10.1970



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

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C A S E FOR THE RESPONDENT

Record

1. This is an appeal, pursuant to leave granted by the Supreme Court of Hong Kong (Appellate Jurisdiction) brought by the above-named Appellant against a judgment of the said Supreme Court (Appellate Jurisdiction) (Rigby S.P.J., Blair-Kerr and Huggins JJ.), dated the 25th September, 1968, reversing a judgment of the said Supreme Court (Original Jurisdiction) (Scholes J.), dated the 24th June, 1967.

pp.491-492

pp.472 (a) - 472 (b)

p.369

2. The action was brought against the Respondent under the provisions of the Crown Proceedings Ordinance 1957 representing the Crown in its right of Government of the Colony of Hong Kong.

3. The question which arises for decision in this appeal is whether, on the exercise by the Appellant of an option to renew contained in the lease referred to in paragraph 8 below, the Director of Public Works of Hong Kong fixed a rent which was, as required by the said lease, a "Rent .... fairly and impartially fixed by the said Director as the fair and reasonable rental value of the ground at the date of such renewal".

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4. The land with which this appeal is concerned is an area of 3,293 square feet, registered in the Land Office as Kowloon Inland Lot No. 3,793. This was formerly part of Kowloon Inland Lot No. 539, an area of 105,618 square feet.

pp.510-518

5. On the 3rd October, 1888, the Crown demised to one John David Humphreys Kowloon Inland Lot No. 539 for a term of 75 years from the 24th June, 1888. The lease was granted in consideration of a premium of $528 and an annual rent of $484. In the course of time Kowloon Inland Lot No. 539 was split up into a number of sections, one of which is Kowloon Inland Lot No. 3,793, of which one Wong Yung became Crown lessee or sub-lessee.

pp.519-520

6. In 1924, Wong Yung assigned Kowloon Inland Lot No. 3,793 to the Appellant's predecessor in title, Madam Maria Chu de Yau, to hold for the residue of the term of 75 years from 1888.

7. In 1936, it became apparent that, by reason of non-payment or late payment of rent, all the tenants of the land comprised in the 1888 lease were in danger of losing their land if the Crown were to exercise its right of re-entry. An amicable arrangement between the Government and these leaseholders was arrived at, in consequence of which the Crown re-entered and offered new separate Crown leases to each lessee.

pp.540-546

8. The lease granted to Madam Chu de Yau is dated the 14th July, 1937. By the said lease, the Crown demised to Madam Chu de Yau Kowloon Inland Lot No. 3,793, for a term of 75 years from the 24th June, 1888, in consideration of a rent of $76 per annum. The lease made no provision for the payment of a premium, but it is not in dispute that Madam Chu de Yau in fact paid a premium of $1,238.38. Although the lease of 1888 had been non-renewable, a proviso in the lease of 1936 gave Madam Chu de Yau an option to renew in the following terms:

p.546

"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 /of Public Works/ as the fair and reasonable rental value of the ground at the date of such renewal ...."

9. On the 27th January, 1948, Madam Chu de Yau assigned to the Appellant the residue of the term of 75 years granted by the lease of 1937, together with the right of renewal. pp.547-549

10. In February, 1963, the Appellant's lease being due to expire in the following June, his solicitors wrote to the Registrar General (Land Officer) giving notice that he was exercising his right of renewal. In December, 1964, the Appellant was informed by the Superintendent of Crown Lands and Survey that the rent payable under a new lease of Kowloon Inland Lot No. 3,793 would be $60,764 per annum. p.563 p.577

11. The rent of $60,764 per annum was arrived at in the following way. As the basis of calculation, the full market capital value of the land was taken as $375 per square foot. Since the Appellant's property contained 3,293 square feet, the capital value of his land was $1,234,875. This figure was then "decapitalized", i.e. spread over 75 years with interest at 5%: this was done by multiplying $1,234,875 by the reciprocal of the yearly purchase figure taken from valuation tables, which, working to four decimal places, is 0.0489. This gave a figure of $60,386, to which was added the Zone Crown Rent for the property, which was $378 per annum, so giving an annual rent of $60,764. pp.550-553

