by operation of sub-section 10(b) of the Interpretation Ordinance the repeal of any enactment shall not affect anything duly done, under the enactment repealed, then the application for a

re-building certificate made by the 2nd defendant under section 3A(1) must remain a valid application, entitling the 2nd defendant to have his application determined in accordance with the repealed provisions of sections 3A - 3E inclusive. The said application also, amounts, in my view, to an acquired right under sub-section 10(c) of the Interpretation Ordinance; especially as the Director of Public Works had issued the prescribed "notice of intention" (Exh. C2) to give the 2nd defendant a re-building certificate. Accordingly I hold that the defendant had acquired a right to have his claim for vacant possession determined in accordance with the repealed section 3A - 3E of the Landlord and Tenant Ordinance.

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With regard to point 4, it must, in my view, follow that if the 2nd defendant has acquired a right - as I have held he has - to have his application determined in accordance with the repealed provisions of section 3A - 3E inclusive, then, on the determination of that application or claim in his favour by the Governor in Council, it was in order for the Director of Public Works to issue him with the re-building certificate dated October 12, 1957; and accordingly I hold that this certificate is valid.

As far as I can see there is no authority completely on all fours with the present case in regard to the question as to what may constitute an "acquired right". In my opinion the nearest to it is the case of Hamilton Gell vs White 1922 K.B.D. Vol.II page 422. In this case, which involved a dispute between landlord and tenant, the tenancy commenced in 1907 and was a tenancy from year to year. In 1920 the landlord contemplated a sale of the property and gave the tenant a year's notice to quit. The tenant then gave the landlord, within 2 months after receipt of the notice to quit, notice of his intention to claim compensation in accordance with the terms of section 11 of the Agricultural Holdings Act 1908; but before he could comply with a further condition in the said section 11 which required him to make his claim for compensation within 3 months of quitting the holding, section 11 of the Act of 1908 was repealed. He, however, subsequently made his claim, notwithstanding the repeal of the section, within the three months time limit it had prescribed.

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The case went to the Court of Appeal in England where it was held that notwithstanding the repeal of section 11 of the Act of 1908 the tenant was entitled to claim compensation under that section since by virtue of section 38 of the Interpretation Act, which is similar to our section 10, the repeal did not affect any right acquired under the section repealed. On p.430, of the case just cited, Scrutton L.J. states as follows:

> "As soon as the tenant had given notice of his intention to claim compensation under S.11 he was entitled to have that claim investigated by an arbitrator. In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say, that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation, which had been begun, continue, for s.38 expressly provides that the investigation shall not be affected by the repeal." (See para (e) of S.38)

In the present case, the 2nd defendant, in my view, had acquired a right under sub-section 10(b) (c) and (e) of the Interpretation Ordinance to have his claim investigated and determined in accordance with sections 3A to 3E of the Landlord and Tenant Ordinance; especially as proceedings before the Governor-in-council had already been begun when the sections in question were repealed.

With regard to point 5, I am of the opinion that the order for "possession" under section 18 referred to in section 3E of the Landlord and Tenant Ordinance can only mean, having regard to the wording of section 3E and to that of the preceding section 3A, an order for <u>vacant possession</u>, which must mean an order ejecting all tenants including sub-tenants. Thus, it must be assumed that the situation contemplated by section 3E(2) is one in which an order for <u>vacant possession</u> has been made, by the Tenancy Tribunal, or, in other words, is one in which the Tenancy Tribunal has made an order for ejectment expressly directing (as it can do under s.23) that its ejectment order shall apply to sub-tenants as well as to principal tenants. In my view this is the only way in which the "<u>vacant possession</u>" contemplated by sections 3A and 3E can have any meaning.

Having held as I have, I now come to the conclusion that the 2nd defendant is entitled to vacant possession of the premises in question. Accordingly this action is dismissed with costs to the defendants.

(J. R. Gregg)
Senior Puisne Judge
13.7.59.

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Judgment of Mr. Justice Gregg,

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No. 6

In the Supreme Court of Hong Kong, Appellate Jurisdiction

No. 6

Notice of Motion on Appeal,

17th July 1959.

NOTICE OF MOTION ON APPEAL

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
CIVIL APPEAL NO. 17 OF 1959

(An Appeal from Supreme Court Original Jurisdiction Action No. 464 of 1957)

BETWEEN:

Ho Po Sang, Leung Tak Hing, Chan Shun, Pang Shiu Kai, Tse Ki Biu, Chow Chak Chuen, Fok Wai Man, Chan Hok Lin, Ngan Shing Yuen trading as Kwong Shing Tong, Mei La Hair Dressing Saloon, Chan Wai Sang and Lo Kin trading as Ho Kwong Furniture & Decoration Co. 1st Appellants (1st 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 Shok, 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 2nd Appellants (2nd Plaintiffs)

- and -

In the Supreme Court of Hong Kong, Appellate Jurisdiction

The Director of Public Works — 1st Respondent (1st Defendant)

Kwong Siu Kau — 2nd Respondent (2nd Defendant)

No. 6

Notice of Motion on Appeal, 17th July 1959 - continued.

Order 29
rule 1

TAKE NOTICE that the Full Court will be moved at 10.00 o'clock a.m. on the 16th day of November 1959 or as soon thereafter as Counsel can be heard, by Mr. B. Bernacchi, Counsel for the above-named 1st and 2nd Appellants for an Order that the Judgment of The Honourable Mr. Justice James Reali Gregg, Puisne Judge, dated the 13th July 1959 be reversed, and judgment entered for the 1st and 2nd Plaintiffs (1st and 2nd Appellants).

And for an Order that the 1st and 2nd Respondents do pay to the 1st and 2nd Appellants the costs of the said action and of this appeal, such costs to be taxed, and that such further or other order may be made in the premises as to the Full Court shall seem fit.

Dated the 17th day of July 1959.

Solicitors for the 1st and 2nd Appellants.

To the Registrar of Supreme Court and to the Attorney General for the 1st Respondent; and to Messrs. Johnson, Stokes and Master, Solicitors for the 2nd Respondent.

N. B. 17th, 18th and 19th November 1959 also reserved.

(Sd.) G. S. Edwards.

Dep. Registrar.

No. 7

In the Supreme Court of Hong Kong, Appellate Jurisdiction

No. 7

Judgment - (a) Mr. Justice Blair-Kerr, 31st December 1959.

J U D G M E N T

(a) Mr. Justice Blair-Kerr.

This is an appeal from the judgment of the learned Senior Puisne Judge in O.J. Action No.464 of 1957.

The facts were not in issue in the Court below. The 2nd respondent has been Crown Lessee of premises 230, 232, 234, and 236 Temple Street Kowloon. The 1st appellants are the tenants of the 2nd respondent, and the 2nd appellants are the sub-tenants of the 1st appellants.

The 2nd respondent originally held these premises under a Crown Lease which expired on 24th December 1951. On the 9th April 1950, 2nd respondent applied for a renewal of this lease. Negotiations between the 1st and 2nd respondent proceeded, and about 21st October 1954 the particulars and conditions for the grant of a new Crown Lease to the 2nd respondent were agreed. This agreement (Ex.A) was reduced to writing and signed by the 1st and 2nd respondents on the 7th day of June 1955.

The agreement reads as follows:-

> "Memorandum of Agreement between Kwong Siu Kau ..... (lessee) of the one part and the Director of Public Works for and on behalf of the Governor, of the other part Whereby It Is Agreed that the lessee shall surrender the Lot and premises set out in the Second Schedule of the foregoing particulars and shall be entitled to a Lease of the new Lot described in the First Schedule subject to and on the terms and conditions hereinbefore contained."

Then followed the signatures, the 1st respondent signing "Theodore L. Bowring, Director of Public Works".

The conditions in the Schedule to this agreement were divided into two parts viz "General Conditions" and "Special Conditions". Of the General Conditions, Condition 1 provided that the surrender to the Crown of the old lot would be

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Judgment - (a) Mr.Justice Blair-Kerr, 31st December 1959 - continued.

executed by the Lessee at his expense when the Land Officer required him to do so. Condition 2 stipulated that the Lessee would pay by instalments to the "Government of Hong Kong" the sum of $70,800 premium for the grant of the new Crown Lease. Under Condition 3, Crown Rent for the new lot payable half yearly was to commence from the date of the agreement. Condition 4(a) stipulated that provided "the conditions herein contained have been complied with to the satisfaction of the Director of Public Works and the Land Officer, the Lessee of the Lot shall, subject to the approval of his title by the Land Officer, be entitled to a Lease of the new Lot .... for a term of 150 years commencing as from the 25th December 1876".

Condition 4(c) reads: "Pending the issue of such new Lease the tenancy of the new Lot shall be deemed to be upon and subject to, and such new Crown Lease when issued shall be subject to, and contain, all Exceptions, Reservations, Covenants, Clauses and Conditions as are contained in the existing lease or agreement for tenancy under which the same is held as varied modified or extended by the Conditions herein contained ...."

Condition 6(a) reads: "The Lessee of the Lot shall develop the same by the erection thereon of the buildings specified in ..... such buildings to be completed before the expiration of 24 calendar months from the date hereof and shall expend thereon a sum of not less than $200,000.00 ....."

Condition 6(b) reads: "Provided always that the fulfilment by the lessee of his obligations under the Conditions shall be deemed to be a condition precedent to the grant or continuance of tenancy hereunder and in the event of any default by the lessee in complying therewith such default shall be deemed to be a continuing breach ....."

The Landlord & Tenant Ordinance Cap.255 was amended by Ordinance No.22 of 1953 and Ordinance 11 of 1954 by the addition, inter alia, of sections 3A-E. Section 3A reads 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 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.

(4) This section shall apply notwithstanding any agreement or condition that the Crown lease will not be granted until the building covenant which would bring subsection (1) into operation has been fulfilled."

Section 3B reads:-

(1)"Where, pursuant to the provisions of subsection (2) of section 3A, the Director of Public Works gives notice of his intention to grant a re-building certificate, the applicant may, within three weeks after receipt of such notice, serve in manner specified in section 32 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 re-building certificate.

(2) Any such tenant may, within three weeks after service upon him of such notice, appeal by

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way of petition to the Governor in Council against the proposal of the Director of Public Works to give a re-building 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 re-building certificate who is served with a copy of a petition pursuant to the provisions of subsection (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."

