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UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
6 - DEC 1971  
25 RUSSELL SQUARE  
LONDON W.C.1

IN THE PRIVY COUNCIL

NO. 3 of 1969

ON APPEAL FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N :

CHANG LAN SHENG (Plaintiff) Appellant

- and -

THE ATTORNEY GENERAL (Defendant) Respondent

CASE FOR THE APPELLANT

RECORD

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- 10 1. This is an appeal from a judgment of the Full Court of the Supreme Court of Hong Kong acting in its Appellate jurisdiction (Rigby S.P.J., Blair-Kerr and Huggins J.J.) dated 25th September, 1968 setting aside a judgment of the Supreme Court of Hong Kong acting in its original jurisdiction (Scholes J.) dated 24th June, 1967. p. 472(a)
  - 20 2. This action was brought by the Appellant as Plaintiff on 17th June, 1965 to obtain declarations that the Director of Public Works for Hong Kong had failed fairly and impartially to fix a fair and reasonable rent for certain property as required by the terms of a lease. The action was brought against the Attorney General in accordance with Section 13 of the Crown Proceedings Ordinance, No.18 of 1957. p. 369
  - 30 3. The principal question involved in this Appeal is whether the sum fixed by the Director of Public Works was the fair and reasonable rent for the property without any fine or premium and in particular (i) whether a fair and reasonable rent should be construed as being identical with a full market rent and (ii) whether it was fair and reasonable that the capital sum from which the rent was calculated should be the same capital sum as could be pp. 1-4

RECORD

obtained in the open market for the land, notwithstanding that valuable consideration had been paid in 1936 for an option to renew the lease on its expiry in 1963.

pp.510-512

On 3rd October, 1888 the Crown granted a lease of Kowloon Inland Lot 537 to one J.D. Humphreys. This property was divided into various portions called sections and various persons became Crown Sub-lessees of the different sections. On 15th January, 1924 Madam Maria Chu De Yau became assignee of the underlease of Section Q of Kowloon Inland Lot 537. The Crown re-entered on Kowloon Inland Lot 537 on 21st March, 1936 for reasons immaterial to this appeal and subsequently offered Madam Yau a new Crown Lease of Section Q which was then renumbered Kowloon Inland Lot 3793. Madam Yau accepted this offer and the lease dated 14th July, 1937 was executed for a term of 75 years commencing from 14th June, 1888 (sic) with an option to renew such lease for a further 75 years. A rent of \$76.0.0 per annum was reserved under the lease and a premium of \$1238.38 was paid. The premium is not mentioned in the Lease. On 27th January, 1948 Madam Yau assigned her lease to the Appellant in consideration of the sum of \$80,000.

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pp.540-546

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pp.547-549

5. The material part of the lease for the purpose of this appeal is as follows :-

p.546  
11.11-40

"Provided also and it is hereby further agreed and declared that the said Lessee shall on the expiration of the term hereby granted be entitled to a renewed Lease of the premises hereby expressed to be demised for a further term of SEVENTY FIVE YEARS without payment of any Fine or Premium therefor and at the Rent hereinafter mentioned and that His said Majesty will at the request and cost of the said Lessee grant unto him or them on the expiration of the term hereby granted a new Lease of the said premises for the term of Seventy five years at such Rent as shall be fairly and impartially fixed by the said Director as the fair and

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reasonable rental value of the ground at the date of such renewal."