12. Zone Crown Rent appears to be a concept peculiar to Hong Kong. For many years Crown

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pp.382-388, 394-395

land in Hong Kong has been alienated by offering for sale by public auction a lease of the land at a stated Crown rent fixed according to the Zone where the land is situate, the lease being sold to the bidder who offers the highest premium, which is generally paid in cash at the time of purchase. The fall in the value of money, and the rise in the value of property in Hong Kong, have had the consequence that Crown rents have become so low as to bear no relationship to the value of the property on which they are charged: nevertheless, the Government has maintained the system in order to preserve the essential features of leasehold tenure. The Zone Crown Rent for Tsimshatsui, the area in which the Appellant's land is situated, is currently $5,000 per acre, and in the courts below the Appellant has submitted that throughout the whole period of the renewed lease he should pay to the Crown only the appropriate figure for Zone Crown Rent, that is to say $378 per annum.

pp.1-4

pp.4-11

13. The Appellant commenced the present action on the 17th June, 1965, and by his Statement of Claim, delivered on the 20th October, 1965, sought various declarations, and inter alia:

pp.9-11

"(a) A declaration that the rental value of the said property has not been fixed by the Director himself.

"(aa) Further and in the alternative the rent has not been fixed as required under the terms and provisions of the Crown Lease.

"(b) Further and in the alternative a declaration that (if the rental value of the said property has been fixed by the Director) the same is not a "fair and reasonable" rent having regard to the terms and provisions of the Crown Lease.

"(c) Further and in the alternative a declaration that (if the rental value of the said property has been fixed by the Director) the same has not been

fixed fair and impartially as required under the terms and provisions of the Crown Lease ....

"(g) Further and in the alternative a declaration that (if the assessment of the rental value of the said property has been fixed by the Director) the same is "ultra vires" the terms and provisions of the Crown Lease or otherwise that the rental as fixed should not be enforced inasmuch as the same includes the following:

(I) A decapitalisation of the full market value of the said property over a period of 75 years; and

(II) Interest on the capital amount at the rate of 5% per annum compounded over the term of renewal ...."

14. The Respondent, by his Statement of Defence, dated the 10th November 1965, denied that the Appellant was entitled to the declarations claimed. pp.12-14

15. The action was heard by Scholes J. in the Supreme Court (Original Jurisdiction) on the following dates in 1967 (all inclusive), namely the 23rd January to the 3rd February, the 25th, 27th and 28th February, the 1st to the 4th and the 6th March, the 17th to the 20th April and the 24th to the 29th April. Judgment was delivered on the 24th June 1967. The learned judge held that the rent had not been fixed by the Director of Public Works in accordance with the terms of the relevant proviso in the Lease. pp.324-368

16. At the trial, the Appellant submitted that the rent had not been duly fixed by the Director on several grounds. The main submissions of the Appellant, and the decision of the learned judge in regard to those submissions, are summarised in the following paragraphs, 17 to 30. In substance the only submissions of the Appellant accepted by the learned judge were those summarised in paragraph 30.

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pp.340-343 17. The Appellant submitted that the premium paid by Madam Chu de Yau on the grant of the lease was paid not only for the remaining 27 years of the term then granted, but also in respect of the 75 years for which the lessee had a right to renew the lease. The learned judge found that the premium was not paid for the further term of 75 years.

p.343 18. The Appellant submitted that the Zone Crown Rent would by itself be a fair and reasonable rent. The learned judge held that it would not, "being far too low and bearing no reality to economic rents". 10

pp.343-346 19. The Appellant submitted that the "rent" fixed by the Director of Public Works was not in fact genuine rent, but merely labelled as such, and that it was actually composed of a hidden premium, payable by instalments, plus Zone Crown Rent.

p.346 The learned judge held that the rent fixed was "rent, being for the purpose of an annual payment to be paid by the tenant to the Landlord for the use of the land to be demised in the lease". 20

pp.346-347 20. The Appellant submitted that the Director of Public Works had not himself fixed the rent, as required by the relevant proviso. The learned judge was satisfied and found that the Director did fix the rent.

pp.347-348 21. The Appellant submitted that, if the Director of Public Works had fixed the rent, he had done so at the wrong time, by a minute dated some weeks prior to the date of the renewal of the lease. The learned judge considered that the Director had fixed the rent at the wrong time, but that the Appellant had incurred no loss thereby, since a rent fixed at the correct time would have been higher. 30

pp.348-350 22. The Appellant submitted that the function of the Director of Public Works under the proviso to the lease was that of an arbitrator or quasi-arbitrator, and that as such he should have heard both parties before fixing the rent, which he did not do. The learned judge, having cited Collins v. Collins 26 Beav. 306, held that the function of the Director was that of a valuer, 40

and not that of an arbitrator or quasi-arbitrator, and that he was under no obligation to hear both parties.