Section 3D(2) and (3) read:-

(2)"No person lodging a petition or cross-petition as aforesaid shall be entitled to appear before the Governor in Council, but every petition and cross-petition lodged in due time shall be taken into consideration by the Governor in Council who may direct that a re-building 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."

Section 3E reads:-

(1)"Within one month after the giving of a re-building 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: Provided that where a contractual tenancy exists in respect of which the period of notice to be given exceeds one month the prescribed period of two months shall be extended if necessary to enable notice in the prescribed form to operate as a notice to quit under the contractual tenancy, which such notice shall in such case be deemed to be.

(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 re-building 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 re-building 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."

On 11th June 1956, 2nd respondent applied to the 1st respondent for a Rebuilding Certificate; and on 20th July 1956, the 1st respondent, pursuant to section 3A(2) of the Ordinance, wrote to the 2nd respondent in the following terms:- "I have to inform you that after due consideration of your application dated 11 June 1956 it is my intention to give a Rebuilding Certificate in accordance with section 3A(1) of the Landlord & Tenant Ordinance ..... "

In the meantime, the 2nd respondent paid to the Crown the increased rent of $270 per month as from the 25th December 1951 and annual instalments of $3,930.00 towards the total agreed premium of $70,800.00 provided for under the Agreement of the 7th June 1955.

After receipt of the 1st respondent's letter of 20th July 1956, the provisions of section 3B of the Landlord & Tenant Ordinance were complied with; the tenants appealed by petition to the Governor in Council, and there was a cross-petition from 2nd respondent. These petitions and cross-petition were not determined by the Governor in Council until a considerable time after April 1957. In the meantime the Landlord & Tenant (Amendment) Ordinance No. 14 of 1957 was enacted, and this Ordinance repealed sections 3A-E of the principal Ordinance with effect from 9th April 1957.

On the 20th March 1957, a letter signed on behalf of the 1st respondent was sent to the 2nd respondent's solicitors in the following terms:-

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"Government is prepared to grant to your client, Mr. Kwong Siu Kau, the owner of the lot, an extension of time in which to fulfil the Building Covenant ..... The extension of time offered is for a period ending 28th June, 1958 ....."

The Governor in Council having considered the petitions, directed that the Rebuilding Certificate be given and, on 12th October 1957, 1st respondent issued a rebuilding certificate to 2nd respondent in the following terms: "I hereby certify that in my opinion it is reasonable that the Building Covenant relating to the premises known as 230 - 236 Temple Street be complied with and that Mr. Kwong Siu Kau the Crown Lessee of this lot, should be given vacant possession of the premises." The 2nd respondent thereupon served notice to quit on all his tenants under the repealed section 3E(1) of the Landlord & Tenant Ordinance.

O.J. Action 464/59 was subsequently commenced by the plaintiffs claiming the following reliefs:-

"(a) A declaration that on the 12th October 1957, the 1st Defendant was no longer empowered to issue a re-building certificate as aforesaid.

(b) Alternatively, a declaration that at no material time was the procedure under Sections 3A, B, C and D of the Ordinance applicable to the premises the subject matter of this Action.

(c) An Order that the 1st Defendant do withdraw the said certificate.

(d) An injunction against the 2nd Defendant to restrain him from acting on the said certificate or any certificate purporting to be a re-building certificate and issued by the 1st Defendant after the 9th day of April 1957.

(e) A declaration that the premises the subject matter of this action remain controlled under the Landlord and Tenant Ordinance Cap.255.

(f) A further injunction to restrain the 2nd Defendant from proceeding in the manner

prescribed by section 3E of the Landlord and Tenant Ordinance (now repealed).

(g) A declaration that the certificate issued by the 1st Defendant on or about the 12th October 1957 is null and void and an Order for its destruction.

(h) A declaration that in the alternative the 2nd Plaintiffs are protected from ejectment under the terms of the Landlord and Tenant Ordinance and have become direct Tenants of the 2nd Defendant by virtue of Section 23 thereof."

Before the enactment of sections 3A-E of the Landlord & Tenant Ordinance in 1953, the only procedure for obtaining an order that controlled premises should be exempted from the further operation of the Ordinance, was the procedure prescribed in section 31 of the Ordinance. This involves an application to a specially constituted Tenancy Tribunal which inquires fully into the matter and makes a recommendation to the Governor in Council either that the premises be exempted or not exempted as the case may be. If the recommendation is that the premises should be exempted, the Tribunal may recommend that adequate compensation be paid to all persons who may be disturbed in consequence of an exemption order by the Governor in Council.

The enactment of sections 3A-E of the Ordinance gave lessees an additional cheap method of obtaining vacant possession as under this procedure there was no provision for the payment of compensation to any person in cases where Rebuilding Certificates were issued. It seems obvious, therefore, that the purpose of the 1957 Amending Ordinance was to put all persons in the same position in regard to obtaining vacant possession of premises for any purpose, irrespective of whether the lease under which the property was held contained a building covenant or not.

No matter which procedure is adopted (section 31 or sections 3A-E), Crown Lessees are in a peculiar position. It may be that, under the agreement for Lease the lessee is duty bound under the building covenant to develop the land, and the penalty for failing to do so, is forfeiture. Yet,

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the mere existence of such a building covenant gives the Crown Lessee no right whatever to vacant possession although this is an essential preliminary to the development of the land. In the case of the section 31 procedure, it is the executive act of the Governor in Council which "decontrols" the premises; in the case of the sections 3A-E procedure, it is again the executive act of the Governor in Council which enables the rebuilding certificate to issue which in turn opens the door to the lessee obtaining vacant possession.

Sub-sections (b), (c) and (e) of section 10 of the Interpretation Ordinance Cap.1 read as follows:-

"10. 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.

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

The position therefore is that, before the repeal of sections 3A-E of the Landlord & Tenant Ordinance any person invoking the procedure set out in these sections, had to show:-

(1) the existence of a building covenant compliance wherewith involved the demolition of premises subject to the Ordinance; and

(2) that he was the person liable to the Crown under that covenant, being a person who, in law or equity, was a lessee of the Crown.

After the repeal of sections 3A-E, any person applying for a rebuilding certificate has, in addition, to show that he has an "accrued right" under the repealed sections which enables him to continue to invoke those sections by virtue of section 10 of the Interpretation Ordinance.

It will be convenient here to refer to Article XIII of the Letters Patent. It 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 or 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.

Nothing in this Article shall be construed as preventing the enactment of laws by the Legislature of the Colony regarding the making and execution of such grants and dispositions."

Mr. Sneath, Crown Counsel, who appeared for 2nd respondent, informed the Court that the Crown did not contest the fact that there is no power in the Letters Patent or elsewhere for the Governor to delegate his power to "make and execute" "grants and dispositions" of land.

It was contended therefore by Mr. Bernacchi for the appellants:-

(1)(a) That if the agreement for a lease (Ex.A) operated as a disposition of land it was void in that it was executed by someone other than the Governor;

(b) That if Ex.A was not a disposition of land, then the 2nd respondent is merely a yearly tenant holding over. In either case there would be no building covenant for him to comply with.

(2) That on the 9th April 1957, when sections 3A-E of the Landlord & Tenant Ordinance were repealed, the 2nd respondent had no right to possession, and that therefore he had no "right" "acquired or accrued" which could be protected by section 10 of the Interpretation Ordinance.

(3) That the effect of the words in section 3E(2) (viz "in like manner and with the like remedies as if an order for possession thereof had been made under section 18") is that, even although

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the issue of the Rebuilding Certificate was legal, it could not operate against sub-tenants as they are protected by section 23 of the Ordinance, because an order for ejectment made against a principal tenant in the words of section 23 "shall not, unless the tribunal so directs, operate as an order for ejectment against any sub-tenant."

I do not think the argument in support of point (3) above is well-founded. We are entitled to look at the purpose of this legislation. Section 3A specifically deals with a situation where there is a building covenant compliance with which involves the demolition of premises. Mr. Bernacchi submitted that there was no magic in the expression "vacant possession", and with that I agree. But, if the expression "vacant possession" as used throughout these sections were not to mean that all persons on the premises vacated those premises, it would render the sections completely nugatory. Section 3E(2) may not be as clearly worded as one would desire, but the intention of the legislature is quite clear. Section 3E(1) states that, notwithstanding any contractual tenancy, the prescribed notice is for the purpose of calling upon "all persons in occupation of the premises peaceably to quit the same." There is no question of the notice being addressed to named principal tenants; and, in conferring upon the lessee the right to "vacant possession" by 3E(2) "in like manner ..... as if an order for possession ..... had been made under section 18", bearing in mind that "tenant" is defined in the Ordinance as including sub-tenant, there is no reason to think, on the plain wording of sections 3E and 18, that the Legislature intended otherwise than that there should be an ejectment in like manner to an ejectment under section 18 i.e. an order to operate against "all persons in occupation."

I now turn to the question of whether, on 9th April, the 2nd respondent had an accrued right, as this was the first point argued by Mr. Bernacchi.

The sequence of events visualised in sections 3A-E are:-

(i) an application by the lessee for a rebuilding certificate (3A(1)).

(ii) Consideration of that application by the Director of Public Works (3A(2)).

(iii) Delivery by the Director of Public Works to the lessee of a written notice saying he intends to give a rebuilding certificate (3A(2)).

(iv) Notice of the Director of Public Works' intention to be served on all tenants (3B(1)).

(v) Tenants appeal by petition to Governor in Council served on lessee (3B(2)).

(vi) Cross-petition of lessee served on tenants (3B(3)).

(vii) Petition and cross-petition 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; the decision of the Governor in Council shall be final (ss.3B(2) and 3B(3)).

It seems quite clear from a consideration of the terms of section 3D and the authorities cited, (including the recent Full Court decision in Miscellaneous Proceedings No.17 of 1959) that the Governor in Council, when exercising the powers conferred by this section, was exercising powers of an executive or ministerial character and not a judicial character. I am of the opinion therefore that his direction under section 3D that the Rebuilding Certificate do issue was a purely executive act.

Therefore, on the 9th April 1957, what rights did the 2nd respondent have which were capable of being kept alive under section 10 of the Interpretation Ordinance?