RECORD

6. The Appellant exercised his right to renew the lease by a letter dated 25th February, 1963 written by his Solicitors on his behalf. The Appellant was informed in a letter dated 2nd December, 1964 that the Crown Rent would be \$60,764 per annum. The Appellant did not accept that figure and brought an action seeking, inter alia, a declaration that the rent had not been fixed as required by the terms of the Crown Lease.
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7. At the trial the Appellant gave evidence that he had had a ten storey building constructed on the property and that the construction work started on 16th July, 1963. The gross rent produced from the building was slightly in excess of \$25,000 per month.
8. John Lyons, a defence witness was interposed. He was a Senior Estate Surveyor in the Hong Kong Government working in the Crown Lands and Surveys Department, a sub-department of the Public Works Department. Mr. Lyons produced a memorandum signed by Mr. Clarke, Superintendent of Crown Lands and Surveys which summarises the history of the scheme of land tenure in Hong Kong whereby it became the practice of the Crown to grant leases of property at a very moderate rent known as Zone Crown Rent. These leases were sold at auction for a premium. Paragraph 12 of the Memorandum shows that the practice arose in about 1898 of granting leases for a term of 75 years with an option to renew the lease for a further 75 years upon the same terms as to rent as are contained in the present lease. In these cases it is necessary to fix a fair and reasonable rent. Mr. Lyons admitted that in fixing the premium payable by Madam Yau in 1937 the Crown had acted on the assumption that the option to renew the lease would be exercised. He produced a document to show that this was the method adopted in fixing the premium for the new leases of all those tenants who held leases in Kowloon Inland
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- p. 563  
p. 577
- p.16 ll.  
25-31
- p.17 ll.  
11-13
- p.23 1.40  
p.24 1.25
- p.25 11.1-2  
p. 610
- p.25 ll.  
17-40  
p.614 ll.  
28-38
- p.31 1.26-  
p.32 1.22
- p.617-618

RECORD

Lot 537 under the original 1888 lease and whose tenancy was interrupted by the resumption of possession of Kowloon Inland Lot 537 by the Crown in 1936. Mr. Lyons did, however, assert that the premium assessed in this manner did not include any element of premium for the renewal term of 75 years. In cross-examination he admitted that a possible reason for the insertion of the words "without fine or premium" was that the premium had already been paid in 1937. Mr. Lyons stated that the method used to assess rent in the present case was to fix the Capital value of the land for a period of 75 years. Mr. Lyons admitted that the Capital figure was the same figure which the Crown would expect to obtain as a premium in the case where the Crown was disposing of a lease in consideration of a premium and Zone Crown Rent. The Capital figure was then decapitalised over 75 years at 5% to arrive at an annual figure. One element in this annual figure is a provision for a sinking fund. The result of this is that at the end of 75 years the lessee will have paid in 75 annual instalments the capital figure plus interest on the outstanding capital at 5%. In determining whether the assessment was reasonable and fair for the lessee Mr. Lyons first valued the land with the subsequently erected building and then deducted the cost of erection and an element of profit for the risks involved in investing in the building. He then expressed this as a percentage of the value of the land and came to the conclusion that the appellant could obtain a return of 24.2% on the capital value. Mr. Lyons expressed his conclusions thus :-

"The rental value of the land is purely and simply the annual value which gives Government a 5% return on the value of its asset".

Mr. Lyons admitted that there had been a considerable fall in the value of land in Hong Kong since June 1963, the renewal date for this lease

p.32 11.  
42-44

p.86 11.  
1-14

p.43 1.22-  
p.47 1. 7

p.48 1.6-  
p.49 1.45

p. 49.11.  
40-44

P.35 11 5-8  
p.50 11.7-16  
p.131 1 10-  
p.133 1 14.

9. David Anthony Bailey gave evidence for the Appellant and produced an arithmetical calculation which showed that in calculating the capital value of the proposed lease to Madam Yau in 1936 the Crown presumed that she should hold the land and enjoy its income for such a number of years as could mathematically be treated as perpetuity. Mr. Bailey produced a further detailed calculation which showed the way in which the rental figure was calculated in 1963 and how that figure sufficed to pay both interest on the capital figure and to provide a sinking fund whereby the whole of the capital sum as worked out by Mr. Lyons is paid to the Crown over a period of 75 years. This same calculation also showed that as a result of working to only 3 places of decimals the rent in fact assessed by the said Director would have produced for the Crown \$21,334 more than was required to produce the return on the money which according to Mr. Lyons was that required by the Crown.
10. An Affidavit of John Victor Moore was put in evidence by the Appellant in which Mr. Moore (as a Chartered Surveyor) expressed the following opinion of the method which should have been employed to determine a fair and reasonable rent from the Appellant to the Crown.
- 30 "As no fine or premium is to be paid in respect of the renewable lease it is my considered opinion that the revised Crown Rent should therefore be based on the Zone Crown Rent applicable to the Plaintiff's property at the date when the renewal term commenced i.e. the 24th June, 1963".
11. Alex Michael Wright, the Director of Public Works for Hong Kong, gave evidence that he considered in consultation with expert advisers the value to be placed upon the land which was the subject of the Appellant's proposed new lease and arrived at a figure of \$375 per square foot. He then recorded this valuation in a Government file. He admitted in
- RECORD  
p.690 ll.  
1-14  
  