Record

23. The Appellant submitted that, in calculating the rent on the basis of the value of the land, the land had been wrongly valued as though the Crown had an asset of 75 years and the land was unencumbered, whereas in fact the land had become encumbered for a period of 75 years when the option to renew was exercised. The Appellant accordingly submitted that the rent should be calculated on the footing that the only asset of the Crown was the ultimate reversion, of negligible value, expectant on the determination of the 75-year renewed lease. The learned judge rejected this submission, and held that it was necessary to take the value of the land as though it were not encumbered by the lease in order to work out a rent under the lease.

pp.350-351

24. The Appellant submitted that an error of $21,334 over the period of the lease was shown as a result of the reciprocal of the year's purchase being taken no further than 4 decimal places in the calculations by which the Director of Public Works fixed the Appellant's rent. The learned judge held that working to 4 decimal places could not be said to be unreasonable.

p.351

25. The Appellant submitted that in fixing the rent the Director of Public Works had taken into consideration certain matters which he should not have considered, namely (1) Government policy, (2) the advice of civil servants of the Crown, (3) premia and payments which the Appellant would receive in respect of a new building to be erected on the land, and (4) the redevelopment value of the property. The learned judge considered that the evidence did not support the third of these contentions, and that the other matters were matters which the Director could properly take into account.

p.353

26. The Appellant submitted that, in calculating the rent, compound interest had been charged, when no interest should have been

pp.353-354

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charged at all. The learned judge found that compound interest had been charged, but did not consider that this vitiated the figure arrived at.

p.354

27. The Appellant submitted that in fixing the rent the Director of Public Works had failed to take into account certain matters which he ought to have considered, namely, that the rent of the property had been increased in 1936 or 1937, and that there might be fluctuations in prices over the period of the renewed lease, including the effect of the New Territories Lease coming to an end. The learned judge held that it was irrelevant whether the first matter had been considered, and that the second matter was too speculative to be of any great weight, and that the principle to be applied was simply whether or not the rent fixed was fair and reasonable.

pp.354-355

28. The Appellant submitted that the Director of Public Works had erroneously over-ruled the advice of his expert advisers. The learned judge did not hold that such over-fuling vitiated the figure arrived at.

pp.355-356

29. The Appellant submitted that the Director of Public Works did not fix the rent "fairly and impartially", as he was required to do under the terms of the proviso in the lease, because he was biased by Government policy. The learned judge held that the Director had not acted improperly in taking Government policy into consideration and found that he acted impartially in fixing what he considered to be a fair and reasonable rent.

pp.356-367

30. The Appellant submitted that the rent fixed by the Director of Public Works was the full market rent, and therefore was not a "fair and reasonable rent", as was required under the terms of the proviso in the lease. The learned judge, having contrasted the words "fair and reasonable" with a reference to "full and fair compensation" in another part of the lease, and having cited John Kay Ltd. v. Kay [1952] 1 All E.R. 813 (in which the Court of Appeal decided that a full market rent was not necessarily a "reasonable" rent within section 12 (1) of the

Leasehold Property Temporary Provisions Act, 1951), held that the full market rent fixed was not in accordance with the terms of the lease. The learned judge also said that since it had been agreed that the lessee was to pay no fine or premium, it seemed to him to be hardly fair (or for that matter reasonable) so to fix the rent that the plaintiff should be made to pay the same figure of money as if he had to pay a fine or premium.

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p.367

31. The learned judge then declined to fix the rent of the property himself, and made a declaration in the terms sought in paragraph (aa) of the Statement of Claim, namely, that the rent had not been fixed in accordance with the terms and provisions of the Crown Lease.

pp.367-368

32. The Supreme Court (Appellate Jurisdiction) (Mills-Owens and Pickering J J.) granted the present Respondent leave to appeal on the 24th October, 1967. By his Grounds of Appeal, filed on the 26th October, 1967, the Respondent sought the reversal of the decision of Scholes J., on several grounds, and inter alia:

pp.371-372

pp.373-375

"1. That in construing the proviso for renewal in the Crown Lease dated 4th July, 1937, as meaning that a reasonable rent would be some rent below the open market rent the learned judge misdirected himself in law.

pp.373-374

"2. That the learned judge misdirected himself in law in relying on the case of John Kay v. Kay /1952/ 1 All E.R. 813 to assist him in his judgment since the case has no relevance to the issues.

"3. That in reaching the conclusion that it was hardly fair or for the matter reasonable so to fix the rent that the Plaintiff should be made to pay the same figure of money as if he had to pay a fine or premium the learned judge misdirected himself both in law and in fact ...."