Mr. Bernacchi contends that the lessee had no right to a rebuilding certificate and therefore he had no power to issue a notice to quit under section 3E.

Mr. Sneath for the 1st respondent contended that, just prior to the repeal, 2nd respondent's

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rights could be summarised as follows: That as the 2nd respondent had taken a step which evinced an intention to exercise his rights, therefore he had a present right, that right being that, in the future, there shall be granted to him a rebuilding certificate; that if the 2nd respondent complied with the procedural steps regarding the giving of notice etc., he would then find himself with the right to possession. Mr. Sneath contended that, by taking a step under section 3A(1) "the 2nd respondent had put in suit his rights"; that "under section 3A he got a right to recover vacant possession in the event of something happening in the future, and, having set the train of events in motion, this could lead to the issue of the re-building certificate and hence to possession", but that this "right" was defeasible as it could be defeated by the Governor in Council's decision. At another point in his submission, Mr. Sneath contended that the 2nd respondent had a contingent right, contingent on the exercise of the discretion of the Director of Public Works and the Governor in Council.

Mr. Patrick Yu for the 2nd respondent argued that an accrued right, for the purpose of section 10 of the Interpretation Ordinance, could be either vested or contingent; that the 2nd respondent had a right to take advantage of the machinery of sections 3A-E; that section 3A(1) created no more than a general privilege which did not begin to operate till the lessee had set the law in motion by applying to the Director of Public Works for a rebuilding certificate; but that, once the procedure was thus set in motion, the lessee had a right that the procedure be continued.

Various authorities were cited by counsel on this point, and these included the following:-

(1) Reynolds and another v. Attorney General for Nova Scotia (1896) A.C. 240.

(2) Hamilton Gell v. White (1922) 2 K.B. 422.

(3) Leung Siu Chi v. Francis Britto 31 H.K.L.R.119

(4) Kerr v. Bride (1923) A.C. at p.27.

(5) Roberts v. Potts (1894) 1 Q.B. 213.

(6) Heston and Isleworth Urban District Council v. Grout (1897) 2 Ch. 306.

(7) In re Lambton (1923) 92 L.J. Ch. 446.

(8) Briggs v. Thomas Dryden (1925) 2 K.B. 679.

(9) Moakes v. Blackwell Colliery Co. (1925) 2 K.B. p.69.

(10) Abbott v. The Minister of Lands (1895) A.C. 425.

(11) Man Yu Firm v. Li Chan Shi 20 H.K.L.R. 28.

The learned judge in the Court below regarded the case of Hamilton Gell v. White as approximating most closely to this case. In the Hamilton Gell case the facts were: In September 1920 the landlord of an agricultural holding, being desirous of selling it, gave his tenant notice to quit. By section 1 of the Agricultural Holdings Act 1914, where the tenancy of a holding is determined by a notice to quit in view of a sale of the holding the tenant is entitled, by virtue of the provisions of that section, to recover compensation in terms of, and subject to the provisions of section 11 of the Agricultural Holdings Act 1908 as for an unreasonable disturbance. Under section 11 of the 1908 Act it was a condition of the tenants title to compensation thereunder that he should within two months after receipt of the notice to quit give the landlord notice of his intention to claim compensation, and further, that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of intention to claim compensation; but, before the tenancy had expired, and therefore before he could satisfy the second condition, section 11 of the 1908 Act was repealed. He subsequently made his claim within the three months limited by the section. It was held that, notwithstanding this repeal, he was entitled to claim compensation under section 11. As soon as the landlord gave the tenant notice to quit, the tenant "acquired a right" to compensation for disturbance under section 11 subject to his satisfying the conditions of that section.

It seems to me that this case does not really assist the respondents. The tenant's right to

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compensation was a right given to him by law upon the happening of a certain event, namely his receiving notice to quit. The section had not then been repealed. It was a contingent right, but nevertheless a vested right. It was contingent on his satisfying the two conditions mentioned in the section by the giving of notice and lodging the claim within the time limits specified. But the right to compensation vested in the tenant by virtue of the terms of section 11 of the 1908 Act on the notice to quit being served. As Scrutton L.J. said at page 430 of the report:

> ".... it is not suggested by the appellant that his right to compensation was acquired by his giving notice of intention to claim it; what gave him the right was the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by section 11 were conditions not of the acquisition of the right but of its enforcement. ..... As soon as the tenant had given notice of his intention to claim compensation under section 11 he was entitled to have that claim investigated by an arbitrator. In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation which had been begun, continue, for section 38 (of the Interpretation Act) expressly provides that the investigation shall not be affected by the repeal".

The "investigation" referred to in section 10(e) of the Interpretation Ordinance is an investigation ..... "in respect of any such right", viz. the right referred to in section 10(c). It does not envisage the continuance after the repeal of an investigation begun before the date of the repeal to ascertain if any right exists. In Leung Siu Chi v. Francis Britto 31; H.K.L.R.119 the facts were: In September 1946, a landlord gave a tenant notice to quit, and in April 1947, she commenced proceedings before the Tenancy Tribunal under Article 5(1A)(1)(a) of Proclamation No.15 of 1945 for the eviction of her tenant, alleging that she required the premises for her own use. The matter came on for hearing after the Landlord and Tenant Ordinance 1947 came into force, section 27(3) of

which reads: "Subject to the provisions of section 12 of the Interpretation Ordinance 1911 (now section 10 of Cap.1), all proceedings pending before the Tenancy Tribunal at the commencement of this Ordinance shall be continued before such Tribunal in all respects as if the same had been commenced under the provisions of this Ordinance".

The Tribunal treated the application as being governed by section 19 of the 1947 Ordinance which introduced the "greater hardship" rule and dismissed the application. The Full Court reversed this decision and held that the application was governed by Proclamation No.15 of 1945 and that greater and lesser hardship was not an issue to be decided.

The Learned President, Blackall C.J., said at p.123 of the report:-

> "The general principle of interpretation is that the repeal of an enactment shall not, unless a contrary intention appears, affect any right accrued under the repealed enactment. This principle is embodied in section 12 of the Interpretation Ordinance 1911; .... if a party sets the law in motion during the existence of the repealed enactment then, even though the law is altered during the pending of the action, the rights of the parties will be decided by the law as it existed when the action was begun, unless the new legislation shows a clear intention to the contrary."

There again, it is clearly laid down that the rights of the parties will be decided by the law as it was prior to the repeal. The passage presupposes that a right either vested or contingent exists prior to the repeal, in which case the repeal shall not affect the investigation and enforcement of that right.

Gould J. in dealing with a submission that no accrued right existed when the 1947 Ordinance came into force, said; at p.127:-

> "This argument I consider to be fallacious. The right which the applicant had in this case after the expiry of her notice to quit and upon the issue of her application was a

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right to possession of the premises provided she established certain facts to the satisfaction of the Tribunal when her application was heard."

The Tenancy Tribunal, of course, is not a body exercising executive discretion. It exercises judicial functions. The right to be investigated and adjudicated accrued on the expiry of the notice to quit.

In Heston and Isleworth Urban District Council v. Grout (1897) 2 Ch. 306. The facts were: On 30th October 1891 The Heston and Isleworth Local Board served notices on frontagers to sewer and make up a private street under section 150 of the Public Health Act 1875. This section empowers such local authorities to give notice to frontagers "requiring" them to make up private streets, within a time specified in the notice and it goes on to enact that, if such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned in the notice and recover the expense of so doing from the owners in default according to the frontage of their premises and "in such proportion as is settled by the surveyor of the urban authority, or in case of dispute by arbitration." The frontagers having made default, the local authority took steps to do the work. In the meantime, the local authority adopted the Private Street Works Act 1892 section 25 of which provided that, from the date of the adoption of the 1892 Act, section 150 of the 1875 Public Health Act "shall not apply" to any District in which the 1892 Act was in force. An originating summons was taken out after the work had been done and apportioned for a declaration that a frontager owed the sum of £157-14-10 which was his proportion of the expenses of making up the work. It was held that section 25 of the 1892 Act did not affect the validity or effect of the notice given while section 150 was in force in the district.

North J. at p.310 of the report states:-

"The matter stands in this way - proceedings had been taken long before the adoption of the Act under section 150 of the Act of 1875; those proceedings were in active progress at the time when the Act was adopted. The plaintiffs were carrying out the work which

they had power to do under section 150. They had given the proper notices ..... "

"The defendant was in this position. He had a valid building notice to him to do the work. There was an existing provision that if he did not do it, the plaintiff might do it, and they were taking steps to do it, then section 150 says the defendant is to pay for it. That seems to be a liability expressly existing and preserved notwithstanding the repeal of section 150."

The decision of North J. was upheld by the Court of Appeal.

It was argued by Mr. Sneath that, when the notice under section 150 of the Public Health Act 1875 was issued, it was not known whether Mr. Grout, the frontager, would be liable in anything because it was not known whether he would be in default; and further that, even after he was in default and the work of making up the road had been completed by the local authority, it was not known till after the apportionment what sum Mr. Grout was liable for.

Again, I am of the opinion that the Heston case can be distinguished quite clearly from the present case. Section 150 gave the local authority a "right" to do the work and recover the expenses thereof as soon as default of compliance with the notice occurred, i.e. on the expiry of the period specified in the notice. Under section 150 a surveyor or arbitrator does not determine the question of liability. Their only jurisdiction is to decide what is the proper proportion of the whole sum to be recovered from each frontager. There never was any question of the local authority's right being defeated nor could the corresponding liability of the frontager abate. The Interpretation Act preserved not only the giving of the notice by deeming it to be "duly done"; it also preserved the accrued rights and liabilities under the repealed enactment.

The facts in Briggs v. Thomas Dryden & Sons (1925) 2 K.B. 667 were: In April 1918, a workman Briggs was injured in an accident arising in the course of his employment. In November 1918, an agreement between employer and workman was recorded

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by which the employers admitted their liability to pay compensation under the Workmen's Compensation Act 1906 during total or partial incapacity. Under the 1906 Act, when a workman under 21 had been injured and had a right to compensation, his weekly payment could be reviewed under paragraph 16 of the First Schedule. After the Workman's Compensation Act 1923 came into force, the workman applied for a review and increase of the rate of compensation under the proviso to Schedule I paragraph 16. It was held that he had an accrued right to a review under this proviso and was entitled, by virtue of the Interpretation Act, to a review under that proviso even after it had been repealed by section 31 of the 1923 Act and a new proviso "substituted" by section 24(b) of that Act.