p. 690  
1.1.15 -  
p. 699  
  
p.216 ll.  
2-7  
  
pp.674-678  
  
p. 244 ll,  
9-21  
  
p.552 ll  
10-24

RECORD

p.258 11. cross-examination that having fixed a capital  
26-34 value of \$375 per square foot the remaining  
part of the calculation was done by experts  
p.284 1.33 in Crown Lands and Survey Department. He  
p.285 1.37 further admitted that the value of land in  
p.304 11. Hong Kong had declined some time after the  
35-39 renewal date of the said lease in 1963.

12. Mr. Justice Scholes gave judgment in the  
action on 24th June, 1967 and made the  
following, among other, findings :-

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p.338 1.26 (i) The annual sum assessed was  
p.339 1.12 calculated in the manner described by  
Mr. Lyons. Zone Crown Rent was added to  
the decapitalised sum reached by these  
calculations;

p.342 1.44 (ii) The premium of \$1238.38 paid by  
p.343 1.2 Madam Yau was not paid for the further  
term of 75 years resulting from the  
option to renew the original lease;

p.343 11. (iii) Zone Crown Rent by itself would  
2-6 not be a fair or a reasonable rent being  
far too low and bearing no reality or  
relation to economic rents;

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p.344 11. (iv) The Appellant was asked to pay  
10-17 the same figure as rent as Zone Crown  
Rent plus premium paid by instalments;

p.353 11. (v) In assessing the rent account was  
34-39 taken of the re-development value of the  
property. This was a proper consideration;

pp.366-367 (vi) The full market rental of the  
property was fixed contrary to terms of  
lease. Mr. Justice Scholes expressed  
it thus: "I think that if it had been  
intended that the open market rent was  
to be fixed that the lease would plainly  
have said so, and I think that, in all  
the circumstances, as was thought in  
Kay's case, that a reasonable rent, would  
be some rent below the open market rent.

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RECORD

It is admitted that in fact the full market rental value was fixed, and in the circumstances, for the reasons I have given, I do not consider that that is in accordance with the terms of the relevant proviso to the lease".

10 Accordingly Mr. Justice Scholes made the Declaration that the rent had not been fixed as required under the terms and provisions of the Crown Lease.

13. The Respondent (Appellant in the Full Court) appealed to the Full Court by Notice of Motion dated 4th August, 1967 and on 26th October, 1967 Served on the Appellant (Respondent in the Full Court) notice of his Grounds of Appeal pursuant to an order of the Full Court (Mills-Owen and Pickering J.J.) made on 24th October, 1967. The Appellant Served a Respondent's Notice on the 17th November, 1967.