33. The appeal was heard before the Supreme

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Court (Appellate Jurisdiction) (Rigby S.P.J., Blair-Kerr and Huggins J J.) on the 13th to the 15th and the 18th to the 21st March (both inclusive) 1968, and the judgments (which were unanimous) were delivered on the 25th September, 1968.

pp.379-472

34. In the course of their judgments, one or more of the learned judges expressed their agreement with the views of the learned trial judge on the submissions set out in paragraphs 17-23, 25 (in part), 26, 27 (in part), and 29, above.

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pp.419-420

35. At the hearing of the appeal, the present Appellant submitted that, in fixing the rental value of the land, the Director of Public Works failed to take into account that the building covenant in the 1936 lease required the lessee to maintain on the land a building of the value of $7,000 only, so that in fixing the rent at $60,764, the Director was, in effect, forcing the Appellant to develop his land to the maximum. This submission was rejected by Blair-Kerr J., who held that the building covenant was not a factor to be considered in ascertaining the rental value of the land at the date of renewal, and that the extent to which the Appellant chose to develop the land was entirely a matter for him.

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pp.452-458. 459-460

p. 453

36. The present Appellant submitted that the learned trial judge had wrongly excluded certain evidence, by refusing to order production of Government file No. L.S.O.5296/53. On the 1st February, 1967, the Colonial Secretary had certified his opinion that "the file required to be produced belongs to a class which on the grounds of public interest must as such be withheld from production to the court" and directed the Respondent to claim privilege in respect of the said file. By an Affidavit of 2nd February, 1967, the Colonial Secretary had deposed that he himself was of opinion that, in view of the contents of such file, which included legal opinions, minutes of Executive Council meetings and policy matters of a highly confidential nature, it would be against public interest that they should be produced. The learned trial

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p.453-454

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p.454

judge had upheld the claim of privilege, being of the opinion that the file (since it included minutes of Executive Council meetings) contained papers which might be termed in Hong Kong the equivalent to Cabinet papers in England. On appeal, the learned judges, who cited Conway v. Rimmer [1968] A.C. 910, came to the same conclusion on this point as Scholes J. Record pp.458, 460

37. The present Respondent submitted that the learned trial judge had been in error in holding that the rent fixed by the Director of Public Works was not a "fair and reasonable rent" for the reasons set out in paragraph 30 above. On appeal, the learned judges upheld this submission. Blair-Kerr J. distinguished the decision in John Kay Ltd. v. Kay [1952] 1 All E.R. 813, on the ground that it was concerned with a statute whose object (the protection of a certain class of tenants against rents being inflated by scarcity) was not contemplated by the parties to the lease in the present case, and held that the case was "not an authority for the proposition that in fixing the rental value of the ground, some figure lower than the full market value of the ground was contemplated by the parties to this lease". The learned judge also held that the fact that the word "full" occurred in one proviso in the lease and not in another did not appear to be material. The learned judges further held that it was not unfair or unreasonable so to fix the rent that the Appellant should be made to pay the same sum as if he had had to pay a fine or premium. Blair-Kerr J. was of the view that the words "without payment of any fine or premium" in the relevant proviso did not qualify the plain meaning of the words "rental value of the ground": either they referred to the granting of the new lease and implied that no further fine or premium for the exercise of the option to renew should be payable, or they meant that upon the lessee opting for a second term there were to be no demands on the part of the Crown for payment of the full capital value of the new lease at its commencement. pp.443-452, 466-472 p.447 p.448 pp.448-452, 466-469 pp.449-452

38. The Supreme Court (Appellate Jurisdiction) pp.472(a)-472(b)

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therefore allowed the present Respondent's appeal, and directed that the judgment of Scholes J. be set aside and that in lieu thereof judgment be entered for the Respondent.

39. On this appeal, the Respondent will argue that the decision of the Supreme Court (Appellate Jurisdiction) was right for, inter alia, the reasons set out in the following paragraphs, 40-46, and will also argue that the Colonial Secretary's claim of privilege was rightly upheld.

40. The Respondent submits in the first place that the premium paid by Madam Chu de Yau in 1936 was paid by her for the lease then granted and for the option to renew, but not for the second term of 75 years, so that the Appellant cannot argue that the only rent payable in respect of the second term is Zone Crown Rent. The Respondent submits that a premium is paid for benefits obtained under a lease granted at the time of payment, not for benefits which may be obtained under a lease which may be granted in the future; and that it is in any event highly unlikely that a premium would be paid for something which might never come into existence, i.e. the further term which the lessee might choose not to demand. In this connection the Respondent refers to the heading to Exhibit J. p.617 The Respondent further submits that the questions whether or not Madam Chu de Yau paid a premium for the lease and option then granted and how the premium was calculated are irrelevant to the construction and application of the proviso to the lease providing for the fixing of the rent by the Director of Public Works.