Pollock M.P. said at page 673: "... a recorded agreement has been reached between the parties under which the employers admit their liability, subject only to the measure of that liability being quantified under the procedure of the Act of 1906. That being the nature of the agreement it appears clear to me that there was a right acquired or liability accrued or incurred as between the workmen and the employers under the Act of 1906. That being so, that right or liability continues to be ascertained under that Act by virtue of section 38 of the Interpretation Act."

Atkin L.J. said at page 680: "... the workman had a right to compensation that was recognised by an agreement ....; the man has claimed his compensation at the right time, and he had an acquired right to compensation for the actual injury that had happened to him although the actual amount of compensation would vary with the circumstances, and depend upon whether or not incapacity again supervened so as to show that the workman really was suffering from a loss of earning capacity".

Mr. Sneath drew attention to a passage in the judgment of Pollock M.P. at page 680. The learned judge in commenting on Bankes L.J.'s judgment in the case of Hamilton Gell v. White (supra) said: "It is clear from what Bankes L.J. said that a step had been taken by the tenant indicating an intention to put in suit his rights and therefore that the supervening Act which modified the rights of a tenant in such a case had no application".

Again, of course, this presupposes that rights exist prior to the taking of the step, prior to the indication of the intention, prior to the putting 'in suit'. It must be obvious that if there are no rights, there is nothing to put in suit. Commencing a suit can not create rights or liabilities which do not otherwise exist.

In Moakes v. Blackwell Colliery Co. (1925) 2 K.B. 64, - the position was that under the Workmen's Compensation Act 1906, compensation was given to a workman in respect of injury by accident in the course of his employment and the amount was settled by Schedule I to the Act which provided that the amount of compensation should be (a) where death results, a certain sum payable to dependents, and (b) where incapacity results a different scale of compensation. But in all cases, whether death or incapacity supervened, by the terms of the Act it was from the injury that the right to compensation arose. It was provided in the Schedule that weekly payments made under the Act to an injured workman should be deducted from the sum payable to dependents, should the workman die.

In October 1920, a workman met with an accident and the employers paid him a weekly sum. On 1st January 1924 the Workmen's Compensation Act 1923 came into force. Section 2 of that Act provided for an increase of the amount of compensation payable on the death of a workman and subsection 2 of section 24 enacted that: there should be no deduction of weekly payments so as to reduce the sum payable below £200. On 12th April 1924, the workman died, death being due to the injury. At that date the total amount of weekly payments was £204-5-0. The total amount which would have been due to his dependents under the 1906 Act would have been the difference between £300 and £204-5-0 viz. £95-15-0. The County Court Judge held, however, having regard to the sections of the 1923 Act, that the employers were liable for not less than £200. On appeal, it was held that section 24(2) of the 1923 Act did not apply to cases where the accident happened before the commencement of the Act, and that the employers were entitled to make the deductions.

Sargant L.J. said at page 72 of the report: "Here it seems to me that employers who had been

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making these weekly payments and who had been protected down to the point of the Act from having to pay more than the balance left of the £300, after giving credit for the weekly payments, had a vested right not to be deprived of the benefit of those weekly payments or have that ultimate balance increased to their detriment".

I do not see how this case assists the respondents. It was argued by Mr. Sneath that the "right" of the respondents at the date of the application for a Rebuilding Certificate was analogous to that of Moakes' estate in regard to the lump sum; that in the Moakes case the right was contingent on the death of Moakes: that in the former the "right" was contingent on the exercise of the discretion of the Director of Public Works and the Governor in Council.

One naturally asks what right was contingent on the Governor in Council's discretion? The issue of the Rebuilding Certificate was certainly dependent on the exercise of the Governor in Council's discretion; but no "right" to the issue of that certificate came into being until the discretion had been exercised. In the Moakes case the right to compensation was conferred by law on the happening of the accident long before the repeal. The law made detailed provision for compensation should death occur later. So far as the lump sum to the estate was concerned, a contingent right came into being on the happening of the accident, but the right was nevertheless an accrued or vested right.

Scrutton L.J. said at page 70: "... the repeal of the previous Act will not affect any right, privilege or obligation or liability acquired, accrued or incurred under any enactment so repealed. And it seems to me that when the accident happened the employers incurred a liability by reason of the provisions of the Act if certain subsequent events happened, and that liability would be altered if the 1923 Act applied to that section and the death following it".

The case of Abbott v. The Minister of Lands (1895) A.C. 425 was cited to the Court. The Lord Chancellor at page 431 of the report said: "It may be that the power to take advantage of an enactment may without impropriety be termed 'a right'. But

the question is whether it is a 'right accrued' ... Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed'. They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued'."

It was argued by Mr. Yu that, as the 2nd respondent had made an application therefore he must be said to have availed himself of a right. But the question is: what "right"? The "right" (which is no more than a "privilege") to set a particular procedure in motion is one thing. The acquisition of rights capable of being preserved by the Interpretation Ordinance, as a result of that procedure being continued is quite another matter.

Reynolds and Another v. A.G. for Nova Scotia seems to me to come closer to the present case than any of the other cases cited to us. The facts in Reynolds case were as follows:-

Under Section 95 of C.VII of the Nova Scotia Statutes, the Commissioner of Mines had power to grant mining licences, and the section empowered the Commissioner to extend the licence up to 3 years. The section was in these terms:- "any licence to work shall be for a term of 2 years and shall be extended to 3 years upon the additional payment by the holder of the licence of one half of the amount originally paid for such licence." On 23rd August 1887 the appellants applied for a licence and it was issued to them. On 21st August 1889, the appellants applied for a renewal of the licence for 1 year. That application was entered in the books of the Commissioner's office. On 17th April 1889 an Act was passed repealing s.95 of the Statute. The Commissioner had no power to grant any renewal licence except under section 95. It appears that one of the objects of the amending Act of 1889 was to get rid of licences and substitute leases.

In a subsequent dispute, the question arose as to the Commissioner's power to grant the renewal of

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the licence and as to whether the appellants at the date of the repeal had any "accrued right" to such renewal.

It was held by the Privy Council that the Commissioner had no power to grant the renewal of the licence. Lord Morris at page 244 of the judgment said: "In the present case the only existing licence the appellants had when the amending statute was passed was one for 2 years expiring in August 1889. They had a privilege to get an extension for 1 year under section 95, but had no accrued right".

The above cases illustrate the kind of "rights" and "liabilities" which section 10 of the Interpretation Ordinance is intended to preserve, and I do not think any of those cases assist the respondents in this case. Sections 3A-E of the Landlord & Tenant Ordinance have to be read together. No particular right, defeasible by the Governor in Council's direction under section 3D(2), is conferred by section 3A(1) alone. The mere existence of the building covenant gives the lessee no more than a privilege to apply under the procedure set out in sections 3A-E. The Interpretation Ordinance does not preserve such "rights" to apply because there is nothing to be preserved after the repeal. Nor do I accept the submission that once this procedure was started by the application for a rebuilding certificate, the applicant had a "right" to have the procedure continued after the repeal.

The matter can be stated very simply thus:- If the stage had been reached when notice to quit had been served on the tenants prior to the repeal, the 2nd respondent would undoubtedly in my opinion, have had an accrued right to vacant possession. If the Rebuilding Certificate had been issued prior to the repeal, even although no notice to quit had been served, it might also have been urged that the 2nd respondent had a vested right which should be preserved. But the mere application on his part for a rebuilding certificate and the expression of intention on the part of the 1st respondent that he intended to issue a certificate, taken by themselves, in my view, created no right or liability on any person. When a right accrues, there is usually a corresponding liability, actual or contingent. One may ask: assuming there was a right of some sort

vested in 2nd respondent at the time of his application, was there any corresponding obligation of any sort placed on any other person or persons. The answer surely is that the tenants, being occupants of controlled property, were under no obligation to quit the premises, and the 1st respondent or the Governor in Council were under no obligation to grant a rebuilding certificate.

I am of the opinion that, on 9th April 1957, when 2nd respondent had only applied for a Rebuilding Certificate, he 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 all-important Rebuilding Certificate would be issued to him. It is one thing to invoke a law for the adjudication of rights which have already accrued prior to the repeal of that law; it is quite another matter to say that, irrespective of whether any rights exist at the date of the repeal, if any procedural step is taken prior to the repeal, then, even after the repeal the applicant is entitled to have that procedure continued in order to determine whether he shall be given a right which he did not have when the procedure was set in motion. No case has been cited to this Court for that proposition and this Court knows of none.

In view of the conclusion I have reached on this aspect of the case, it is not strictly necessary to deal with the remaining grounds of appeal relating to the question whether the agreement for Lease (Ex.A) is or is not a "disposition of land", and whether it was competent for the 1st respondent to enter into such agreements on behalf of the Governor. I have, however, read the very comprehensive judgment about to be delivered by my brother Mills-Owens on this latter aspect of the case. I concur in the views expressed, and the conclusions reached, by him, and I have nothing to add.

For the above reasons, I am of the opinion that this appeal must be allowed with costs here and in the Court below.

(Sd.) W.A. BLAIR-KERR

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I concur, but as we are differing from the learned trial judge, I will express my views. First, on the question whether the second respondent had a vested right when the relevant sections were repealed, I am also of opinion that, far from having such a right, he had a mere hope or expectation of obtaining a rebuilding certificate and thus of acquiring a right to vacant possession.

The case is fundamentally different from that of Hamilton Gell v. White where the right to compensation arose eo instanti and directly from the landlord giving notice to the tenant; when the statutory provisions relative thereto were repealed the right to compensation had already vested by the express terms of the statute, although the amount payable remained to be ascertained and the tenant was obliged to comply with a certain procedure. The cases of Briggs v. Thomas Dryden & Sons and Moakes v. Blackwell Colliery Co. are illustrative of the same principle.