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p. 370  
pp.373-5  
pp.371-2  
pp.376-378

14. On 25th September, 1968 the Full Court (Rigby S.P.J. Blair-Kerr and Huggins J.J.) delivered judgments in which they allowed the Appeal and set aside the judgment of Scholes J. and entered judgment for the Respondent. Rigby S.P.J. agreed with the judgments of Blair-Kerr J. and Huggins J.

p.472(a) & (b)

Blair-Kerr J. came inter alia to the following conclusions :

30 (i) No part of the consideration for the lease for the period 1963-2038 for which lessee might in 1963 have opted was included in the sum of \$1238.38 paid by Madam Chu De Yau in 1936. This sum of \$1238.38 was the price of the option and nothing more.

p.413 ll. 38-44

40 (ii) There was nothing unfair or unreasonable in the fact that in 1936 the Director fixed the rental value of the Appellant's ground on the basis of full market value decapitalised over the

p.449 ll. 32-36

RECORD

whole renewal period of 75 years at 5%.

p.451 11.  
34-38

(iii) The words "without payment of any fine or premium therefore" in the lease refer to the granting of the new lease and imply that no further fine or premium for the exercise of the option shall be payable by the lessee.

Huggins J. concurred with the judgment of Blair-Kerr J. and came inter alia to the following conclusions :-

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p.469 11.  
9-11

(i) The premium paid by Madam Yau represented nothing more than the mere price of the option;

p.499 11.  
18-22

(ii) The provision in the 1936 lease that the lessee may renew the lease for a further term "without payment of any fine or premium" is satisfied if no lump sum is payable at the time of renewal in diminution of the rent;

p.470 11.  
39-4

(iii) The sinking fund provided for in the rent did not make that figure unfair or unreasonable since the basic capital figure upon which the rent is based is the figure which a willing purchaser would have paid for the term of 75 years at the end of which the land would equally have reverted to the Crown;

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p. 471 11.  
7-36

(iv) The requirement in the lease that the assessed rent should be fair and reasonable did not restrict the Director of Public Works to a figure below full market rent.

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p. 489 (a)  
& (b)

15. On 23rd October, 1968 the Full Court (Rigby S.P.J. Blair-Kerr J. and Huggins J.J.) ordered that in lieu of the judgment for costs passed by Scholes J. the Respondent should recover costs from the Appellant to be taxed and that the costs of the appeal be paid by the Appellant to the Respondent, such costs to be taxed.

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16. The Appellant served Notice of Motion on 1st October, 1968 on the Attorney-General for leave to appeal to the Privy Council against the judgments of the Full Court on 25th September, 1968. On the 5th October, 1968 the Appellant was granted leave to Appeal upon terms as to costs.

RECORD  
p. 490

p.491-492

10 17. The Appellant submits that the judgment of the Full Court of the Supreme Court of Hong Kong should be set aside and the judgment of Mr. Justice Scholes restored for the following, among other

R E A S O N S

- 20 (i) That the Director of Public Works in fixing the rent assessed a capital value which was the price he considered a willing purchaser would have paid if the land had been sold by public auction in complete disregard of the fact that the appellant's right to renew could have prevented any such sale by public auction. The said right to renew was purchased for valuable consideration and its value should have been reflected by a reduction in the said capital value as assessed by the said Director:
- 30 (ii) That it was an erroneous method of arriving at the fair and reasonable rent to include an element in the annual sum assessed equivalent to a sinking fund which would result in the capital sum assessed by Mr. Lyons being repaid to the Crown in addition to annual interest upon the part of that sum still outstanding, so that the Crown after 75 years would have received not only the sinking fund but also interest on the said capital sum, and resumption of possession of the land itself:
- 40 (iii) That the said Director in purporting to fix a fair and reasonable rent in fact fixed a full market rent for the land contrary to the terms of the lease:

RECORD

- (iv) That the said Director in purporting to fix a fair and reasonable rent in fact fixed a rent which because of erroneous calculations was in excess of a full market rent:
- (v) That in the premises the Full Court erred in law in holding that the said Director had fixed a fair and reasonable rent in accordance with the terms of the lease:
- (vi) That in the premises the full Court erred 10 in law and its decision should be reversed and the judgment of Mr. Justice Scholes restored.

R.A.R. STROYAN

No. 5 of 1969

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT  
OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N :

CHANG LAN SHENG (Plaintiff)  
Appellant

- and -

THE ATTORNEY GENERAL (Defendant)  
Respondent

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CASE FOR THE APPELLANT

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