41. The Respondent submits that the evidence in the case shows that the Director of Public Works personally fixed the rent payable under the renewed lease, and that the findings of the courts below on this point should be upheld. The Respondent relies in particular on the fact that in fixing the capital value of the ground which figure formed the basis for the calculation of the new rent, the Director did not accept the advice of his officials as to the value of Kowloon Inland Lot No. 3,793, but arrived at an

independent conclusion on this point. Record

42. The Respondent submits that the Director of Public Works was not in the position of an arbitrator when fixing the new rent of the land, and in consequence was not under an obligation to act judicially. The Respondent relies on the absence from the present case of two elements which are generally regarded as indicative of there being an arbitration: firstly, the existence of a difference (as distinct from the possibility of a future difference) between the parties before the matter in issue is submitted to the person who is to arbitrate; and secondly, the intention of the parties that the arbitrator should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him.

43. The Respondent submits that in fixing the rent payable under the new lease, the Director of Public Works acted "fairly and impartially" in accordance with the terms of the relevant proviso. The Respondent relies on the fact that no attempt has been made by the Appellant to impugn the honesty of the Director of Public Works, and further submits that Government policy was a matter which he might properly take into account in arriving at a non-judicial decision.

44. The Respondent submits that in the circumstances the Director of Public Works acted on the correct principle when he assessed the value of the land on the basis of what a willing purchaser would have been prepared to pay for an assignment of the lease. The Respondent further submits that the alternative method of valuation proposed by the Appellant, namely, that the land should be regarded as encumbered for the whole of the further term of 75 years, so that its value to the Crown is only the Zone Crown Rent chargeable together with the remote reversion, is unsatisfactory, since it is an attempt to calculate rent on the basis of rent so that no realistic progress is made.

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45. The Respondent submits that the rent fixed by the Director of Public Works was in all the circumstances a "fair and reasonable rent" in accordance with the terms of the relevant proviso in the lease. The Respondent submits that, even if the rent represented the full market value of the premises, there is no authority for the proposition that such a rent cannot be a fair and reasonable rent. The Respondent further submits that, if the rent fixed results in the Appellant paying over the term of the renewed lease the amount which he would have paid if a premium had been charged, this is only in accordance with what is normal in a situation of this nature; that the rent fixed by the Director was genuinely fixed as rent and does not contain any element of a hidden premium; and that the requirement in the relevant proviso that the new lease be granted "without payment of any fine or premium" is satisfied if no premium was in fact charged for the grant of the new lease.

46. The Respondent submits that, if the rent fixed by the Director of Public Works contains an element of compound interest, this does not prevent the rent being a rent fixed in accordance with the terms of the relevant proviso if, in the circumstances of the case regarded as a whole, the rent is "fair and reasonable".

47. The Respondent submits finally that the claim of privilege made in respect of Government File No. L.S.O. 5296/53 was rightly upheld.

48. The Respondent therefore submits that this appeal should be dismissed with costs for the following among other

REASONS

1. BECAUSE the premium paid by Madam Chu de Yau in 1936 was not paid for the second term of 75 years and because the payment of such premium, however calculated, is irrelevant both to the construction and operation of the material proviso in the Appellant's lease.

2. BECAUSE the Director of Public Works personally fixed the rent payable under the new lease.

3. BECAUSE the Director of Public Works was not in the position of an arbitrator when fixing the said rent.

4. BECAUSE the Director of Public Works acted fairly and impartially when fixing the said rent.

5. BECAUSE the Director of Public Works acted correctly in the method which he adopted for assessing the value of the land in question.

6. BECAUSE the rent fixed by the Director of Public Works was in all the circumstances fair and reasonable.

7. BECAUSE Government File No. L.S.O. 5296/53 was rightly excluded from evidence.

8. BECAUSE the decision of the Supreme Court of Hong Kong (Appellate Jurisdiction) was right.

G.B.H. DILLON

MARTIN NOURSE

No. 3 of 1969

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ON APPEAL FROM THE SUPREME COURT OF HONG KONG

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B E T W E E N :

CHANG LAN SHENG (Plaintiff) - Appellant

- and -

THE ATTORNEY-GENERAL (Defendant) - Respondent

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C A S E FOR THE RESPONDENT

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