The decisions in Abbott v. Minister for Lands and Reynolds & Anor v. A.G. for Nova Scotia appear to me to be most pertinent to the present case. Just as in those cases the person asserting a vested right was a person who might have become entitled to a right if the statute had not been repealed, so in the present case the second respondent was a person who might have become entitled to a rebuilding certificate and thus to a right to vacant possession. To suggest that a person who makes an application which may or may not, in the exercise of an executive discretion, be granted, is a person having a vested right to that which he will obtain if successful in his application, is to equate the application to the grant thereof. It was not contested that the functions of the Governor in Council under the repealed sections were executive rather than judicial or quasi-judicial. It was suggested in opposition to the appeal that as the application of the second respondent had been 'put in suit', when the sections were repealed, there was vested in him a right, at least, to have his application determined. This contention, in reality, elevates the application to the decision thereon. It was his misfortune that the repealing Ordinance came into force before the application was determined, with no provision

being made for pending applications. Nor can the fact that the first respondent, the Director of Public Works, had given a notice under Section 3A(2) of his intention to issue a rebuilding certificate serve to improve the position of the second respondent. The object of such a notice, according to the framework of the sections, was clearly to afford a means of bringing the matter of the application to the notice of the tenants, as parties to be affected, so that, if they objected as undoubtedly in the ordinary course they would, their views might be represented to the Governor in Council before a final decision was taken. The provision for such a notice was merely a procedural device for securing the observance of the principles of natural justice in the determination of the landlord's application. The requirement that, in the opinion of the Director of Public Works, the building covenant in favour of the Crown should be performed was obviously one which invariably would admit of only one answer from that officer inasmuch as, in practice, he would have been the officer who imposed, or at least negotiated for the imposition of, the covenant on behalf of the Crown. Substantially, therefore, the question which the Director had to determine was whether, in his opinion, it was reasonable that the landlord should obtain vacant possession. This question necessarily involved a consideration of the interests of the tenants, and in the event of their petitioning against the application the opinion of the Governor in Council was to be substituted for the opinion of the Director. It is apparent, therefore, that any notice given by the Director under Section 3A(2) was, essentially, in the nature of an originating process, giving rise to no rights or obligations per se.

It is legitimate to consider the repealed sections in relation to the Ordinance as a whole. Prior to their enactment in 1953, a landlord of protected premises who desired to rebuild was enabled to secure vacant possession for that purpose - in the absence of circumstances depriving the tenants of protection under the Ordinance - only upon securing an exclusion order under the provisions of Section 31, a procedure involving proceedings before a tenancy tribunal which, as is a matter of common knowledge, might prove lengthy and expensive; moreover an exclusion order would invariably be conditional upon the payment of substantial compensation to the tenants. Since the repeal of the

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sections, the pre-1953 position is restored. It is difficult to perceive the justification for the introduction of the repealed sections under which such compensation was denied, and from this point of view their repeal would appear to have been a salutary measure.

This leads to a consideration of the matter of "vested rights" from the point of view of the tenants. Might it not be argued that they had acquired a "status of irremovability" under the Ordinance which remained inviolate until, at least, the actual issue of a rebuilding certificate; that thus it was they, not the landlord, who had a vested right? Could it then be said their status became forfeit by reason of the application for a certificate? In my view the tenants had acquired and remained entitled to vested rights in the sense just propounded; when the sections were repealed the whole substratum of the application disappeared, and, inevitably the application with its possible consequences vanished simultaneously.

The case may be compared with that of In re Vernazza, a report of which has become available since the appeal was heard ("Times" 3rd December, 1959). There an order had been made by a Divisional Court under Section 51 of the Judicature Act, 1925 debarring the appellant, as a vexatious litigant, from instituting proceedings in any court without leave. The appellant appealed against the order to the Court of Appeal. The Attorney General cross-appealed, asking that the order be extended to proceedings pending in the name of the appellant at the date of the order, on the ground that since the order was made an amending Act had come into force enabling the Court, in addition, to debar continuance of any proceedings already commenced by a vexatious litigant. It was held that the appellant had vested rights of which he could not be deprived by the variation sought, namely the rights of every subject to bring proceedings before the courts and have them heard; for the Court so to vary the order would be to interfere further with his vested rights than was warranted by the statute in force at the date the pending proceedings were instituted. This decision may well form a high-water mark in the matter of the definition of "vested rights". Whether that is so or not, in my view, Mr. Vernazza's position was much stronger than that of the second respondent in the present case. Mr. Vernazza's

vested right to prosecute his pending proceedings to a conclusion was not a mere right to have some judicial machinery kept in motion or in esse for his benefit, but a right to a process necessary for establishing or enforcing some legal right already vested in him, some right subsisting in advance of and independently of the proceedings; if, therefore, he were to have been restrained from continuing his pending proceedings he would, in effect, have been deprived of such pre-existing legal right so far as it depended on ascertainment or enforcement by the process of law. The fact that his claim to such a legal right might turn out to be unfounded could not affect the matter; if he were to have been so restrained it would never have become known whether it was well-founded or not. The second respondent, on the contrary, simply sought to have kept alive the machinery of the repealed sections in order that he might thereby acquire a legal right, a right completely dependent thereon, which is a fundamentally different matter.

In view of the foregoing conclusions it is not strictly necessary to deal with the further arguments advanced, but as we are told that a considerable number of similar cases are pending I will express the views which I have formed upon the remainder of the case.

It was contended on behalf of the second appellants, the sub-tenants, that even if it were to be held that the second respondent had a vested right which was saved by the provisions of Section 10 of the Interpretation Ordinance, nevertheless any order made by the Governor in Council for the issue of a rebuilding certificate would have been ineffective to enable the second respondent to obtain vacant possession as against them, the second appellants. The contention was based on the provisions of Section 3E which provide that on the issue of a rebuilding certificate the landlord shall be entitled to vacant possession of the premises "in like manner and with the like remedies as if an order for possession thereof had been made under section 18". It was argued that inasmuch as, by reason of the provisions of section 23, an order for possession made by a tenancy tribunal under Section 18 is not effective against subtenants unless the order so provides, the introduction of the reference to section 18 in Section 3E(2) implies that a successful

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applicant for a rebuilding certificate is in the same position as respects the subtenants. The effect of this legislation by reference, Counsel for the second appellants contended, is to preserve the status of the subtenants, possibly unintentionally but nevertheless effectively. I would not be prepared to accept this construction. The object of the repealed sections was to secure vacant possession for rebuilding purposes, the legislation clearly had regard to the fact that both tenants and subtenants might be affected, and the reference to Section 18, in my view, was introduced for the purposes only of indicating the effect of a rebuilding certificate and of ensuring that the provisions of the Ordinance respecting enforcement of orders for recovery of possession might apply.

Then it was contended for both appellants that no building covenant, within the meaning of Section 3A(1), subsisted in favour of the Crown. This contention was based largely on the proposition that the Agreement Exhibit A, wherein the alleged building covenant appears, was invalid in that it was a disposition contrary to the terms of Article XIII of the Letters Patent, not having been made by the Governor but by the Director of Public Works purporting, wrongly as it was said, to act on his behalf. It also rests on the proposition that the term 'covenant' primarily implies an agreement under seal whereas the Agreement was under hand only, and that although a parol agreement may, in the light of the context, indicate that the word 'covenant' is used therein in a less technical sense it is not permissible to adopt this less technical view in the present case unless it is at the same time conceded that the Agreement amounted to a 'disposition' within the meaning of the Letters Patent; in other words, if there was no disposition there was no building covenant inasmuch as section 3A clearly contemplated an association of the building covenant with an interest in land, namely the interest of a Crown lessee at law or in equity. I have no doubt that the building covenant should be so associated but does it follow that there could be no building covenant in this case unless the Agreement is taken to be a disposition? Counsel for the appellants argued that if the Agreement were held to be void as a disposition contrary to the Letters Patent then the second respondent was in a position of a tenant holding over on the terms of the expired Crown lease, notwithstanding that he had paid

instalments of the premium and the new rent required by the Agreement. This is an argument of considerable substance; if the Agreement were ultra vires the Director of Public Works it would be difficult to hold that the second respondent was a tenant from year to year on the terms of the Agreement without attributing to the Agreement an efficacy which ex hypothesi it does not possess. The matter therefore turns substantially upon the question whether the Agreement was invalid as being contrary to the terms of the Letters Patent.

It must be observed that the appellants do not dispute the title of their landlord, the second respondent; on their view he is a tenant from year to year holding over on the expiration of the Crown lease and on the terms and conditions thereof. It is to be noted also that whilst the Director of Public Works purported to sign the Agreement on behalf of the Governor it is not suggested that he did so on a specific instruction. Nor is it suggested that the execution of the Agreement was one of that class of acts which may be effectively performed by officers subordinate to the Governor. It is, apparently, the general practice for the Director to negotiate and sign such agreements on his own authority. It is, also, conceded that the principle of Walsh v. Lonsdale (21 Ch.D.9) applies to the Crown in the sense that Crown Counsel does not rely upon any technicality dependent on the rule that an order for specific performance as such may not be made against the Crown.

The terms of Article XIII of the Letters Patent are as follows:-

> "XIII. 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 or 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 regulation in force in the Colony. Nothing in this article shall be construed as preventing the enactment of

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laws by the Legislature of the Colony regarding the making and execution of such grants and dispositions."

In connection with the last paragraph of the Article it is to be noted that no relevant legislation exists in the Colony regarding the grant or disposal of Crown land.

The contention of Crown Counsel for the Director of Public Works was that such agreements as the Agreement Exhibit A are not 'dispositions' within the meaning of Article XIII for the reasons: first, that such an agreement is merely a personal contract creating no interest in the land; secondly, that the Crown, in the person of the Governor, retains an overriding right, whenever considered necessary in the interests of public policy, to refuse to issue a Crown lease pursuant to such an agreement and to oppose a declaration in the nature of an order for specific performance thereof. According to the contentions for the Director, the true view of the principle laid down by Walsh v. Lonsdale is that an agreement for a lease creates no interest in the land but if the intending lessee enters into possession and pays a yearly rent he becomes a tenant from year to year at law on the terms of the agreement; however, he remains entitled to possession so long, and so long only, as he remains in a position to obtain a decree of specific performance or, where the Crown is involved, a corresponding declaration. To meet a possible argument that an intending lessee of the Crown may apply for a Crown grant to be issued to him in pursuance of the agreement, or seek a declaration from the Court that he is entitled to a Crown lease pursuant to the agreement, Crown Counsel fell back on the argument that public policy may be relied upon to resist such an application or declaration. Counsel for the second respondent adopted these arguments and, further, contended that in any event the act of the Director of Public Works in signing the Agreement 'on behalf of the Governor' had been ratified, in the circumstances of this case, in that the Government had acted on the Agreement by demanding and collecting instalments of the new premium and the new rent and in that the Governor in Council must have become aware of, and impliedly approved, the Agreement by reason of the proceedings taken under the repealed sections. Whilst I would not dispute that, if the Agreement were ultra vires

the Letters Patent, it was nevertheless capable of ratification, in my view much more cogent evidence than is available in this case would be required from which to infer such a ratification. The premium and rent would have been collected simply by another department of the Government and it is taking matters very far to impute an intention in the Governor to ratify the Agreement when concerned therewith in an entirely different, statutory, capacity.

First, therefore, was the Agreement a disposition within the meaning of the Letters Patent? The meaning of the expression 'disposition' has been considered in a number of cases but must, of course, be considered in the light of the context in each case. I would adopt the definition proposed by Stirling J. in the case of Carter v; Carter (1896) 1 Ch. 62 where its meaning in the context of the Fines and Recoveries Act, 1833 was under consideration; there the learned judge said, (at page 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."

The contentions for the Director of Public Works involve (a) an assertion that the second respondent was a lessee at law, by reason of his possession of the land and payment of rent, and (b) a denial that he was a lessee in equity, because the Agreement for a Crown lease gave rise to no interest in the land. It is a necessary corollary to the contention that the second respondent holds from year to year at law, that he does so on the terms of the Agreement, as otherwise he would not have been bound by the building covenant and would have failed to qualify under Section 3A(1). The immediate question which arises is what was meant by the reference to a lessee in equity of the Crown in section 3A(1) if it was not intended to extend to a person holding under an agreement for a lease? Such a case is the first example of a lessee in equity to leap to mind, and it is amply justified by the provisions of subsection (4) of the section which specifically contemplate the case where the

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Crown lease is not to be executed until the building covenant has been fulfilled.

The contention on behalf of the Director that the second respondent holds on the terms of the Agreement implies that the execution of agreements for leases of Crown lands is a matter within the competence of the Director. But whence is his authority derived in this respect in the absence of enabling legislation? The answer must be that he derives his authority from the Governor. But here the Director is faced with two difficulties: first, the maxim delegatus non potest delegare, and, secondly, the proposition that the Letters Patent require the personal exercise by the Governor of the power to make grants and dispositions of Crown land, either as a matter of construction of Article XIII or on the ground that the provisison of the Article amount to a delegation of the Royal Prerogative in the matter of disposal of Crown land. Each is a formidable difficulty. As to the first, no argument has been advanced against the applicability of the maxim, and it is not suggested that the matter of signature of such agreements is one which must, necessarily, in the interests of administrative convenience, fall to be dealt with by officers subordinate to the Governor. As to the second difficulty I would hold that the power conferred upon the Governor by Article XIII is one personal to his high office. The disposal of Crown land in any territory of the Crown must be a matter of considerable consequence. It may well be that the Governor is a delegate of the prerogative of the Crown in this respect. Whether this be so or not, the Letters Patent have the force of law, overriding local laws (vide Colonial Laws Validity Act 1865) and the obvious intention, in my view, is that the power of disposal of Crown land is one to be exercised by the Governor personally, in the absence of legislation enabling some other mode of disposition. It is significant that in many territories the grant by officers other than the Governor of even such transient rights as temporary licences to occupy Crown land is the subject of specific enabling legislation.

Reverting to the argument that the Agreement gave rise to contractual rights only, reliance was placed by Crown Counsel for the Director on the following passage from the judgment of Farwell J.

in the case of Manchester Brewery v. Coombes (1901) 2 Ch.D.608 at p.617:-

> "Although it has been suggested that the decision in Walsh v. Lonsdale takes away all differences between the legal and equitable estate, it, of course, does nothing of the sort, and the limits of its applicability are really somewhat narrow. It applies only to cases where there is a contract to transfer a legal title, and an act has to be justified or an action maintained by force of the legal title to which such contract relates. It involves two questions: (1) Is there a contract of which specific performance can be obtained? (2) If yes, will the title acquired by such specific performance justify at law the act complained of, or support at law the action in question?"

It was contended that this means that a person holding an agreement for a lease has no interest in the land except such as might arise in any particular case by reason of his entry into possession and payment of rent or his holding over on the expiry of a former lease. But the whole tenor of the judgment in this respect is to show that a person holding under an agreement for a lease, which is specifically enforceable, may rely for the protection of his rights thereunder as effectively upon the agreement as he might rely upon the legal estate contracted to be granted were it to have become vested in him. As between himself and the landlord therefore, he is in as good a position as if the lease had been granted, except that inequitable conduct, falling short, possibly, of conduct giving rise to a forfeiture of the lease if it were to have been actually granted, might deprive him of his right to obtain a lease at law.

In the present case the second respondent was in possession pursuant to the terms of the Agreement, and thus any intending purchaser would have had notice of his rights and have taken subject thereto (Hunt v. Luck (1902) 1 Ch.428), as was the position in England prior to the 1925 legislation. In the circumstances of the case, therefore, subject to the argument based on public policy and assuming the Agreement to have been valid as respects the Letters Patent, his position was as good as if he

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held a Crown lease, and this not only as against the Crown but as against third parties. His interest was expressly provided to be assignable once the building covenant was performed, and in the meantime he was empowered thereby to charge his interest by way of a building mortgage to enable him to carry out the covenant. He was in a position to obtain a declaration in the nature of a decree of specific performance, unless, of course, he were in breach of the Agreement and the Crown thought fit to rely on the breach. (Coatsworth v. Johnson (1886) 55 L.J. Q.B.220). The fact that his right to such a declaration was dependent on his 'coming to equity with clean hands' does not however mean, as was suggested in argument, that he held something in the nature of a determinable or conditional right, in the sense of a right which subsisted so long, and so long only, as he was not in default. Just as a breach by a lessee giving rise to a right in the landlord to forfeit the lease does not automatically avoid or terminate the lease, so an agreement for a lease is not automatically rescinded by such a breach as would enable the landlord to resist specific performance. The second respondent had, subject to what is said above on the point of the validity of the Agreement and subject to the point of public policy, 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 meantime. He was in a position to maintain ejectment proceedings against a third party if he were wrongfully dispossessed of the land (General Finance etc. Co. v. Liberator Permanent Benefit Building Society (1878) 10 Ch.D.15), as to which reference may also be made to the judgment of the great Chief Baron Palles in the case of Antrim County etc. Co. Ltd. v. Stewart (1904) 2 I.R. 357 (C.A.), where he said:-

> "Where the plaintiff claims to be entitled to any right - such as here, the right of possession of land - by virtue of an equitable estate, the High Court, whatever may be the division of it in which the suit may happen to be, must, so long as the suit remains in the division, give the same relief as ought to have been given by the Court of Chancery in a suit properly instituted for that purpose before the Act. This is one of the broadest of the principles which are the

> bases of the Judicature Act, and we cannot allow it to be frittered away by small technicalities, which it was one of the objects of the Act to extinguish. From this principle results that which Sir George Jessel . . . . . in the General Finance etc. Co. v. Liberator Permanent Benefit Building Society, treats as settled law that no action of ejectment can be defeated for the want of the legal estate where the plaintiff has a title to the possession. To my mind, that proposition is absolutely incontestable."

The second respondent may not have been enabled by assignment of his interest under the Agreement to bring about the relationship of landlord and tenant as between the Crown and his assignee (Purchase v. Litchfield (1915) 1 K.B.184) but that is to be explained by the rule that the relationship of landlord and tenant is a matter of tenure rather than of contract. As was said by Turner V-C in Cox v. Bishop (1857) 8 De G. M. & G. 815 at 824:-

> "The relationship of the landlord and tenant is a legal and not an equitable relation";

and as was said by Lord Greene M.R. in Milmo v. Carreras (1946) K.B.306 at 311:-

> "That relationship must depend on privity of estate. I myself find it impossible to conceive of a relationship of landlord and tenant which has not got that essential element of tenure in it, and that implies that the tenant holds of his landlord, and he can only do that if the landlord has a reversion. You cannot have a purely contractual tenure. Tenure exists by reason of privity of estate."

This does not mean however that the second respondent's own rights were merely contractual. The Crown in seeking to enforce the incidents of the tenancy against an assignee would be unable to rely upon privity of contract and likewise would be unable to rely upon privity of estate. Admittedly where third parties are concerned an agreement for a lease is not always as good as a lease. As between the second respondent and the Crown, however, equity would take that to be done which ought to have been done, and accordingly, the second respondent would

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as respects the Crown be in the like position in all respects as if a Crown lease had been granted, so that a tenurial relationship would be taken to subsist as between him and the Crown so far as might be necessary in defence of his interests under the Agreement. It appears to be far too late in the day to assert, with any hope of success, that an agreement for a lease gives rise only to rights in personam as between the immediate parties. As Megarry and Wade state in their volume on the Law of Real Property, (at p.112 footnote 16):-

> "Maitland laid stress on the personal nature of equitable rights, for historical and other good reasons . . . . If by rights in rem is meant (as normally) rights enforceable against third parties generally, as opposed to rights in personam, which are enforceable only against specified persons (e.g. contractual rights), then equitable rights to property are unquestionably rights in rem, though somewhat different from legal rights to property. This is merely stating the obvious truth that equitable rights to property are proprietary, not personal."

On this aspect of the case it would therefore be my view that the Agreement Exhibit A was a purported 'disposition' within the meaning of Article XIII of the Letters Patent, a disposition which as I have indicated above, it was not competent for the Director of Public Works to enter into on behalf of the Governor in the absence of enabling legislation, and accordingly that the second respondent was not, by virtue of the Agreement, a lessee in equity bound by the building covenant. (It is not, of course, suggested that such agreements may not be negotiated by the Director for ultimate approval by the Governor.)

There remains the contention that there is vested in the Crown some right in appropriate circumstances, as a matter of public policy, to refuse to execute a Crown grant in pursuance of a contractual obligation. No relevant authority has been quoted in support of the contention and it is a contention which, as it appears to me, is one which cannot possibly be supported. It is necessary to refer only to the cases of The Rederiak-Tiebolaget (1921) 3 K.B. 500, and Robertson v. Minister of

Pensions (1949) 1 K.B. 227.

I concur therefore in holding that the appeal must be allowed with costs here and in the court below.

(Sd.) R.H. MILLS-OWENS

Temporary Additional Puisne Judge.
31st December, 1959.

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No. 8

No. 8

Order granting final leave to appeal to Her Majesty in Council, 17th March 1960.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
CIVIL APPEAL NO. 17 OF 1959.

(On appeal from Supreme Court Original Jurisdiction Action No. 464 of 1957.)

BETWEEN:	Ho Po Sang and others	1st Appellants (1st Plaintiffs)
	Chan Yiu Wing and others	2nd Appellants (2nd Plaintiffs)
	- and -	
	The Director of Public Works	1st Respondent (1st Defendant)
	Kwong Siu Kau	2nd Respondent (2nd Defendant)

Before the Full Court the Honourable Mr. Justice Courtenay Walton Reece, Acting Senior Puisne Judge, and the Honourable Mr. Justice William Alexander Blair-Kerr, Acting Puisne Judge, sitting in Chambers.

Dated this 17th day of March, 1960.

UPON the motion by the Respondents and upon hearing Crown Counsel for the 1st Respondent and

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Counsel for the 2nd Respondent and Counsel for the Appellants and upon reading the affidavit of Graham Rupert Sneath filed herein on the 10th day of March, 1960 and the affidavit of Christopher Paul D'Almada e Castro and the Certificate of the Registrar as to due compliance of formalities connected with the appeal to Her Majesty in Council both filed herein on the 14th day of March, 1960, IT IS ORDERED that the Respondents do have final leave to appeal to Her Majesty in Her Privy Council and that the judgment to be carried into execution on the security of an undertaking given in writing to the Registrar of this Honourable Court by the Solicitors for the Plaintiffs to abide by the order of Her Majesty in Council. 10

(L.S.) (Sd.) J.R. OLIVER

Deputy Registrar.

E X H I B I T S

Exhibits

"A"

Agreement and Conditions of Renewal, 7th June 1955.

"A" - AGREEMENT AND CONDITIONS OF RENEWAL

Ref. No. L.S.O. 26/5135/49.

PARTICULARS AND CONDITIONS FOR THE GRANT OF A NEW CROWN LEASE OF KOWLOON INLAND LOT NO.

First Schedule

PARTICULARS OF THE NEW LOT

Registered No.	Situation	Boundaries	Area in sq.ft.	Annual Rental	Premium
Kowloon Inland Lot No.6516	Temple Street, Kowloon	As per plan signed by the Lessee Area coloured red	2,950	From 25.12.51 $270.00	$70,800.00

Second Schedule

PARTICULARS OF THE OLD LOT TO BE SURRENDERED

Kowloon Inland LOT NO. 63 Sec. A.R.P.

GENERAL CONDITIONS

1. A Surrender to the Crown of the old lot together with all rights of way and other rights and easements (if any) used and enjoyed therewith shall be executed by the Lessee at his own expense and without payment or compensation such Surrender to be made when required by and in a form to be approved by the Land Officer.

2. The Lessee shall pay into the Government of Hong Kong the sum of $70,800.00 as premium for the grant of the new Crown Lease by instalments (incoporating interest at 5% per annum) in accordance with Special Condition (b) hereinafter contained.

Exhibits

"A"

Agreement and Conditions of Renewal,

7th June 1955 - continued.

3. Crown Rent for the new Lot commencing from the date of this agreement shall be as specified in the First Schedule and shall be payable by equal half-yearly payments on the 24th day of June and the 25th day of December the first half year's rent or a due proportion thereof being payable on the next half yearly date following the date hereof.

4. (a) Provided the conditions herein contained have been complied with to the satisfaction of the Director Public Works and the Land Officer, the Lessee of the Lot shall subject to approval of his title by the Land Officer be entitled to a Lease of the new Lot as described in the First Schedule for a term of one hundred and fifty years commencing as from the 25th day of December 1876.

(b) The Lessee shall take up the Crown Lease for the new Lot when called upon to do so by the Land Officer and shall pay the prescribed fees therefor and an endorsement by the Land Officer on these conditions or on the Register of Title at the Land Office that plans of the Lot or any specified part thereof are in the Land Office and that the Crown Lease thereof must be taken up before any further dealings with the Lot or such specified part can be registered, shall have effect accordingly. In the event of more than one building being erected on the said Lot the Lessee will be required to take up a separate lease for the site of each separate building and shall pay the prescribed fees for every additional lease so required to be taken up.

(c) Pending the issue of such new Lease the tenancy of the new Lot shall be deemed to be upon and subject to and such new Crown Lease when issued shall be subject to, and contain, all Exceptions, Reservations, Covenants, Clauses and Conditions as are contained in the existing lease or agreement for tenancy under which the same is held as varied modified or extended by the General and Special Conditions herein contained, and a covenant to provide for the payment by instalments of the balance of the premium then remaining unpaid.

5. (a) The exact boundaries of the new Lot shall be determined by the Director of Public Works (whose decision shall be final) before the issue of the Crown Lease. Adjustment of premium in respect of any excess or deficiency in area then found

shall be paid or allowed and will be calculated at a rate to be determined by the Director of Public Works having regard to the nature and relative value of the area representing the excess of deficiency compared to the remainder of the Lot but not exceeding $24.00 per square foot. Crown Rent will be adjusted to the nearest even dollar at a rate to be determined as aforesaid but not exceeding the rate of $4,000.00 per acre per annum.

(b) The Lessee shall permit Boundary Stones properly cut and marked with the number of the lot to be fixed on the lot as required by the Director of Public Works and shall pay the fees prescribed by him therefor as well as the prescribed fees for the refixing of such boundary stones which, through being lost, damaged and/or removed, need replacing.

6. (a) The Lessee of the Lot shall develop the same by the erection thereon of the building(s) specified in Special Condition (c) with such materials as may be approved by the Director of Public Works, and in all other respects in accordance with the requirements of the Special Conditions and the provisions of all Ordinances, Byelaws and Regulations relating to buildings or sanitation as shall or may at any time be in force in the Colony, such buildings to be completed before the expiration of 24 calendar months from the date hereof and shall expend thereon a sum of not less than $200,000.00 (such sum to exclude moneys spent on site formation, foundations, access roads, and other ancillary works), and shall throughout the tenancy maintain all buildings erected or which may at any time hereafter be erected on the Lot in good and substantial repair and condition, and in such repair and condition deliver up the same at the expiration or sooner determination of the tenancy. In the event of the demolition at any time during the tenancy of the buildings then standing on the lot or any of them or any part thereof the Lessee shall replace the same either by sound and substantial buildings of the same type and of no less volume or by buildings of such type and value as shall be approved by the Director of Public Works. In the event of demolition as aforesaid the Lessee shall, within three months of such demolition, submit plans for redevelopment of the lot to the Building Authority, and upon approval of such plans shall within one month thereof commence the necessary

Exhibits
"A"
Agreement and Conditions of Renewal, 7th June 1955 - continued.

work of redevelopment, and shall complete the same to the satisfaction of, and within such time limit as is laid down by, the Director of Public Works.

(b) Provided always that the fulfilment by the lessee of his obligations under the General and Special Conditions shall be deemed to be a condition precedent to the grant or continuance of tenancy hereunder and in the event of any default by the lessee in complying therewith such default shall be deemed to be a continuing breach and the subsequent acceptance by or on behalf of the Crown of any Crown Rent or Rates or other payment whatsoever shall not (except where the Crown has notice of such breach and has expressly acquiesced therein) be deemed to constitute any waiver or relinquishment or otherwise prejudice the enforcement of the Crown's right of re-entry for or on account of such default or any other rights remedies or claims of the Crown in respect thereof under these conditions which shall continue in force and shall apply also in respect of default by the lessee in the fulfilment of his obligations under the General and Special Conditions within any extended or substituted period as if it had been the period originally provided.

7. The Lessee shall not permit sewage or refuse water to flow from the new Lot on to any adjoining land or any decaying, noisome, noxious, excrementitious, or other refuse matter to be deposited on any portion of the Lot, and in carrying out any works of excavation on the lot no excavated earth shall be deposited on the Lot or (whether so permitted) on Land adjoining, in such manner as shall expose the slopes of such excavated earth to be eroded and washed down by the rains, and all such slopes shall be properly turfed and, if necessary, secured in place by means of masonry toe walls. The Lessee shall see that all refuse matters are properly removed daily from the premises.

8. Any private streets or roads and scavenging or other lanes which may be found shall be sited to the satisfaction of the Director of Public Works and included in or excluded from the area to be leased as may be determined by him and in either case shall be handed over to Government free of cost if so required. Where taken over by Government the surfacing, kerbing and channelling shall be carried out by Government at the cost of the

Lessee and thereafter maintained at public expense but where remaining part of the area leased or to be leased such streets roads or lanes shall be surfaced kerbed channelled and maintained by and at the expense of the lessee to the satisfaction in all respects of the Director of Public Works.

9. Should the Lessee neglect or fail to comply with any of the General or Special Conditions, the Crown shall be entitled to retain any premium which the Lessee may have paid and also to re-enter and take possession of the new Lot without payment or compensation to the lessee in respect of the value of the land or any buildings thereon and to re-sell the same either by public auction or private contract at such time and place and in such manner as shall be deemed fit, but without prejudice nevertheless to the exercise execution or enforcement by the Crown of any of the rights, remedies, claims and powers under the existing Crown Lease in respect of any antecedent breach, non-observance or non-performance by the Lessee of any of the terms and conditions of the existing Lease.

10. The expression "Lessee" shall in these General and Special Conditions include the Lessee or Lessees and where the context so admits or requires his/their executors, administrators and assigns and in the case of a corporation its successors and assigns.

11. The foregoing General Conditions shall be read and construed as varied or modified by the Special Conditions hereinafter contained, and the expression "these Conditions" whenever used shall mean and include the General and Special Conditions.

SPECIAL CONDITIONS

(a) The lessee, his executors, administrators and permitted assigns shall not assign, underlet or part with the possession of or otherwise dispose of the new lot or any part thereof or any interest therein or enter into any agreement so to do unless and until he has in all respects observed and complied with the General and Special Conditions to the satisfaction of the Director of Public Works and the Land Officer and shall not mortgage or charge the new lot except by way of a Building Mortgage in connection with the development thereof.

Exhibits

"A"

Agreement and Conditions of Renewal,

7th June 1955 - continued.

The form of Building Mortgage shall be approved by the Land Officer and every assignment, mortgage, charge, sub-letting or other alienation of the new lot or any part thereof shall be registered at the Land Office.

(b) The premium referred to in Clause 2 of the General Conditions shall be paid in 40 equal annual instalments of $3,930.00 which includes interest at 5% per annum the first instalment to be paid within 14 days after the signature of this Agreement, the 2nd on the 25th day of December 1955 and subsequents on 25th day of December each year.

(c) The new lot shall not be used for industrial purposes and no factory building shall be erected thereon.

(d) A filtered water supply from the Government mains will be given on the usual terms, and subject to the provisions of the Waterworks Ordinance, or any enactment amending the same or substituted therefor.

(e) In view of the limited water supplies in the Colony no guarantee can be given that any water which is supplied will be continuously available; moreover the Water Authority has the right under the Waterworks Ordinance Chapter 102 to restrict the hours of supply, which is likely to be periodically necessary, or to withhold the service in whole or in part when in his opinion the available supply is insufficient.

(f) No water from Government mains shall be used for flushing purposes upon any part of the new lot without the written consent of the Director of Public Works. Such consent will not normally be given unless an alternative supply is impracticable and evidence to that effect is offered to the Water Authority before construction is commenced. It is considered that a well water supply should be possible on this site.

(g) All rain and surface water from the new lot and from balconies or verandahs or other projections over Crown Land shall be trapped within the boundaries of the new lot and shall thence be conveyed in a pipe connected directly to the public drainage system in a manner to be approved by the Director of Public Works.

Exhibits

"A"

Agreement and Conditions of Renewal,

7th June 1955 - continued.

(h) All foundations proposed to be constructed near to or adjoining any sewer or storm-water drain within or adjoining the new lot shall be formed as the Director of Public Works may require.

(i) The lessee shall pay to the Government of Hong Kong, on demand, the cost of connecting any drains or sewers from the new lot to the Government storm-water drains or sewers. Such work shall be carried out by the Director of Public Works who shall, however, incur no liability to the lessee in respect thereof.

(j) The lessee shall pay to the Government of Hong Kong, on demand, such sum as the Director of Public Works shall certify as being the apportioned cost of repairing the roads, pavements, scavenging lanes, retaining walls, drains and sewers within the areas coloured green on the attached plan. Government shall be under no obligation to carry out this work at the request of the lessee but shall do so as and when it sees fit and until that time or until such time as the Director of Public Works shall confirm in writing his acceptance of the road as a public road the lessee shall remain responsible for the upkeep of the roads, pavements lanes, retaining walls, drains and sewers lying in the area cross hatched green.

(k) The lessee shall pay to the Government, of Hong Kong, on demand the cost of removing, diverting and reinstating elsewhere as may be required any drains, sewers, nullahs, water course, pipes, cables, wires or other utility services, or any other works or installations on the new lot whatsoever which the Director of Public Works may consider it necessary to remove or divert.

(Sd.) THEODORE L. BOWRING
Director of Public Works.

MEMORANDUM OF AGREEMENT

Between KWONG SIU KAU ( ) of No. 44 Bonham Strand ground floor Hong Kong Merchant (the Lessee) of the one part and the Director of Public Works for and on behalf of the Governor of the other part

Whereby It Is Agreed that the Lessee shall Surrender

Exhibits

"A"

Agreement and Conditions of Renewal, 7th June 1955 - continued.

the Lot and premises set out in the Second Schedule of the foregoing particulars and shall be entitled to a Lease of the new Lot described in the First Schedule subject to and on the terms and conditions hereinbefore contained.

C/R No. 5206

Dated this 7th day of June 1955.

In the event of signature of this agreement by an attorney or agent of the Lessee the agreement shall within three days thereafter be confirmed by the formal signature or execution thereof by the principal to the satisfaction of the Land Officer.

Signature of Lessee

Witness to Signature of Lessee (Sd) Illegible

Occupation Clerk,

Address Land Office.

Name of Interpreter (if any)

Occupation

Address

(sd) E. L. Strange (sd) Theodore L. Bowring

Witness to Signature of Director of Public Works. Director of Public Works

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"C.1"

Letter, Supt. of Crown Lands & Surveys to Kwong Siu Kau, 20th July 1956.

"C.1." - LETTER SUPT. OF CROWN LANDS & SURVEYS TO KWONG SIU KAU

REGISTERED POST

CROWN LANDS & SURVEY OFFICE,
PUBLIC WORKS DEPARTMENT,
HONG KONG.

L.S.O.26/5135/49

20th July, 1956.

Sir,

Kowloon Inland Lot No. 6516

I have the honour to refer to your letter dated 11th June, 1956 and now enclose a certificate of intention to issue a Rebuilding Certificate.

Before the Rebuilding Certificate is issued, a

Exhibits

"C.1"

Letter, Supt. of Crown Lands & Surveys to Kwong Siu Kau,

20th July 1956 - continued.

Statutory Declaration will be required certifying that notices have been posted in the manner required by Section 32 (2) of the Landlord & Tenant Ordinance.

I have the honour to be,
Sir,
Your obedient servant,

(Sd) M.I. De Ville

Supt. of Crown Lands & Surveys.

/RN

Mr. Kwong Siu Kau,
786, Nathan Road,
3rd floor,
Kowloon.

"C.2." - CERTIFICATE OF INTENTION TO GIVE RE-BUILDING CERTIFICATE

"C.2"

Certificate of Intention to give Re-building Certificate,

20th July 1956.

L.S.O.
Our Ref: 26/5135/49

O R I G I N A L

PUBLIC WORKS DEPARTMENT,
LOWER ALBERT ROAD,
HONG KONG.

20 / 7 / 19 .

LANDLORD & TENANT ORDINANCE (Cap. 255)

Section 3A(2)

Lot No. K. I. L. 6516.

Sir/Madam,

I have to inform you that after due consideration of your application dated 11 June 1956 it is my intention to give a Re-building Certificate in accordance with Sec.3A(1) of the Landlord and Tenant Ordinance (Cap.255) in respect of the above mentioned premises.

I am, Sir/Madam,
Your obedient servant,

Sd. Illegible
Director of Public Works.

Mr.Kwong Siu Kau,
786 Nathan Road,
3rd floor,
Kowloon.

Exhibits

"D"

Letter, Acting Director of Public Works to C.Y. Kwan & Co., 20th March 1957.

"D" - LETTER ACTING DIRECTOR OF PUBLIC WORKS TO C.Y. KWAN & CO.

Your Ref. 11887
26/5135/49

20 March, 1957

Gentlemen,

Kowloon Inland Lot No. 6516.

I have the honour to refer to your letter dated 1st March, 1957 and to inform you that subject to your client's acceptance of variation of terms Government is prepared to grant to your client, Mr. Kwong Siu Kau, the owner of the lot, an extension of time in which to fulfil the Building Covenant in respect of the above lot, without payment of penalty fine.

2. The extension of time offered is for a period ending 28th June, 1958 strictly subject to the following conditions:-

(a) A sum of not less than $200,000.00 to be expended in rateable improvements on the lot.

(b) In the event of non-fulfilment of these conditions and of the Agreement and Conditions of Renewal No. 5206 as now amended thereby Government shall be entitled to re-enter and take back possession of the whole or any portion of the lot without payment of any compensation whether for the value of the land or in respect of any amount expended under the Building Covenant or otherwise, the premium and any deposit originally paid being in such event also forfeited to the Crown.

(c) The stipulations hereof shall be deemed to be incorporated in the Agreement and Conditions of Renewal No.5206 which shall remain in full force and effect as so varied. The owner to sign an undertaking in the following form endorsed on this letter which is to be returned without delay.

I have the honour to be,
Gentlemen,
Your obedient servant,

(Sd) R. C. Clarke.

for Acting Director of Public Works.

/RN

Messrs. C.I. Kwan & Co.,
Room 736, 7th floor,
Alexandra House,
Hong Kong.

I hereby undertake to observe and be bound by these terms and conditions.

(Sd)

Signature of Owner.

Witness to Signature of the owner Sd. C.Y. Kwan
Address 736 Alexandra House, Hong Kong.
Occupation Solicitor.

Exhibits

"D"

Letter, Acting Director of Public Works to C.Y. Kwan & Co., 20th March 1957 - continued.

"B.1." - LETTER DIRECTOR OF PUBLIC WORKS TO KWONG SIU KAU

"B.1"

Letter, Director of Public Works to Kwong Siu Kau, 12th October 1957.

CROWN LANDS & SURVEY OFFICE,
PUBLIC WORKS DEPARTMENT,
HONG KONG.

IN REPLY PLEASE QUOTE:
L.S.O. 26/5135/49

12th October, 1957.

Sir,

Kowloon Inland Lot No. 6516

I am directed to refer to my letter of 20th July, 1956 and enclose herewith Rebuilding Certificate No. 35 in respect of the above mentioned lot.

I am, Sir,
Your obedient servant,

(Sd.) J. Lyons
for Director of Public Works.

/RN

Mr. KWONG Siu Kau,
c/o Messrs. C.Y. Kwan & Co.,
Room 736, 7th floor,
Alexandra House,
Hong Kong.

Exhibits

"B.2"

Rebuilding Certificate.

"B.2." - REBUILDING CERTIFICATE

No.35

ORIGINAL

LANDLORD & TENANT ORDINANCE (Cap. 255)

Section 3A (1)

Re-building Certificate

Lot No. K.I.L. 6516

I hereby certify that in my opinion it is reasonable that the Building Covenant relating to the premises known as 230-236 Temple Street be complied with and that Mr. KWONG SIU KAU the Crown lessee of this lot, should be given vacant possession of the premises.

Messrs. C.Y. Kwan & Co.
Room 736, 7th Floor
Alexandra House
Hong Kong.

(Sd.) Illegible
Director of Public Works.

Date: