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No. 3 of 1969

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 33 OF 1967
(On appeal from Original Jurisdiction Action No. 1382 of 1965)

BETWEEN

CHANG LAN SHENG — **Appellant**

- and -

THE ATTORNEY GENERAL — **Respondent**

RECORD OF PROCEEDINGS

Volume II

WILLIAMS & JAMES,
3/4 South Square,
Gray's Inn,
London W.C.1.
Solicitors for the Appellant

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

IN THE PRIVY COUNCIL No. 7 of 1969

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.33 OF 1967
(On appeal from Original Jurisdiction
Action No.1382 of 1965)

BETWEEN

CHANG LAN SHENG — Appellant

- and -

THE ATTORNEY GENERAL — Respondent

RECORD OF PROCEEDINGS

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E X H I B I T S

In the Supreme Court of Hong Kong

No.8
Notice of Motion of Appeal - 4th August, 1967

No.8
Notice of Motion of Appeal - 4th August 1967

- - - -

Civil Appeal No.33 of 1967
(On appeal from Original Jurisdiction Action No.1382 of 1965)

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

B E T W E E N:

CHANG LAN SHENG Plaintiff

and

THE ATTORNEY GENERAL Defendant

- - - -

TAKE NOTICE that the Full Court will be moved so soon as counsel can be heard on behalf of the above named defendant on appeal from such part of the decision herein of the Honourable Mr. Justice A.D. Scholes given herein on the 24th day of June, 1967 whereby it was adjuged that the rent had not been fixed as required under the terms and provisions of the Crown Lease.

Dated this 4th day of August, 1967.

Sd. D.A. O'Connor
Counsel for the above named defendant.

To the abovenamed Plaintiff

and to Messrs. Peter Mark & Co., Solicitors for the Plaintiff.

No.9
Order - 24th October 1967

In the Supreme Court of Hong Kong

No.9
Order of Full Court - 24th October 1967

1967 No.33
IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
(On Appeal from Supreme Court Original Jurisdiction Action No.1382 of 1965)

B E T W E E N :

CHANG LAN SHENG — Respondent (Plaintiff)

and

THE ATTORNEY GENERAL — Appellant (Defendant)

BEFORE THE FULL COURT (THE HONOURABLE MR. JUSTICE RICHARD HUGH MILLS-OWENS AND THE HONOURABLE MR. JUSTICE WILFRED FRANCIS PICKERING) IN COURT.

O R D E R
Dated the 24th day of October 1967.

UPON reading the notice of motion dated the 17th day of October, 1967 on behalf of the defendant, and upon hearing Counsel for the Appellant (Defendant) and Counsel for the Respondent (Plaintiff) and upon reading the affidavit of Patrick Francis Xavier Leonard filed the 18th day of October, 1967 and the affidavit of John David Andrew Ip filed the 21st day of October, 1967 and by consent IT IS ORDERED :-

(1) That the Appellant do within seven days from today file and serve the grounds upon which he relies to support his appeal and that the same be deemed to form part of his Notice of

In the Supreme Court of Hong Kong

No.9
Order of Full Court - 24th October 1967 (Contd.)

Appeal.

(2) That the Respondent's notice (if any) under Order 59 rule 6(4) of the Rules of Supreme Court, 1967 be filed and served within twenty-one days from the service of the grounds of appeal.

(3) That the terms of the Rules of Supreme Court, 1967 shall apply to the conduct and hearing of this appeal as if the Notice of Appeal had been filed on the date of the filing of the grounds of appeal, and

(4) That the costs of the Respondent (Plaintiff) in this application be costs in the appeal (such costs to be full costs of this application).

(B.L. Jones)
Assistant Registrar.

No.10
Grounds of Appeal filed pursuant to Order of the Full Court made herein on the 24th day of October, 1967. - 26th October, 1967.

In the Supreme Court of Hong Kong

No.10
Grounds of Appeal filed pursuant to Order of the Full Court - 26th October 1967

CIVIL APPEAL NO.33 OF 1967
(ON APPEAL FROM ORIGINAL JURISDICTION ACTION NO.1382 OF 1965)
IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

B E T W E E N:

CHANG LAN SHENG
Plaintiff/Respondent

and

THE ATTORNEY GENERAL
Defendant/Appellant

Grounds of Appeal filed pursuant to Order of the Full Court made herein on the 24th day of October, 1967.

The above-named Defendant appeals to the Full Court from that part of the decision herein of the Honourable Mr. Justice A.D. Scholes given on the 24th day of June, 1967 in which the learned Judge declared that the rent of K.I.L. 3793 had not been fixed as required under the terms and conditions of the former Crown Lease relating thereto and made a consequent Order as to costs, on the following grounds :-

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.

In the Supreme Court of Hong Kong

No.10

Grounds of Appeal filed pursuant to Order of the Full Court - 26th October 1967 (Contd.)

2. That the learned Judge misdirected himself in law in relying on the case of John Kay v. Kay 1952, 1 A.C.R.813 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.

4. That in holding that the rent of $60,764.00 per annum represented the full market rent of the property, the learned Judge misdirected himself in fact.

5. That in holding that it was admitted that the full market rental value had been fixed the learned Judge misdirected himself in fact.

6. That in holding that the Plaintiff/ Respondent was asked to pay the same sum of money as if he were paying a premium the learned Judge misdirected himself in fact and in law.

7. In view of the foregoing the learned Judge should not have make a declaration that the rent had not been fixed in accordance with the terms and provisions of the former Crown Lease relating to K.I.L. 3793.

8. The Full Court shall be asked to make the following Order :-

(i) That the appeal herein be allowed and the declaration made by the learned Judge be reversed.

(ii) That the costs of the appeal and of the proceedings before the

learned Judge be taxed and paid by the Plaintiff/Respondent to the Defendant/Appellant.

Dated this 26th day of October, 1967.

(Sd.) P.F.X. Leonard

Counsel for the above-named Defendant/Appellant

To the above-named Plaintiff/Respondent and to his solicitors Messrs. Peter Mark & Co.

- -- - -- - -- -

In the Supreme Court of Hong Kong

No.10

Grounds of Appeal filed pursuant to Order of the Full Court - 26th October 1967 (Contd.)

In the Supreme Court of Hong Kong

No.11
The Respondent's Notice - 17th November 1967

No.11
The Respondent's Notice-
17th November, 1967.

CIVIL APPEAL NO.33 OF 1967
(ON APPEAL FROM ORIGINAL JURISDICTION
ACTION NO.1382 OF 1965)
IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

B E T W E E N:

CHANG LAN SHENG
Plaintiff/Respondent

and

THE ATTORNEY GENERAL
Defendant/Appellant

TAKE NOTICE that the Plaintiff on the hearing of this Appeal will seek to affirm the decision of the Learned Trial Judge for the reasons given by the Learned Judge in his Judgement, and alternatively for one or more of the following reasons :-

1. Upon the true construction of the Lease, the subject of the action, and in the events which happened, the fair and reasonable rental value of the ground comprised in the said Lease was approximately the present Crown Rental usually charged for that particular zone of 378 dollars per annum.

2. The Director did not, as required by the said Lease, fairly and impartially fix the fair and reasonable rental value of the said ground, but, contrary to the provisions of the said Lease, fixed the amount of a premium payable by instalments with interest.

3. The Director did not personally fix the alleged rent.

4. The Director erred in not hearing and considering representation on the part of the Plaintiff prior to fixing the alleged rent.

5. That on the documentary evidence the amount of premium was assessed on the assumption that the right of renewal should be exercised and the Director erred in not taking into consideration the premium paid on the grant of the Lease or the fact that the said ground is subject to the right of renewal conferred by the said Lease.

6. The Director erred in taking government policy into consideration.

7. Further or alternatively the Director erred in taking into account the value of the building erected or to be erected on the said ground, and/or in basing his figure on the maximum development possible under the Buildings Ordinance.

8. The Director erred in including in the alleged rent 5 per cent compound or simple interest.

9. Generally the Director was wrong in adopting a method or alternatively formula in fixing the alleged rent which was based on the full alleged market or capital value of the land decapitalised over the term of renewal of 75 years at the rate of 5% per annum and adding thereto the Zone Crown Rent of $5,000.00 per acre per annum.

10. The Director erred in principle in adopting the same method or alternatively formula for calculating the alleged rent as was applied for fixing of premium for a regrant of a Lease without the option for renewal as conferred by the Plaintiff's Lease.

11. That the Director erred in fixing the capital value of the Plaintiff's land arbitrately overruling the views of Government's experts thereon.

In the Supreme Court of Hong Kong

No.11

The Respondent's Notice -17th November 1967 (Contd.)

12. Generally the Director erred in principle in fixing the alleged rent, or alternatively fixed a rent which was grossly excessive.

13. The Learned Judge was wrong in upholding the claims for privilege of the Defendant and the Plaintiff will ask that all relevant documents be now produced before this Full Court.

14. The Respondent will be asking the Full Court to give an indication of the manner in which the fixing of a fair and reasonable rent (or rental value) should be assessed and to give some indication of the amount of rent per annum which would be fair and reasonable.

Sd. A. Sanguinetti,
Counsel for the Plaintiff/Respondent.

No.12
Judgment of the Hon. Sir Ivo Rigby - 25th September, 1968.

In the Supreme Court of Hong Kong

No.12
Judgment of the Hon. Mr. Sir Ivo Rigby - 25th September 1968

IN THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.33 OF 1967
(On appeal from Original Jurisdiction Action No.1382 of 1965)

B E T W E E N:

CHANG LAN SHENG — Plaintiff

and

THE ATTORNEY GENERAL — Defendant

Coram: Rigby, Blair-Kerr & Huggins, JJ

25th September, 1968.

J U D G M E N T

Rigby, S.P.J.: I have read, re-read, and read yet again, the judgments prepared by me brothers Blair-Kerr and Huggins, JJ for the purposes of this appeal. I agree with the conclusions they have reached that this appeal should be allowed and I do not consider that any useful purpose would be served by my delivering a further supplementary judgment to the lengthy and comprehensive judgment of Blair-Kerr, J.

In the Supreme Court of Hong Kong

No.13
Judgment of the Hon. Mr. Justice Blair-Kerr - 25th September 1968

No.13
Judgment of the Hon. Mr. Justice Blair-Kerr - 25th September, 1968

IN THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

CIVIL APPEAL NO.33 OF 1967

(On appeal from Original Jurisdiction Action No.1382 of 1965)

B E T W E E N:

CHANG LAN SHENG Plaintiff

and

THE ATTORNEY GENERAL Defendabt

J U D G M E N T

Blair-Kerr J:

On 3rd October 1888, the Crown demised to one John D. Humphreys, 105,618 square feet of land bounded on three sides by Granville Road, Carnarvon Road and Cameron Road, Kowloon, and registered in the Land Office as Kowloon Inland Lot No.539, for the term of 75 years commencing from 24th June, 1838, the consideration being a premium of $528 which was paid upon the execution of the lease and an annual rent of $484. In the course of time this lot was split up into a number of sections; and in 1936, the lessees of the various sections came to some arrangement with Government whereby Government re-entered on the land and issued a new lease to the lessee of each section. Some of the lessees accepted Government's offer of a "non-renewable" 75-year lease as from 24th June 1888; the remainder asked for, and were given, a similar lease but "renewable", that is to

say it contained a clause giving the lessee the option to renew the lease for a further term of 75 years.

The land with which we are concerned in this case is section Q, an area of 3,293 square feet situated at the junction of Carnarvon Road and Salisbury Avenue. This section is now registered as Kowloon Inland Lot No.3793. In 1924 the plaintiff's predecessor in title, Madam Maria Chu de Yau, purchased the residue of the term for $35000. In 1936 she surrendered her lease of section Q to the Crown; and she was given a new lease for seventy five years as from 24th June 1888, with an option to renew for a further term of 75 years. It is not in dispute that she paid a premium of $1,238.38 although the lease makes no mention of this fact. The rent was increased from $19.74 per annum to $76 per annum for the remaining twenty seven years of the term. The proviso in the lease which gave Madam Maria Chu de Yau the option to renew, reads :-

> "...it is hereby further agreed and declared that the 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 Director of Public Works) as the fair and reasonable rental value of the ground at the date of such renewal ....."

In the Supreme Court of Hong Kong

No.13
Judgment of the Hon. Mr. Justice Blair-Kerr - 25th September 1968
(Contd.)

On 27th January 1948, Madam Chu de Yau in consideration of the sum of $80,000 assigned to the plaintiff the residue of the term of 75 years due to expire on 23rd June 1963 together with the right of renewal. The plaintiff exercised his option in February 1963; but it was not till 2nd December 1964 that he was informed that the rent in respect of the renewed lease had been fixed at $60,764 per annum.

Briefly stated, the plaintiff's case is that the Director of Public Works (hereinafter referred to as "the Director") has not fixed the rent in accordance with the proviso in 1936 lease; that although the figure of $60,764 is labelled rent, it in fact includes an element of hidden "premium"; that this is contrary to the terms of the proviso which stipulates that no fine or premium shall be payable; that the rent fixed is not fair and reasonable because, according to the plaintiff, the premium which Madam Chu de Yau paid was calculated on the basis that the option to renew would be exercised in 1963 and that in fact the premium of $1,238.38 paid by her was capitalised rent in respect of the whole period of 102 years which the parties had in contemplation in 1936; that the Director has not acted impartially; that, in any event, the figure of $60,764 per annum is exorbitantly high; and that, in all the circumstances, the Director ought to have fixed the rent at $378 per annum.

Some aspects of the history of land alienation in Hong Kong which appear to be pertiment as a background to the issues raised in this case are touched upon in two documents which were admitted in evidence in the court below. The first is a memorandum dated 7th August 1956 by a Mr. R.C. Clarke who was then Assistant Superintendent of Crown Lands. This memorandum reads in part:-

In the Supreme Court of Hong Kong

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Judgment of the Hon. Mr. Justice Blair-kerr - 25th September 1968

(Contd.)

"This memorandum deals with the disposal of Crown land and provides information showing how the practice arose of disposing of land at a low or practically nominal Crown rent ... ...
....
....Royal Instructions ......dated 5th April 1843 with reference to the disposal Crown lands direct as follows :-

'And it is Our further Will and Pleasure that no such lands shall be sold or let except at public auctions; and that at every such public auction, the lands to be then sold or let, be put up at a reserved, or minimum price equal to the fair reasonable price and value or annual rent thereof.'

....
....
....

11. .... in a despatch of 2nd January 1851 the Secretary of State stated that 'after a careful consideration of the papers before him, and as regarded the system of selling Crown lands to the highest bidder of an annual rent, stated he was decidedly of opinion that, in future, biddings for Crown lands should not be in the form of an advance of rent, but that any such property should be offered for lease at a moderate rent to be determined by the Crown surveyor and that the competition should be in the amount to be paid down as a premium for the lease at the rent so reserved by parties desiring to obtain it'.

12. Between 1875 and 1880 or thereabout the issue of 999-year lease ceased except in special cases

In the Supreme Court of Hong Kong

No.13
Judgment of the Hon. Mr. Justice Blair-kerr - 25th September 1968
(Contd.)

and 75-year leases without the option of renewal were introduced. The issue of these leases continued until about 1898 when the standard period became 75 years renewable for a further 75 years at 'such rent as shall be fairly and impartially fixed by the surveyor to his Majesty as the fair and reasonable rental value of the ground at the date of such renewal.'

13. The practice of selling land at a low annual Crown rent which started from the then Secretary of State's Despatch of 1851 has continued unchanged to the present day .....
....".

The second document is a memorandum written some years ago by a Mr. Lyons, at present Senior Estate Surveyor in the Crown Lands and Surveys Office, which is a sub-department of the Public Works Department Mr. Lyons' memorandum reads in part:-

"The current method of alienating Crown land is well known and has been in existence for well over a century. Land is sold at public auction at a low or nominal Crown rent the bidding being by way of a premium, payable, with few exceptions, in cash at the time of purchase. With the passing of the years, the amount of Crown Rent charged on any lot has ceased to bear any relationship to the value of the lot in spite of the fact that an arbitrary system of 'zones' has been used with differing rates of rent in each zone. It is obvious from an inspection of a plan of these zones that an attempt was made to correlate these with land values but as these latter vary relatively and within comparatively short periods of time

the zone rents not only remain arbitrary but, unless revised at short periods, become meaningless as differentials.

The leasehold system of land tenure arose originally from the tenant's need for protection by his superior landlord for which he paid in various forms of services. These services were in fact both a payment for protection and an acknowledgment of the superior ownership of the land by the landlord. In time however the need for the services gradually disappeared and they were commuted into money payments whilst still leaving the acknowledgment of superior ownership.

This latter acknowledgment is still an essential part of the system and is one of the main reasons for the payment of rent. It prevents any presumption of absolute "ownership by the tenant which otherwise could, and in many countries, does, arise. This is, incidentally, a cogent argument against redemption of rent which in any case is one of the main points in any scheme for leasehold enfranchisement. Without payment of rent the leasehold system would undoubtedly fail.

It follows from this foregoing that whilst the payment of rent at regular intervals is an essential part of the leasehold system as a legal entity, the amount of the rent is not.

Generally speaking rents fall into two main categories:

(1) Rack rents, i.e. periodic charges amounting to the full economic value of what is being let assessed at the date of letting, and

In the Supreme Court of Hong Kong

No.13
Judgment of the Hon. Mr. Justice Blair-kerr - 25th September 1968
(Contd.)

(2) Rents which are something less than rack rents.

.....
.....
.....
.....

It has long been accepted that rent from developed land arises from three sources:

1. the income derived from ownership of the original powers of land and other gifts of nature.

2. the income derived from the investment of capital in the land.

3. the income derived from the general progress of society.

It is clear that a landlord who is leasing land only (i.e. without buildings or other capital investment) would be entitled to charge on the basis of items (1) and (3) above and these would amount to a fully economic rent for the land itself, in other words a ground rent. The lessee's profit would come from (2) i.e. from the investment of his capital. Over the years of course, and with the normal depreciation in the value of money, the amount of rent ceases to be fully economic but from the ground landlord's point of view this is countered by the greater security of his rent and by the increase in the value of his reversion due to the effluxion of time.

Crown Rents in Hong Kong fall into the category of rents which are less than rack rents whatever zone they may be in and it is now necessary to examine how much lower they are than the rack rents.

" An example is the industrial land sold over the past few years at San Po Kong and Kwun Tong. An analysis of these sales shows that figures from $30 to upwards of $100 per sq.ft. were obtained. The zone Crown rent for both areas is $1,000 per acre per annum or $0.023 per sq.ft.

If the figures of premium are decapitalised to give an annual equivalent we arrive at a figure of annual value which is comparable to the Crown Rent, also an annual payment. This method unfortunately raises difficulties in that in New Kowloon and the New Territories the Crown is only a mesne landlord whereas in the case of Kowloon itself and Hong Kong Island, the Crown is absolute owner though it is admitted that the political situation may make this latter statement a little more tenuous than it sounds.

In either case it is more simple to compare capital values and in the example quoted above, if the rent is capitalised at 20 years purchase the comparison of rent to premium becomes $0.46 to a figure varying between $30 and $100. Even at the lower sale figure it is obvious that Government is only receiving a maximum of 1.5% of its land value in rent. If the average figure is taken the amount falls to less than 1%.

In the case of residential properties the difference is more marked still. A typical example in a high density residential area (Density Zone 1) might have a value of from $120-$350 per sq. ft. i.e. an average of say $200 with Crown Rents in the range of $1,000 - $5,000

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No.13
Judgment of the Hon. Mr. Justice Blair-kerr - 25th September 1968
(Contd.)

per acre per annum i.e. from $0.023 to $0.115. At 20 years purchase again comparable figures are $0.46 to $2.30 an average being say $1.30 - as against a value of $200, 0.6%. With commercial properties the relationship is more marked still.

It follows from this that the actual amount of Crown Rent payable in the Urban Area (and it must be stressed that the above arguments are meant to apply only to that area) has in practice a minimal effect on the value of land .....
.....

The average figure of Crown Rent paid in the Urban area is of the order of $0.069 per sq. ft. The average size of lot sold in 1964 is of the order of 10,000 sq. ft. for approximately 200 sites. The average size of lot regranted for a second term of 75 years during the same period is of the order of 1,000 sq. ft. for a similar number of sites. In all probability therefore the average amount of Crown Rent paid based on sales and regrants in the urban area is of the order of $350 - $400 per site per annum."

It is notorious that the population of Hong Kong has increased from approximately 1.5 million in 1949 to just under 4 millions in 1966. Owing to the scarcity of accomodation in the urban area, land values have greatly increased; and Building Regulations have been relaxed to enable developers to erect multi-storey blocks. The "boom" in land development in the late 1950's and early 1960's may be judged from the following figures taken from the Government Annual Report for 1967. At page 330, there is a statement of the total amounts of premium received by Government upon " sales " of

75-year leases of Crown land. The figures do not include sales in respect of which premia were paid by instalments. Starting from 1946, the approximate figures are :-

Period	Premia received by Government
1946 - 56 (10 years)	$ 67 million
1956 - 61 (5 years)	$177 million
1961 - 62 (1 year)	$107 million
1962 - 63 (1 year)	$234 million
1963 - 64 (1 year)	$207 million
1964 - 65 (1 year)	$143 million
1965 - 66 (1 year)	$ 75 million
1966 - 67 (1 year)	$ 50 million

It is estimated (p.292 of the Report) that premia for the year 1967-68 will total $75 million.

On 8th February 1965, there was a "run" on certain banks in Hong Kong. Public confidence in those banks was shaken to the core. A financial crisis ensued. Land values dropped considerably; and such values have not yet returned to their 1963 level. Mr. Lyons said that whereas the premium payable in 1963 on a 75-year lease of KIL 3793 was estimated at $375 per square foot, the corresponding figure in February 1967 (when he gave evidence in the court below) would be between $325 and $350 per square foot.

This is the background to the issues raised in the appeal now before this Court.

On the 6th June 1936, the Land Office wrote to Madam Chu De Yau's agent informing him of the terms on which Government proposed to grant the new lease. The letter reads in part :-

"1. The term to be for 75 years from the 24th June 1888 renewable for one further term of 75 years at a Crown Rent to be assessed by the Director of Public Works.

In the Supreme Court of Hong Kong

No.13
Judgment of the Hon. Mr. Justice Blair-kerr - 25th September 1968 (Contd.)

2. The Crown lease shall contain a covenant to maintain buildings on the land comprised in the grant of a value of not less than $7,000.

3. The Crown Rent to be calculated at the rate of $1,000 per acre per annum now in force in the district which gives an annual rental of $76 per annum .....

4. A premium to be paid calculated on the approved method, namely the difference between the value of the existing tenancy and the value of the new lease as assessed respectively by the Valuation and Resumption Officer. The premium as so calculated is $1238.38."

Madam Chu do Yau's agent asked for a copy of the Valuation and Resumption Officer's Report; and this was forwarded to him by the Land Officer on 8th July, 1936. So far as applicable to Section Q of K.I.L. 539, it reads :-

"I set out below valuation, showing the amounts of premium which should be paid upon a renewal being granted based on the approved method laid down in - - - - - - - - - - - Proposed terms for renewal of lease.
- -
- -

K.I.L. 539 Sec. Q. (No.11 Carnarvon Road).

(a) Building Covenant. The section is fully developed by the existing house which comprises an old 2-storeyed villa residence which has been reconstructed and added to. A covenant to maintain buildings to the value of $7,000 would be reasonable.

(b) Revised Crown Rent. The existing lease area included ½ of the site of Salisbury Avenue abutting on the section (old Crown Rent $19.74) Approx. area of the building site as computed from 50' plan is 3,313 sq. ft. Amount of new Crown Rent = $\frac{(1000 \times 3313)}{43,560}$

= $76 p.a. - - - -

(c) Renewal Premium.

(i) Value of old lease

Estimated gross income of $1,440 p.a.

Outgoings

Crown Rent	$ 19.74	Gross Income	$1,440.00
Rates 17% of $1700:	$289.00	Outgoings	$ 551.74
Insurance	$ 63.00	Net Income	$ 888.26
Repairs	$180.00	Years purchase for 27 years @7%	11.987
	$551.74	Capital Value	$10,647.57

(ii) Value of proposed lease

Estimated net income of $832 (i.e. $888.26 less difference between new and old Crown Rent) --

Net Income	$ 832.00
Years purchase @7% for, say, perpetuity	14.286
	$11,885.95

Amount of premium in therefore $11,885.96 - $10,647.57 = $ 1,238.38

Revised Crown Rent $76 p.a."

In the Supreme Court of Hong Kong

No.13
Judgment of the Hon. Mr. Justice Blair-kerr - 25th September 1968
(Contd.)

This method of calculation was, according to Mr. Lyons, apparently based on a method of calculation set out in a minute written by a Mr. Kirk on 2nd April, 1926 in a Public Works Department file. This latter minute deals with a purely hypothetical case; and it reads :-

"Method of determining the premium to be paid upon the grant of a right of renewal for a further term of 75 years to lessees who hold leases for 75 years (Non-renewable) expiring within the next 30 or 40 years.

Assume a typical case as under :-

(a) Existing Lease terms

Lease for a term of 75 years (non-renewable) dating from 1886.

Crown Rent = $5.00 per annum
Building covenant = $5,000.
The gross annual rental value of the demised premises = $3,000 estimated to be the rents lessee would receive from Building to be erected
The net income derived therefrom by the lessee = $2,500 ($3,000 less $500 for Crown Rent, Insurance & Repairs).

(b) Proposed terms upon grant of right of renewal

New lease to be granted for 75 years from 1886 with right of renewal for a further term of 75 years. Amended Crown Rent of $50 per annum (at say, rate of $250 per acre) to be charged commencing from present time.

New building covenant of $20,000 to be imposed.

(2). The value of Government's present interest in the property consist of:-

(i) Crown rent of $5.00 per annum receivable for 35 years
Valued @ $5.00 x 16.37419

(Y.P. for 35 years on 5% tables) - $81.87

(ii) Reversion to net income of $2,505 (Present gross rental value of property less insurance & repairs but not Crown Rent)
Valued as under :-

(Years purchase for perpetuity @ 7% - 14.28571 = $\frac{100}{7}$

Y.P. for 35 years @ 7% - $\frac{12.94767}{1.33804}$

$2,505 x 1.33804 = $3,351.21

$3,433.66

(3) The value of Government's interest in the property on the grant of the right of renewal is :-

Crown Rent of $50 per annum for 35 + 75 - 110 years, taken as equivalent to perpetuity @ 5% = 50 x 20 = $1,000

Note: the reversion is too remote to have any appreciable value.

(4) The difference between the valuation of $3,433.66 in (2) and the valuation of $1,000 in (3), viz.

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$2,433.60 is the amount of premium which should be paid by the lessee.

Sd. A. Kirk.
R.O.
2.4.26"

When exactly the expression "Zone Crown Rent" was introduced is not clear; but, according to the evidence, many years ago it was decided by the Governor-in-Council that the Colony should be divided into zones and that there should be a standard Crown Rent in respect of all land within each zone. For example in Tsimshatsui, Kowloon (the area within which the plaintiff's property is situated) the Zone Crown Rent in 1936 was $1,000 per acre. In 1948, the figure was raised to $5,000 per acre; and that is the Zone Crown Rent for land in Tsimshatsui to-day. According to a map produced in evidence, the present Zone Crown Rent for Yaumati is $4,000 per acre; and for Mongkok it is $3,000 per acre; it is $2,000 per acre for King's Park, and $1,000 for Kowloon Tong; and so on.

There appears to be no doubt at all that the figures for Zone Crown Rent fixed by the Government-in-Council from time to time bear no relation at all to the total consideration in respect of a 'sale' of a 75-year lease of land in Hong Kong. For example there was produced in evidence a copy of the Particulars and Conditions of Sale in respect of a sale of a lease for 75 years of 12,740 square feet in To Kwa Wan Reclamation, Kowloon by public auction on 13th March 1967. According to the map, the Zone Crown Rent for To Kwa Wan is $1,600 per acre. As regards this particular sale the upset price was $855,000. The Zone Crown rent is $468 per annum. What has been happening for many years is that 75-year leases of Crown land have been put up for auction at an upset or minimum "price" or "premium". This sum is invariably paid at the time of the sale; and the only apparent

reason for retaining the system whereby a lessee, having paid by far the greater portion of the consideration for his lease at the commencement of the term, continues to make the very small annual payments labelled "Zone Crown Rent" is so that the essential feature of the leasehold system may be maintained.

"Certain minutes from a Public Works Department file relating to the fixing of the rental value of the palintiff's land in 1963 were produced. They read as follows:-

M.1

Regrant Conference Decision
Basic Premium $350 per sq. foot.

(Sgd) D.W. Lyons
for S.C.L. & S.
4/10/62

M.2

3293 sq. feet @$350 per sq. foot decapitalized @ 5% for 75 years	$1,152,550 .0489 56,360
add zone crown rent 3293 sq. feet @ $5,000 per sq. ft.	378
	$ 56,738

M.4

My Lyons

Re M.3 and 2 figures checked and found correct

(Sgd)_____
13/3/63

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M.5

Hon. D.P.W.

.....

In accordance with the terms of the lease and with the agreed policy and procedure laid down at M.44 and M.45 and (206) in L.S.O. 5296/53 a new Crown rent for the second 75 year term has now been calculated in M.2. I should be grateful if you would agree those figures as 'fair and reasonable' in accordance with the policy referred to above irrespective of the H.G.'s suggested reconsideration of the policy referred to in M.55 in L.S.O.5296/53.

I consider that the new Crown rents as calculated are fair and reasonable and would be obliged if you would signify your confirmation and adoption of these figures.

(Sgd) R.H. Hughes
S.C.L. & S.
28/3/63

M.6

S.C.L. & S.

I have considered your valuation of $350 per sq. foot for this lot and have discussed it with Messrs. Hughes, Stanton & Musson. I am of the opinion that if No. 20C Carnarvon Road is correctly valued at $400 per sq. foot then this lot is undervalued at $350 per sq. foot. I consider that 20C Carnarvon Road is over-valued at $400 and I further

consider that $375 per sq. foot is a more reasonable valuation for KIL 3793.

(Sgd.) A.M.J. Wright
D.P.W.
1/4/63

M.7

Unrestricted Crown Rent
(see M.6)

3293 sq. feet @ $375 per sq.ft. decapitalized @ 5% for 75 years	$1,234,875	
	.0489	
		10,386
Add: Zone Crown Rent 3293 sq. feet at $5000 per acre per annum		378
		$ 60,764

Checked Correct
Sgd. ---
1/12/64"

On the 10th August 1964, the Superintendent Crown Lands & Surveys Office forwarded to the plaintiff's solicitors a memorandum which conveyed the Director's decision that in the case of all "renewable" leases if the lessee opted for a second term the reassessed rental value of the ground would be calculated on the basis of the full market value of the land decapitalised over the whole renewal period of 75 years with interest at 5% per annum. However, the lessee was given a further option to limit re-development to an agreed level, in which case the total consideration for the renewed term would be calculated on some figure below the full market value. The memorandum reads in part :-

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"At the time of expiry of the term granted by a 75-year renewable lease, the lessee, under the terms of his lease, has a right to renewal for a further term of 75 years at a reassessed Crown rent which, as stated in such lease, 'shall, in the opinion of the Director of Public Works, be a fair and reasonable rent for the ground.' The Director of Public Works, in accordance with legal advice, has related such reassessment of Crown Rent to the full market value of the land (excluding buildings) as restricted by the terms of the lease, at the date of renewal. The reassessed annual Crown rent is therefore computed on the basis of such full market value decapitalised over the whole renewal period of 75 years with interest at 5% per annum, to which an addition is made in respect of the zone Crown rent applicable to the area of the land subject to the renewal."

The memorandum proceeded to offer the plaintiff a choice of :

"(a) renewal on the basis of the legal option conferred by the existing Crown lease as mentioned above; or
(b) a new lease of the land the subject of the application for renewal, in exchange for a surrender of the existing lease, to take effect for a single term of 75 years .... on the special terms and conditions which are outlined in this statement";

and the memorandum continued thus :-

"3. Any new lease granted in accordance with para 2(b) of this statement will include terms to give effect to the following provisions :

(a) The development of the lot and its uses will be subject to any existing restriction;

(b) The development of the lot will in addition be restricted to that lawfully in existence at the date of the commencement of the term of the new grant;

(c) a revised Crown rent for the lot will be assessed based on the value of the land subject to such restrictions with an addition in respect of the normal zone rent. Subject to this variation the computation of the Crown Rent will be made in accordance with the formula mentioned in the first paragraph of this statement.

4. .....

5. Where a new lease has been issued under the terms of para 2(b) of this statement the following provisions will apply:

(a) If the provisions of the existing lease so permitted, the Government will, on the application of the lessee, modify the terms of the new lease so as to permit redevelopment of the lot or the enlargement of an existing building on the terms and conditions set out in this paragraph.

(b) The lease will be modified to permit such redevelopment or enlargement -

(1) subject to the observance of limits imposed or created by legislation

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(2) on the lessee agreeing to the payment of a lump sum premium representing the difference between the full market value of the land after modification, such values to be assessed in relation to the values existing at the date of application for modification

(3) The revised Crown rent fixed at the commencement of the new term will continue in force for the remainder of the lease

(4) The lessee will be required to pay the whole of the premium for themodification within such time as may be fixed by the Government. This will in no case exceed 3 years .... During the currency of instalment payment of premium, interest at the rate of 5% p.a. will be payable on the balance outstanding ...."

By letter dated 14th October 1964 to the Superintendent, Crown Lands and Surveys, the plaintiff's solicitors enquired what would be the amount of rent payable under (a) the legal option and (b) a regrant restricting the lot to its present development, in view of the fact that the plaintiff had only recently erected a new building on the premises. On 2nd December 1964, the Superintendent replied as follows :-

"..... as your clients have only just completed the redevelopment of the lot, the restricted and the full Crown rent will be the same and the figure is $60,764 per annum."

The plaintiff had redeveloped the land since 1948. In 1952, he demolished the old two-storey building and erected a five-storey building at a cost of $250,000; and in 1961/62 he submitted plans to the Building Authority for a ten-storey building. Demolition of the five-storey building was completed shortly before 23rd June 1963. The erection of the ten-storey building was completed in 1964 at a cost of $830,000; and the occupation permit issued by the Building Authority is dated 5th June 1964.

On 23rd October 1964, the Superintendent of Crown Lands and Surveys asked the Commissioner of Rating & Valuation to supply details of the rents passing in respect of the plaintiff's property (which had now been re-numbered "45-47 Carnarvon Road"); and on 18th November 1964, the Commissioner of Rating & Valuation replied thus :-

"KIL 3793 - 45-47 Carnarvon Road

The above premises have not yet been assessed to rates and an up-to-date record of rents is therefore not available at present.

However, I have been informed by the owner that the rents of some of the floors as at 10th July 1964 were as follows :-

Ground floor Shop A	$15,000 per month exclusive of rates
First floor	$8,000 per month exclusive of rates
2nd floor Flat A	$800 per month inclusive of rates
2nd floor Flat C	$900 per month inclusive of rates
6th floor Flat B	$750 per month inclusive of rates
6th floor Flat C	$750 per month inclusive of rates
7th floor Flat B	$750 per month inclusive of rates"

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From the above, it would appear that there are at least two shops on the ground floor of the building, one of which had been let at $15,000 per month on 10th July 1964. It also appears that the whole of the first floor had been let on 10th July for $8,000 per month; that the remaining floors are residential; and that on each floor there are three flats (24 in all) of which 5 had been let on 10th July 1964. The rents from such portions of the building as had been let totalled slightly under $27,000 per month. Assuming that the other shop could be let for $15,000 per month and that the remaining flats (B on the 2nd floor, A, B, and C on the 3rd, 4th and 5th floors, A on the 6th floor, A and C on the 7th floor, and A, B & C on the 8th and 9th floors) had been let at approximately the rents of the flats which had been let, the total rents from the entire Building - if maintained at the July 1964 level and on the basis of full occupation - would appear to amount to $56,700. If there are 3 shops on the ground floor, and each were let at $15,000 per month, the total rent for the whole building would be $71,700.

The question of how much rent the building was capable of producing was not fully explored at the trial. The plaintiff gave some evidence that his monthly rents had never exceeded $25,000; and no witnesses were called from the Rating & Valuation Department to testify to the state of the letting in February 1967 when the trial of this action commenced. If we assume that the plaintiff would receive on an average $25,000 per month by way of rent from his tenants, he would be receiving four times as much rent as his landlord is now asking him to pay (i.e. receiving $300,000 per annum and paying his landlord $60,764). If we take $36,000 as the average monthly rent received by him ($432,000 per year) he would then be receiving seven times as much rent as his landlord is now asking him to pay. And if

he were to receive $56,700 per month from his tenants ($680,000 per annum) he would be receiving eleven times as much rent as his landlord is now asking him to pay.

The plaintiff's submission is that throughout the whole period of the renewed lease (1963-2038) the rent which he should pay to the Crown is $378 per annum. If, during those years, he were to receive $300,000 per annum from his tenants, he would be receiving 800 times as much rent as he would be paying to his landlord. And if he were to receive from his tenants $680,000 per year and the Crown rent were fixed at $378 per year, the ratio would be 1800:1.

Reverting to the position in 1936, according to the Report by the Valuation & Resumption Officer, the Crown lessee's gross income from the land was then estimated to be $1,440 per annum. The Crown rent being then $76 per annum, the ratio appears to have been 19:1.

Mr. Lyons was one of the valuation experts on whose advice the Director relied. In regard to the assessment of $60,764, Mr. Lyons said in evidence :-

> "I assessed the rent together with the Director of Public Works. I shall assume that the capital value for a period of 75 years, and subject to the payment of the zone Crown rent, of the land at the relevant date is $1,234,875, based on a figure of $375 per square foot. That is the value to the Crown for the whole 75 years. On this assumption the Crown has an asset worth this sum which it has agreed to let to the lessee at a fair and reasonable rent. The expression fair and reasonable I take to mean: fair and reasonable to both parties. If Government were in a

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position to sell this land for a term of 75 years, that is to lease it for 75 years, to any other person, without the provision that it should be let at a rent without fine or premium, the sum it would receive at the relevant date is $1,234,875 plus the applicable zone Crown rent during the term. As Government is precluded by the terms of the lease from charging this figure of capital value as a fine or premium, it is necessary to discount what figure of annual rental would be fair and reasonable for Government to collect and then consider whether it would be fair and reasonable for the lessee to pay this rent. To make the method clear, I should like first to take an example; the purchaser of real estate is considering the purchase of property as an investment which is worth $10,000 per annum. The investor requires a return of 8% on any money he invests; and can thus afford to pay $125,000 for the property, that is 12½ times an annual value of $10,000. 8% on $125,000 is $10,000. Conversely, if the investor is in possession of property worth $125,000 and requires a return of 8% on his investment, he will be prepared to let the property for $10,000. The figure of 12½ is known as the years purchase. There is thus a clear and distinct relationship between capital value and annual rental value depending on the rate of interest required. One is complementary to the other.

The figure of $125,000 mentioned is applicable only when the income is receivable in perpetuity. If the income is for a lesser period, the investor could not afford to pay $125,000 because at the end of the lease he would have neither capital nor income even though he had received

8% on his capital during the currency of the term .

If the same figure of $10,000 were receivable for a term of 75 years, the formula for calculating the figure of years purchase becomes not 100 divided by the amount of interest, as in the case of rents receivable in perpetuity, but 100 divided by the rate of interest plus an element of sinking fund which if invested would permit the investor to recoup his capital by the end of the term. In the example given, the actual figure of years purchase for a teminable income over 75 years becomes divided by 0.08 + 0.0013216. This sum amounts to 12.297; thus the capital value of an income of $10,000 for 75 years, allowing interest on capital at 8% and a sinking fund at 5% is thus $122,970. 8% of $122,970 is $9,837.60. The sinking fund at 5% of 0.001326 multiplied by $122,970 is $162.42. $9,837.60 which is interest on capital plus $162.40 the amount of the sinking fund equals $10,000, which was the figure of annual income. The $162.40 if invested at compound interest at 5% would amount over 75 years to $122,970 and would give the investor his capital back when his income ceased. It is however unnecessary to make these complicated calculations as they are set out in valuation tables, normally used in the valuation profession. Thus the figure of years purchase to be used as a multiplier for an income for 75 years, allowing interest on capital and sinking fund at 5% is shown in the table as 19.485. A figure of years purchase may also be used as a device to obtain annual value from capital value. In my

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profession it is normal to use calculating machines for working out these figures, and as multiplication on a machine is a simpler process than division, it is normal practice to use not the figure of years purchase for division, but its reciprocal for multiplication. This is purely a mathematical process and gives the same result. The reciprocal of the years purchase figure of 19.485 is .0513. I should point out at this stage that the valuation tables referred to are based on the assumption that payments are made at the end of each year i.e. in arears. Crown rent however being payable half yearly is thus treated as being paid in advance. For this reason it is necessary to reduce the multiplier .0513 which has the effect of reducing the rent to be paid; and as the calculations are based on an interest rate of 5%, this is accomplished by dividing .0513 by 1.05 which has the effect of bringing forward by one year the assumption on which the tables are based, of payment in arrears. The figure used as a multiplier is therefore .0489. Referring back to the original valuation, it will be noted that this multiplier was used. The 5% then is not compound interest. The words against this multiplier are: 'decapitalised at 5% over 75 years'. Decapitalised means the process of arriving at an annual value from a capital value, and when the only evidence available is of capital value, then decapitalisation is the most satisfactory method of arriving at an annual value.

As interest rates in Hong Kong are in general considerably higher than 5% it is thus obvious that the rent proposed for the lot in question

is fair and reasonable from Government's point of view."

Mr. Lyons then proceeded to consider the figure of $60,764 from the plaintiff's point of view. He said :-

"It has long been considered in the valuation profession that income from land is derived from 3 main sources: (1) the income arising from the original powers of the land to be used for man's purposes; (2) The income arising from the investment of capital in that land; and (3) The income arising from the general progress of society, that is the gradual increase in standards of living - the value of money going down. It is apparent from this that where the ownership of land and the ownership of capital invested in the land are in different hands, the lessee derives his income from item (2) at the beginning of the lease and additionally from item (3) during the currency of the lease.

I should point out that the valuation itself is referred to the relevant date, that is during 1963 in our case, and takes account of the fact that the lease is intended to endure for a further 75 years. I should also point out that the particular method does suffer from certain disabilities; but is no less valid on that account.

I now come to the figures of assessing rent from the lessee's point of view, fair and reasonable to the lessee. The first part of the valuation is an assessment of the capital value of the land. The method used in this case is to value the land plus the building and then to deduct the cost of erecting the building together with an element of

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profit for the risks involved in investing in this building. I have taken a net rental value of the building that could have been erected on this lot in June 1963 as $36,000 per month. This gives a yearly figure of $432,000. From this figure I have deducted 10% for external repairs and 2% for insurance, giving a total deduction of $50,000. This therefore gives a net annual return in the region of $380,000. I have then used a figure of years purchase of 9 which gives a capital value of $3,420,000, that is for the 75 years. Now, as it is highly unlikely that the building could be fully let immediately on completion, I have assumed that it would take the lessee six years to let this building fully and to build it and I have deferred the capital value quoted for a period of three years which gives an assumption that the building will be gradually let over the six years' period. Having deferred the previously quoted capital value, the final capital value of the land plus building is $2,569,000 for the 75 years' lease. Now from that figure I have deducted firstly the probable cost of construction which I have taken as $850,000, secondly architects' fees and legal fees at $85,000, the legal fees on the construction, and thirdly an element for the developer's risk and profit at $375,000. These three items total $1,310,000 which when deducted from the capital value of $2,569,000 gives a land value of $1,259,000 which compares favourably with the figure of land value assumed at the beginning of this explanation of the method, viz. $1,234,875.

I come now to the second part of the valuation which is a valuation

of the lessee's interest, again at the relevant date, June 1963. Firstly, the net return per annum taken from the previous valuation is $380,000 per year. From this, I have deducted the rent which it is proposed to charge viz. $60,763. There is an actual income therefore of $319,237. Out of this sum, the lessee must provide for an annual sinking fund on the capital he has invested in the land and this sinking fund taken at 5% compound interest amounts to $1,732 per annum, which deducted from the actual income quoted leaves the lessee $317,505. Thus on an investment of $1,310,000 the lessee can expect a return of $317,500 per annum after allowing for a sinking fund to recoup his capital at the end of the term and for payment of the proposed rent. This is a return of 24.2% which cannot be considered unreasonable by any means."

In cross-examination, Mr. Lyons was asked why he made no allowance in his valuation for rates, water charges, electricity, profits tax, etc. His answer was:

"They have nothing to do with it. Electricity is not a question of valuation. It is purely for the lessee. The question of rates and similar charges I had assumed were paid by tenants. As far as business profits tax is concerned, tax, being a general imposition by Government, is never considered as a deduction to arrive at a correct valuation.

One of the many arguments advanced on behalf of the plaintiff in the court below, and on this appeal, was that the Director (Mr. A.M.J. Wright) did not personally fix the rental value of the ground

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as required by the proviso to the lease. I do not think that there is anything in this point. The trial judge accepted Mr. Lyons' evidence that he and the Director fixed the rent together. The memorandum sent to the plaintiff under cover of the letter of 10th August, 1964 indicates that the formula for computing reassessed rental value from the capital value of the lease was a general one. It was not worked out for the purpose of computing the reassessed rent of the lease of K.I.L. 3793 only. It is clear from the letter that in all similar circumstances in which the rent has to be reassessed this will be done on the basis of the full market value decapitalised over the whole renewal period of 75 years with interest at 5% per annum. There is no doubt at all that Mr. Wright had approved of this formula on the advice of his experts; and in dealing with the renewal of the plaintiff's lease he fixed the capital value at $375 per square foot. The mere fact that in doing so he overruled the advice of his subordinates thus necessitating a further routine mathematical calculation does not make any material difference. In my view Mr. Wright personally fixed the rental value of the ground.

Of course, counsel for the plaintiff's main submission was that if the Director did fix the rental value of the ground, he did not do so in accordance with the proviso in the 1936 lease which states that the lessee shall be entitled to a renewed lease of 75 years "without payment of any fine or premium". Counsel argued that the words "fine or premium" as used in the proviso mean the "price" for which a 75-year lease would be sold to a successful bidder at a public auction (which is by far the greater proportion of the total consideration for a 75-year lease); that in 1936 the parties acted on the assumption that the lessee, or his successor-in-title, would, in 1963, opt for a further term of

75 years; and that the plaintiff having opted for a second term, is now entitled to a new 75-year lease in respect of the period 1963-2038, the only consideration being the nominal Zone Crown rent - at present $378 per annum.

Counsel placed great reliance on the report by the Valuation and Resumption Officer, particularly on the fact that in working out what he called "the renewal premium", this officer calculated the value of "the proposed lease" using a multiplier apparently obtained from valuation tables and by taking "the years purchase at 7% for, say, perpetuity". From that, counsel argues that the parties must have contracted on the basis that the option would be exercised and that the sum of $1,238.38 paid by Madam Chu De Yau in 1936 was the whole consideration for the second term of 75 years other than the nominal Zone Crown rent; or putting it another way, that in 1936 the lessee "bought" a lease of the land for 102 years (i.e. from 1936-2038) - not merely the residue of the term expiring in 1963 (27 years) with an option to renew.

I am in some doubt as to how far this court is at liberty to look at minutes written on Public Works Department files and letters written in 1925 and 1936 by persons not called as witnesses in order to interpret the meaning of the words "without fine or premium" in the proviso of the 1936 lease. The Crown gave very full discovery. The Solicitor General's attitude was that the court might make such use of all these minutes and letters as it thought fit in determining whether the rental value of the ground as fixed by the Director was a fair and reasonable one. The attitude of Counsel for the plaintiff was that it was open to the Court to look at what he described as "the antecedent circumstances" for any purpose. This seemed to me to be tantamount to suggesting that the terms of the contract between the parties should be interpreted in

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the light of statements made in those minutes and letters which stood untested in any way by the viva voce evidence of their authors. Indeed, that the minutes should really form part of the contract between the parties.

I have the gravest doubts as to whether it is open to this court to approach this question in the way suggested by counsel for the plaintiff. Even if we felt we were free to go outside the written agreement between the parties, we have no knowledge of the qualifications of the persons who wrote the minutes on the Public Works Department files or the qualifications of the 1936 Valuation and Resumption Officer. We have no reason to think that the minutes were communicated to Madam Chu De Yau. All we know is that the Valuation and Resumption Officer's report was sent to her agent. She is now an old lady of 95, permanently hospitalised; and a short statement signed by her in St. Teresa's hospital was placed before the judge. In it she states :-

> "..... the Crown ..... offered a new Crown Lease ..... with a right of renewal for a further term of 75 years ..... It was a condition of the said offer that I be required to pay a premium and a revised higher Crown rent ...."

She does not say what she understood by the word "premium" or for precisely what purpose she paid it.

In 1936, the parties could not have known whether the lessee would, or would not, opt for a second term; and I see no reason why we should assume that the parties acted on the assumption that the option would be exercised in 1963. The proviso gave the lessee an option to renew; and it means what it says. The lessee could either opt for a further term, or not, as he chose.

Furthermore, I am not prepared to deduce from the method of calculation adopted by the Valuation and Resumption Officer that the parties had in mind a period of 102 years and not 27 years. As the learned Solicitor General said, the 1936 lease could have been drawn differently, it could have been for the term of 102 years with "a premium" calculated on that basis and with an option to the lessee to surrender his lease in, say, 1963. If the lease had been in that form, the plaintiff could have logically argued as he has done in this case. It is sufficient to say that the lease was not drawn in that way.

Clearly what the parties had in mind in 1936 when the sum of $1,238.38 was calculated was the option to renew. An option is a thing of value to a lessee. For one thing he knows that if he exercises his option there is no question of his having to rebid for a further term at a public auction; and there is no danger of any buildings on the land reverting to the Crown in accordance with the terms of the lease. But how was the value of such a thing to be quantified? One cannot look into the future. In 1936 no one could have foretold what such an option would be worth to the lessee in 1963. It may be that the method of quantification of the option, adopted by persons of whose qualifications as valuers we know nothing, may seem a little strange; but to those who had the job to do, it is not unreasonable to suppose that some calculation based on a profit factor must have seemed to them as logical as any.

In my view no part of the consideration for the lease for the period 1963-2038, for which the lessee might in 1963 have opted, was included in the sum of $1,238.38 paid by Madam Chu De Yau in 1936. This sum of $1,238.38 was the price of the option, and nothing more.

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For a hundred years or more leases of land have been "sold" by public auction in Hong Kong; and people have come to think of such leases in terms of what "price" they would have to pay for them at a public auction. The principal factor determining the price is public demand; and, in 1963, when the Director fixed the capital value of a 75-year lease of K.I.L.3793 at $375 per square foot, he did so because he was well aware of the prices paid in recent years by willing purchasers of leases of land in all districts of Hong Kong. He also considered the value of leases of neighbouring land in the Tsim Sha Tsui area at that time; and $375 per square foot was his estimate of what a willing purchaser would have paid for a 75-year lease if the land had been auctioned in 1963. The plaintiff has not challenged the correctness of the Director's assessment of the capital value in 1963 of a 75-year lease of K.I.L.3793, namely, $375 per square foot or $1,234,875 for the whole area of 3,293 square feet.

Now, if a purchaser of a lease of land for 75 years would have been willing, at the commencement of the term, to pay a purchase price based on $375 per square foot, he would obviously have been prepared to pay more if the total consideration had been spread over the 75-year term and he had been required to pay only an annual periodic sum. In other words the lease is worth more to him than $375 per square foot in terms of hard cash if spread over 75 years. I think the learned Solicitor General put the point very succinctly thus:-

> "The correct way of looking at this matter is to say to oneself: 'What annual periodic payment would the willing lessee have offered in competition with the willing purchaser of the assignment who was prepared to offer $375 per square foot?' A willing lessee

would know very well that a landlord would be only too happy to take that lump sum, viz $375 per square foot, and put it to work; and therefore the willing lessee must offer by way of rent each year a figure which shall compensate the landlord for not getting the lump sum. If the willing lessee finds that $375 per square foot is the market value of the assignment of the Crown lease, i.e. someone in the open market is prepared to buy at that figure, then the figure for rent must have an interest figure added on in order that the rental value be of the same equivalent value."

If the willing purchaser of the 75-year lease in 1963 would have been prepared to pay $1,234,875 at the commencement of the lease, the willing lessee who wished to pay a fixed annual rent and who wished to compete with the willing purchaser, would take into consideration that the landlord would not allow this $1,234,875 to lie idle. The lessee would assume that the landlord would put the money to use at once, and for the whole period of 75 years, that is to say, that the landlord would invest the money. Mr. Lyons' calculations assume an interest return of 5% - a very modest figure for Hong Kong; and $1,234,875 invested at 5% would earn annually $61,744 simple interest - which is $980 per year more than the annual reassessed rent actually fixed by the Director.

Counsel for the plaintiff submitted that the figure $60,764 contained an element of compound interest. He went on to state that $1 million, if invested at compound interest, would accumulate to $45 million at the end of 74 years. I must confess I failed to understand what relevance this second statement had to the problem now before the court. The question is not whether Government could take the

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purchase price payable at the commencement of the term, put it in a Bank, and allow it to accumulate to $45 million in 74 years. The question is: Is $60,764 a fair and reasonable annual rent of the ground assuming that the capital value of $1,234,875 would be due and payable at the commencement of the term? Of course, the whole of Mr. Lyons' calculations depend on whether one views the $1,234,875 as being the 'price' which would be due and payable at the commencement of the term if a lease of 75 years had been auctioned, or whether one regards the $1,234,875 as being largely an advance of rent. If one takes the latter view, Government should logically pay the lessee interest on the rent so advanced by him. But, having regard to the history of the leasehold system as it has developed in Hongkong and in particular to the fact that for over a hundred years leases of land have been "sold" in exactly the same way as a grant in perpetuity, it seems to me that one must consider the 'price' or 'premium' as something due and payable by the lessee the moment the hammer fall, at the auction.

On the assumption that that is the correct view, I do not see how Mr. Lyons' figures can be challenged. Parry's valuation tables, which are constantly used by valuation experts, are apparently designed to provide an annual sum which is made up of two elements :-

(a) a figure of 5% simple interest on the capital sum; and

(b) a figure which will yield the capital sum over 75 years at compound interest, this figure being known as the sinking fund.

Therefore the multiplier provided by Parry's tables is made up of :-

(a) 5% interest i.e. 0.05; and

(b) the appropriate "sinking fund" figure, viz. .0013216.

This latter figure is apparently obtained by use of the formula $\frac{(0.05)}{(1.05)}$ 74 ; that is to say $\frac{(0.05)}{(1.05)}$ to the power of 74. If 0.05 and .0013216 are added together, the resultant figure is 0.051322. If $1,234,875 is multiplied by 0.051322, the annual figure of $63,376 is obtained. One year's simple interest on $1,234,875 is $61,744; and if this latter figure is subtracted from $63,376, the "sinking fund" annual figure of $1,632 is obtained.

These figures can be checked in this way. The reciprocal of 0.0013216 is obtained by dividing it into 1; and this produces 756.654. Using this reciprocal as a multiplier on the annual "sinking fund" figure of $1,632, produces the original capital sum of $1,234,859.

From these figures, it seems that by far the greater proportion of interest earned is simple interest i.e. always assuming that the $1,234,859, being the capital value in 1963 of a 75 year lease of K.I.L. 3793 is regarded as being due and payable at the commencement of the term.

In regard to Mr. Lyons' estimate of the net rental value of the building which could be erected on the land counsel for the plaintiff submitted that $36,000 per month was too high a figure. Apart from the letter of 18th November, 1964 from the Commissioner of Rating and Valuation, the only evidence on this aspect was given by the plaintiff himself in regard to his lettings over a short period. It is not clear whether the learned judge even accepted this evidence; but, in my view, it is immaterial to this case whether he did so or not. It seems to me that potential earnings from land cannot depend upon the

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oral evidence of individual lessees in regard to their alleged actual earnings. If the plaintiff had chosen not to develop the land at all, that is his privilege. The Director was concerned with the potential value of the land, not the actual earnings as alleged by the plaintiff. In any event, it does not appear that the two experts called by the plaintiff considered that $36,000 was an unreasonable figure; and if anything may be deduced from the letter of 18th November, 1964 from the Commissioner of Rating and Valuation, Mr. Lyons' estimate of $36,000 appears to be on the conservative side.

One point in Mr. Lyons' calculations seems to call for scrutiny. He says:-

> "... ... the lessee must provide for an annual sinking fund on the capital he has invested in the land and this sinking fund taken at 5% compound interest amounts to $1,732 per annum, which deducted from the actual income quoted leaves the lessee $317,505. Thus on an investment of $1,310,000 the lessee can expect a return of $317,500 per annum after allowing for a sinking fund to recoup his capital at the end of the term, and for payment of the proposed rent. This is a return of 24.2% which cannot be considered unreasonable by any means."

A return of 24.2% on an investment is a handsome return. On the other hand, if the words ". .. .. a sinking fund to recoup his capital at the end of the term" mean that the sinking fund is worked out on the basis that the plaintiff will get the capital invested by him back in 75 years, I do not think that this would appeal to any developer in Hong Kong today. It was put to Mr. Lyons that land developers expected to get their capital back in 5 years; and

his answer was: "My own figure is 10 - 12 years". It would appear therefore that his calculations were actually made on that basis, although in calculating his estimated gross capital value, he used a figure of 9 years purchase.

Even so, when I think of all the cases which have come before me over the last 22 years in Hong Kong, I would, myself, have put the figure much lower than 10 - 12 years. In 1950 I remember presiding over certain exemption applications in the Tenancy Tribunal in which the applicants, in describing how they proposed to redevelop the land, informed the Tribunal that they expected to get their capital back in 2½ to 3 years. One developer, as I recall, told me that he expected to get back half his capital outlay in the form of "Key money" from the first set of tenants. I apprehend that "key money" is not something which is reported to the Commissioner of Rating and Valuation.

It depends, of course, how one interprets the expression "getting one's capital back". Not only does Mr. Lyons estimate that the plaintiff's annual profit on his investment will be 24.2%, but in arriving at the figure of $1,259,000 as the net value of the land, Mr. Lyons said that he had deducted $375,000 in respect of what he called "developers' risk and profit". Therefore, looking at Mr. Lyons' evidence as a whole, it would appear that the plaintiff will "get back his capital" in less than four years.

The plaintiff's next submission was this" that in fixing the rental value of the land, the Director failed to take into account that the building covenant in the 1936 lease required the lessees to maintain on the land a building of the value of $7,000 only; that in fixing the Crown Rent at $60,764 per annum, the Director was, in

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effect, forcing the plaintiff to erect a multistorey building; and that it was wrong that, upon his opting for a renewal of the lease, the plaintiff should be forced to develop his land to the maximum.

I do not agree with this submission. The Director's duty was to fix the rental value of the land at the date of the renewal of the lease. The rental value of the land must be based on the profits which may be made out of the land; and in 1963, and indeed today, the profits which may be made out of land in the Tsim Sha Tsui district of Kowloon were, and are, very great. The covenant in the plaintiff's lease was not a factor to be considered in ascertaining such rental value; and furthermore the extent to which the plaintiff chooses to develop the land is entirely a matter for him.

Although the plaintiff did not dispute that the capital value of a 75-year lease of KIL 3793 in 1963 was $375 per square foot, he argued that the Director was precluded from valuing the land on this basis in April 1963 because in February 1963 the plaintiff had exercised his option and therefore he was in as good a position as if he had been given a lease for 75 years; that the land was therefore "encumbered"; that all that the Crown had to sell was the reversion; and that, in the circumstances, all the Crown was entitled to was the zone Crown rent plus a few hundred dollars for the reversion.

I do not think there is any substance in this argument. Undoubtedly the Crown would, at the end of the 75-year term, be entitled to the reversion; but they are entitled to the rental value of the land in the meantime; and , as I have already said, I think the Crown are correct in their submission that the proper way to look at the matter is to ask oneself what a willing purchaser would have been prepared to pay

For an assignment of the lease in 1963. That establishes the value of the 75-year term. One should then ask oneself what a willing lessee would offer as rent in order to compete with a willing purchaser who has offered $1,234.875. In arguing thus, the Crown do not suggest that in April 1963 they were in a position to sell the lease to someone other than the plaintiff But nevertheless in 1963 the Director's duty was to determine "the rental value of the ground," not the value of the reversion. The Crown had, during the term of the lease, the right to receive the rental value of the ground; and the rental value of the ground is based on the profits which can be made out of the ground. The learned judge deals with that argument in this way :-

> "If one uses the value of land as a basis for fixing rent for a term of 75 years, the lease being from A to B it seems to me to be incorrect to say that the land has no value, except for its reversion, on account of it being encumbered for 75 years, and it is similar to saying that when A sells an apple to B, the price of the apple having to be fixed according to its value, that the apple has no value to A or anyone else because it has been sold to B, and that therefore A should get no price for the apple. On the other hand, if one says that the only value of the land (apart from its remote reversion) is the rent reserved under the lease, that is the very thing that one is trying to assess from the value of the land, and of it is said that the land (except for the remote reversion) has no value apart from the rent, the land being encumbered, no logical progress is made. If A leases land to B, and the rent is to be assessed based on the value of the land system, (sic) in

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my opinion one has to take the value of the land as though it were not encumbered by the lease to B in order to work out the rent under the lease."

I agree.

As previously stated, the 105,618 square feet originally leased to John D. Humphreys in 1888 became split up into a number of sections; and in 1936 the lessees of those sections were each given a new lease. Some of the leases were "non-renewable"; and some were "renewable". The plaintiff and defendant each submitted a schedule giving details of a number of regrants and renewals in respect of properties in the Granville Road/Carnarvon Road area, some of which formed part of the 1888 lease in favour of John D. Humphreys. The following is based on information contained in the plaintiff's schedule. The leases in question were all "non-renewable" :-

Premises	Area in sq.ft.	Orig. Crown Rent	Present Zone Crown Rent at the rate of $5,000 per acre		Premium	Date of new Agreement
			Total	Cents per sq.ft.		
41/43 Carnarvon Road (KIL6394)	2130	$12	$244.	$0.1145	$42,430 by 10 years of $5,232. per year.	9.10.53

Premises	Area in sq. ft.	Orig. Crown Rent	Present Zone Crown Rent at the rate of $5,000 per acre		Premium	Date of new Agreement
			Total	Cents per sq.ft.		
20B Carnarvon Road (KIL6709)	1468	$6.	$168.	$0.1144	$49,545 by 75 years of $2,422. per year	3.5.56
33 Carnarvon Road (KIL7297)	3874	$18.	$444.	$0.1146	$170,844 by 20 years of $13,052. per year	19.9.57
35 Carnarvon Road (KIL7286)	3489	$16.	$400	$0.1146	$150,724 by 20 years of $11,516 per year	19.9.57
39 Carnarvon Road (KIL7325)	1435	$6.	$164.	$0.1142	$75,338 by 74 years of $3,684. per year	4.10.57
18/18A Carnarvon Road (KIL7290)	3380	$16.	$388.	$0.1147	$168,290 by 75 years of $8,230. per year	11.10.57
51 Carnarvon Road (KIL7709)	987.	$6.	$114.	$0.1155	$68,955 by 80 years of $3,351 per year	2.10.58
16 Carnarvon Road (KIL7990)	1370	$6.	$158.	$0.1153	$128,819 by 75 years of $6,299. per year	15.11.60

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Premises	Area in sq. ft.	Orig. Crown Rent	Present Zone Crown Rent at the rate of $5,000 per acre		Premium	Date of New Agreement
			Total	Cents per sq.ft.		
53 Carnarvon Road (KIL8261)	1060	$6.	$122.	$0.1150	$196,006 paid on 24.8.62	30.5.62
56/61 Carnarvon Road (KIL8645)	2426	$14.	$278.	$0.1145	$389,204 by 21 years of $40,804. per year	12.1.63
55 Carnarvon Road (KIL8826)	820	$7.	$94.	$0.1146	$154,462 paid on 26.11.63	11.7.63
57 Carnarvon Road (KIL9046)	830	$27.35	$96.	$0.1156	$171,200 by 21 years of $17,890 per year (Interest @ 10%)	11.7.63
7B & 7C Salisbury Avenue (KIL9201)	3730	$18.05	$428	$0.1147	$505,000 by 21 years of $52,975. per year	20.4.64

The following are details extracted from the defendant's schedule. The leases of the properties included in this schedule all expired on 23rd June, 1963 and they were "renewable"; two of the lessees accepted the so-called "option (a)" contained in the memorandum of 10th August, 1964, that is to say they accepted the reassessed annual rent which had been calculated on the basis

of full market value decapitalised over the whole renewal period of 75 years at 5% per annum. The remainder negotiated with Government, and they were given renewed terms based on the so-called "option (b)" in the memorandum, that is to say their rent was calculated on the understanding that development would be restricted to some agreed level short of full development. The defendant's schedule gives the following details :-

Address	Area in sq. ft.	Capital Value per sq. ft.	Ground Rent			
			option (a) legal option including Zone Crown Rent		option (b) Restricted to existing development	
			Rent	Rent per sq. foot	Rent	Rent per sq. foot
49 Carnarvon Road	3239	$375	$59,767	$18.50	-	-
2 Salisbury Ave.	1141	-	-	-	$10,588	$9.27
3 Salisbury Ave.	2217	$200	$21,936	$9.80	-	-
6 Salisbury Ave.	1092	-	-	-	$8,912	$8.16
7 Salisbury Ave.	1069	-	-	-	$9,500	$8.90
7A Salisbury Ave.	1060	-	-	-	$6,426	$6.06
12/12A Salisbury Ave.	1480	-	-	-	$12,922	$8.74
34 Granville Rd.	2672	-	-	-	$11,590	$4.33
36 Granville Rd.	2507	-	-	-	$11,590	$4.61
38 Granville Rd.	2494	-	-	-	$11,590	$4.63

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Address	Area in sq. ft.	Capital Value per sq. foot	Ground Rent			
			option (a) legal option including Zone Crown Rent		option (b) Restricted to existing development	
			Rent	Rent per sq. foot	Rent	Rent per sq. foot
40 Granville Rd.	2480	-	-	-	$11,590	$4.67
42 Granville Rd.	2464	-	-	-	$11,590	$4.59
44 Granville Rd.	2451	-	-	-	$11,590	$4.73
46 Granville Rd.	2435	-	-	-	$ 9,094	$3.74

Some of the figures in the plaintiff's schedule are no indication of present-day land values in Tsimshatsui because the regrants were made over 10 years ago. Nevertheless, they do show how land values have increased in recent years:-

41/43 Carnarvon Road (K.I.L. 6394)

In this case the premium payable in 1953 works out at only $20 per square foot.

20B Carnarvon Road (K.I.L. 6709)

In this case the premium payable in 1956 works out at $34 per square foot; and payment of the $49,545 was spread over the whole period of the renewed lease; that is to say at the end of the term (viz. in the year 2031) the lessee shall have paid by way of premium $181,650.

39 Carnarvon Road (K.I.L. 7325)

In this case the $75,338 premium payable in 1957 works out at $52 per square

foot. It is payable by 74 instalments of $3,684 per year. Therefore, by the year 2031 the lessee shall have paid by way of premium (and interest thereon) $272,616.

18/18A Carnarvon Road (K.I.L. 7290)

In this case the $168,290 premium payable in 1957 works out at approximately $50 per square foot. It is payable by 75 instalments of $8,230 per annum. Therefore by the year 2032, the lessee shall have paid by way of premium (and interest thereon) $617,150.

51 Carnarvon Road (K.I.L. 7909)

In this case the $66,955 premium payable in 1958 works out at approximately $70 per square foot. It is payable by 80 instalments of $3,351 per year. Therefore by the year 2038, the lessee shall have paid $268,080 by way of premium and interest thereon.

16 Carnarvon Road (K.I.L. 7990)

In this case the $128,819 premium payable in 1960 works out at $94 per square foot. It is payable by 75 instalments of $6,299. Therefore, by the year 2035, the lessee shall have paid $472,425 by way of premium and interest thereon.

53 Carnarvon Road (K.I.L. 8261)

In this case the $196,006 premium paid in 1962 works out at $185 per square foot.

59/61 Carnarvon Road (K.I.L. 8645)

In this case the $389,204 premium payable in January 1963 works out at $165 per square foot. It is payable by 21 instalments of $40,804. Therefore by the year 1983 the lessee shall have paid $856,884, or

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approximately $350 per square foot.

55 Carnarvon Road (K.I.L. 8826)

In this case the $154,462 premium paid in 1963 works out at $188 per square foot.

57 Carnarvon Road (K.I.L. 9046)

In this case the $171,200 premium payable in 1963 works out at $206 per square foot. It is payable by 21 instalments of $17,890 per year. Therefore by the year 1983, the lessee shall have paid $375,690, or $450 per square foot.

7B and 7C Salisbury Avenue

In this case the $505,000 payable in 1964 works out at $136 per square foot. It is payable by 21 instalments of $52,975 per year. Therefore by 1985 the lessee shall have paid $1,112,475, or approximately $300 per square foot.

The reassessed annual rental value of the plaintiff's land, viz. $60,764 per annum, works out at $18.50 per square foot per annum. It would appear that there are only two properties in the defendant's schedule which are of any use for purposes of comparison, viz. 49 Carnarvon Road and 3 Salisbury Avenue. In each of these two cases, the lessee agreed to pay a reassessed monthly rental calculated from the full market value of the land. The remaining figures would appear to be useless for purposes of comparison with the rent fixed for the plaintiff's property. None of the lessees gave evidence; but it seems to be common ground that they agreed to restrict development in some way in accordance with the "option (b)" contained in the memorandum of 10th August 1964, and that each case was dealt with on its own merits. In those cases there was no question of fixing a full

capital value of the land and then decapitalising in order to fix the annual rental.

As regards 3 Salisbury Avenue, the learned judge has found that this is a less valuable site. From the map, it appears to be situated in a side lane at the end of Salisbury Avenue. The evidence appears to support the view that, having regard to its location, $200 per square foot capital value (or $9.80 per square foot per annum decapitalised rental value) was fair and reasonable in the circumstances.

However, 49 Carnarvon Road may undoubtedly be used for purposes of comparison. This property is a corner property situated at the junction of Salisbury Avenue and Carnarvon Road on the North side of Salisbury Avenue. The plaintiff's property is directly opposite 49 Carnarvon Road on the south side of Salisbury Avenue; and it is also a corner property. Clearly, both properties are valuable. The capital value of a 75-year lease of 49 Carnarvon Road was also fixed at $375 per square foot; and the rental value of the ground was calculated by the same method as was adopted in the case of the plaintiff's property.

There was evidence that the developer who had built the multistorey block on No.49 Carnarvon Road had "sold" many of the flats before the building was completed; and it was submitted by Counsel for the plaintiff that he must have been under a certain amount of pressure to agree what he considered to be a very high rental value of the ground viz. $59,767. However, the question is whether the rental value of the ground is fair and reasonable - not whether the lessee disliked paying so much. It is not surprising that lessees who, for many years, had been paying a few dollars per month for valuable property would object to any attempt to bring the rental value of the ground up to some figure based on the full market value.

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The original rents of the properties shown in the plaintiff's schedule appear to be ridiculously low by modern standards. It seems incredible today that for years and years the rent of each of these valuable properties was only a few dollars per month. But what is also very obvious from the plaintiff's schedule is that during the last 10 years lessees have been getting most favourable terms on certain regrants. Take 18/18A Carnarvon Road (KIL 7290) - an area of 3380 square feet at the junction of Cameron Road and Carnarvon Road. Upon the regrant of this property in October 1957, the premium worked out at $50 per square foot. If the plaintiff's property was worth $375 per square foot in 1963, it is difficult to see how 18/18A Carnarvon Road could possibly be worth less. 41/43 Carnarvon Road (KIL 6394) is a much smaller plot of land and its redevelopment potential is less. But it is also situated on the corner of Carnarvon Road and Cameron Road, opposite 18/18A Carnarvon Road. The premium payable in 1953 was only $20 per square foot. On the other hand, in the case of 53 Carnarvon Road, which is situated at the corner of Carnarvon Road and Granville Road at the north-west corner of the block bounded by Granville Road/Carnarvon Road/Cameron Road, although it is much smaller than KIL 6394, the premium on the 1962 regrant worked out at $185 per square foot. It is only if one adds up what the lessee shall have paid in 21 years time that the total figure works out at $350 per square foot.

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But even in 1963 lessees appear to have been getting bargains. 59/61 Carnarvon Road (KIL 8645) is situated on the corner of Carnarvon Road and Kimberley Road. The premium on the regrant in January 1963 worked out at $165 per square foot.

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What appears to emerge from the whole of the evidence is that about the beginning of 1963, the Hong Kong Government

realised that the public (as represented by Government) was not getting its fair share of rising property values; that the land valuation experts in the Crown Lands & Surveys Office were asked to advise; that a "regrant conference" was held; that the whole question of land values was thoroughly discussed; and that it was decided, (probably for the first time in the history of Hong Kong) that in future land values would be worked out strictly in accordance with generally accepted land valuation principles. Naturally, Crown lessees, who had been making fortunes out of land for years, did not like it; and to make matters worse for them, there was the temporary fall in land values in 1965.

But can it be said that, having regard to all the circumstances, (including the probable depreciation in the value of money over the next 75 years) $60,764 is not a fair and reasonable figure?

What the plaintiff and his successors shall have paid at the end of 75 years may be easily calculated by multiplying $60,764 by 75 which gives a total of $4,557,300. If the land had been auctioned to some other person, the premium payable would have been $1,234,859 and the lessee and his successors would then have paid Zone Crown Rent of $378 per year for 75 years, making a total consideration of $1,234,859 plus $28,450 i.e. $1,263,309.

During the hearing of the appeal, counsel for the plaintiff complained that his client had not been given the opportunity of paying the $1,234,859 being the premium for a lease for 75 years calculated on the basis of $375 per square foot. The answer to that would appear to be that from the beginning the plaintiff has maintained that he is entitled to a renewed lease of the land for 75 years in consideration of the annual zone Crown rent applicable viz. $378

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per year. He has never offered to pay $1,234,859 as the capitalised value of the 75-year lease. But, if he ever did offer to do so, the Crown could hardly refuse his offer.

Another submission made by counsel for the plaintiff was that the Director failed to take account of the fact that the lease of the whole of New Kowloon and the New Territories ends in 1997, and that this would materially affect the position of lessees in the remainder of the Colony. I do not think that the Director erred in apparently failing to take account of this. No one can possibly say today what the position of New Kowloon and the New Territories will be in 29 years from now.

The last group of submissions made on behalf of the plaintiff may be summarized thus: that in carrying out his duties under the proviso the Director was in the position of an arbitrator or quasi arbitrator; that he did not give the plaintiff an opportunity of being heard before the rent was fixed; and that consequently the Director's decision is a nullity; alternatively that if the Director was not an arbitrator, he must be regarded as a valuer because there is no intermediate position he could have held; but that he was not in fact an expert valuer; and therefore he should not have undertaken the job of valuation; that having undertaken the job he wrongly overruled the opinion of his experts and fixed the capital value of the land at a higher figure than Mr. Lyons and Mr. Hughes had originally suggested that it should be fixed; that he allowed himself to be improperly influenced by Government policy as appears from the various minutes before the court; and finally that his valuation is so excessively high any way that he must have acted on some wrong principle and that this court should accordingly set

it aside.

I found it rather difficult to follow the logic of the argument that if the Director was not an arbitrator he must be regarded as a valuer but that he was not a valuer because he said he was not an expert in valuation but that nevertheless he was wrong in overruling his experts and ought to have been an expert himself etc. As the Solicitor-General said, the parties to this contract were at liberty to appoint anyone they liked to fix the reassessed rental value of the land; and if they had chosen someone who had no knowledge of land valuation his valuation could not have been impeached on the ground that he was not an expert in land valuation. On the other hand it is equally difficult to see how a person ignorant of the principles of land valuation could be criticised for taking advice from experts before reaching an honest conclusion.

Be that as it may, Mr. Wright was by no means without professional qualifications. He told the court that in addition to being an associate of the Royal Institute of British Architects, he was a Fellow of the Royal Institution of Chartered Surveyors. Mr. Lyons who is Senior Estate Surveyor in the Crown Lands & Surveys Office said that he was a Bachelor of Science in Estate Management (London), a Fellow of the Royal Institution of Chartered Surveyors, a Fellow of the Chartered Surveyors & Estate Agents' Institute, and a Fellow of the Institute of Arbitrators. It is not known what are the professional qualifications of the other officers employed in the Crown Lands & Surveys Office who dealt with KIL 3793 and whose advice was available to Mr. Wright.

Mr. Wright did not profess to be an expert valuer; but it is quite obvious from his qualifications and from the fact

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that he has been head of the Public Works Department for a number of years, that he knows a great deal about land values in Hongkong; and clearly in the Crown Lands & Surveys Office he had available to him the advice of a number of highly qualified surveyors. This sub-department has been concerned with the valuation and alienation of Crown land for over 100 years.

In support of his contention that the Director was either an arbitrator or quasi-arbitrator, counsel for the plaintiff relied upon the decision of the Court of Appeal in Chambers v. Goldthorpe(1). The question in that case was whether an architect employed for reward by a building owner to ascertain the amount due to the contractor and to certify the same under the contract, occupied the position of an arbitrator and therefore not liable to an action by the building owner for negligence in the exercise of those functions. At p.638 Collins C.J. said:-

> "What then, is the position of an architect who, under a contract such as that here in question, has to give a certificate, which is to be find and binding, not only on his employer, but also on the other party to this contract? Can he address himself to his duty in the matter of giving that certificate free from any obligation towards that other party, or is he placed in a position in which it is his duty to exercise his judgment impartially as between the parties to the contract? It appears to me that he is placed in the last-mentioned position. That being so, the case seems to come exactly within the law as laid down in Stevenson v. Watson(2)..... Lord Coleridge C.J ..... laid down the law as being that,

(1) (1901) 1 K.B.624 (2) 4 C.P.D. 148.

> when a matter is left by two parties to the judgment of a third, who is to determine their rights, and the task of so doing is not a mere matter of arithmetic but involves skill and knowledge, he is in the position of a quasi arbitrator, and no action will lie against him ...."

An arbitration is defined in Halsbury's Laws of England (3rd Ed.) Vol.2, p.2, as follows :-

> "An arbitration is a reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction."

Cases which have come before the courts have frequently involved architects and engineers engaged by building owners under a building contract. The law is stated in Halsbury (3rd Ed.) Vol.39, p.521, thus :-

> " ..... when architects and engineers have to decide matters by the exercise of their skill and knowledge of the particular subject on which they have to give a decision, or when their certificate or determination (not award) is made a condition precedent to the contractors' right to payment, they are not arbitrators. When architects or engineers have to decide the value of works done by the contractor, they are prima facie valuers and not arbitrators. ..... The important question is the intention of the parties. If they intend to have a valuation, and not a judicial enquiry, the fact of the person hearing evidence will not

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overrule their intention, and his determination is a valuation, and not an award, And it does not matter whether the architect is called an arbitrator if the intention of the parties was that he should act as a valuer or certifier.

Whether the clause referring matters arising under the contract to the architect is intended to provide for a judicial enquiry or not, the tendency is to treat the matter as an arbitration agreement, even in cases where the subject matter of the architect's determination may not require a judicial enquiry. But when the architect has given his decision as a certifier without the contractor having previously claimed to be heard by him, or to be allowed to adduce evidence, the tendency is to treat the intention of the parties as being that he should determine by the exercise of his skill and judgment, and not judicially."

A valuer is defined in Halsbury (3rd Ed.) Vol.39, p.1, as :-

> "..... a person who sets a price upon or who estimates the worth or the value of property."

At page 4, the learned editors say :-

> "The distinction between valuation and arbitration is usually expressed by saying that an arbitrator is appointed to determine a certain matter, such as the price of goods, for the purpose of settling a dispute which has arisen between the parties, but that a valuer is appointed to determine such a matter before any dispute has arisen with the object of preventing any

dispute. There is much authority in support of that view, but it may be doubted whether it can be accepted as an absolute test. It is necessary to consider what task the person appointed undertakes to perform, the nature of the matters submitted to him, and whether the parties agree to be bound by his decision. If he is appointed to value the property using only his eyes, his knowledge and his skill, he is a valuer or in certain circumstances, a quasi-arbitrator; if on the other hand he is appointed to hear the parties and any evidence they may call and then determine the matter, he is acting judicially and is an arbitrator. When the parties appoint a person to determine the value of anything according to his own experience, knowledge and skill, and agree to abide by his decision that person is a quasi-arbitrator."

In In re Carus-Wilson v. Greene(3) on a sale of land it was provided that the purchaser should pay for the timber on the land; that each party should appoint a valuer; that the valuers, before they proceeded to act, should appoint an umpire; and that if the valuers disagreed the umpire should value the timber. Lord Esher said (p.9):-

"The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence

(3) (1886) 18 QBD p.7.

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laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and when the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, when, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence and argument. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to the particular circumstances. I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute."

It was the Public Works Department of the Hong Kong Government which conducted the negotiations with Madam Chu de Yau in 1936; and she apparently agreed that in the event of her , or her successors-in-title, opting for a further term, the head of that Department, a servant of the lessor, should fix the rental value of the ground to be leased.

There is nothing in the proviso about holding an inquiry or hearing evidence and arguments; and in opting for a further term, the plaintiff gave the Director no

indication that he wished to be heard. Counsel for the plaintiff submitted that the necessity to hear evidence and arguments from both sides is implicit because the proviso enjoins the Director to perform his duties "impartially". I do not think that the phraseology used in the proviso supports the plaintiff's contention. The Director's function was clearly to fix, i.e. to value, the rental value of the ground using all the skill and knowledge which was available to him in his department; and even if one regards him as a quasi-arbitrator, I do not think that the parties envisaged that he should fix the rent only after hearing evidence or arguments from the lessee. As Goddard L.J. said in Finnegan v. Allen(4):-

> "It is frequently found in commercial contracts that a question of quality is to be submitted to Mr. A.B. .... People do not as a rule mean by that that the person to whom the matter is submitted is to sit as an arbitrator, to hear parties and to hear witnesses as an arbitrator, if he is a true arbitrator, must do. If it is intended that he, being an expert in the trade, should look at a sample on which the goods were sold and look at a sample of the goods delivered and say that there is to be an allowance of so much per lb. or so much per ton ..... that person is perhaps a quasi-arbitrator or you might say that he is an arbitrator; but he is an arbitrator of a particular sort and it is not intended that there should be the same judicial proceeding on his part as there would be in the case of an arbitrator appointed under a formal submission, where the parties clearly intended that he is to hear witnesses, hear arguments and so forth."

(4) (1943) 1 A.E.R. 493 at 500.

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When put in that way it matters little whether one describes the Director as a valuer or as a quasi-arbitrator. He was not, in my view, under any obligation to hear evidence or arguments before fixing the rental value of the ground. One does not have to act judicially in order to act impartially. On the Executive side of Government, departments take hundreds of decisions every day on matters which involve a conflict of interest as between two members of the public or as between a member of the public and the public as a whole as represented by Government. I do not agree that the word "impartial" in the proviso implies that the Director had to act judicially.

In Dean v. Prince & Others (5) the circumstances in which a court may interfere with the decision of a valuer were summarised by Denning L.J. in these words:-

> "It can be impeached not only for fraud, but also for miscarriage. That was made clear by Sir John Romilly M.R. in Collier v. Mason. For instance if the expert added up his figures wrongly, or took something into account which he ought not to have taken into account, or conversely, or interpreted the agreement wrongly, or proceeded on some erroneous principle - in all these cases, the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate. These cases about valuers bear some

(5) (1954) 1 AER 749 at 758-9.

analogy with the cases on domestic tribunals, except, of course, that there need not be a hearing. On matters of opinion, the courts will not interfere , but for mistake of jurisdiction or of principle, and, for mistake of law, including interpretation of documents, and for miscarriage of justice, the courts will interfere."

It is common knowledge that the Director is, by virtue of his office, an official member of the Executive Council. The function of that Council is to advise the Governor on matters of policy. In matters within the sphere of the Public Works Department (which includes land valuation and land alienation) it is the Director to whom the Governor would look particularly for advice on such matters. Obviously, the Director is familiar with all aspects of policy in relation to land valuation and land alienation; and to suggest that in carrying out his duties under the proviso he ought to have banished from his mind all knowledge of Government policy and to have made some sort of declaration to this effect on the files after the fashion of a judge who states in his judgment that he has disregarded certain evidence which he has ruled to be inadmissible, seems to me to be adopting an approach far removed from what the parties had in contemplation when they signed this contract in 1936.

On the other hand, I can find nothing in the evidence to support the view that he allowed his knowledge of Government policy to overawe him and influence him to such an extent that he failed to fix the rental value of the ground fairly and reasonably. It appears from the memorandum sent to the plaintiff on 10th August, 1964 that in the case of "renewable" lease, a general decision had been taken to relate the reassessed rent to the full market value

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of the land and to calculate it on the basis of such full market value decapitalised over the whole renewed period of 75 years with interest at 5% per annum. It is not known whether he took that general decision alone and then reported to Government what he had done or whether there was a "regrant conference" at which a number of Government departments (including perhaps the Colonial Secretariat) were represented. But whether one regards this decision as having been made as a result of Government policy or not, it was a decision which affected, and will affect, equally all holders of "renewable" leases. It was a decision which was based on sound advice from expert valuers of land in the Crown Lands and Surveys Office; and I can see nothing unfair in the fact that the Director either made this general decision himself or concurred in the making of it after discussing it with the representatives of other departments.

The variable is the figure to be fixed in each case in respect of the capital value of the land: It may well be that it is a matter of general policy that the Director shall, in all cases, fix the capital value at such a figure as experience has shown the willing purchaser at an auction would offer. But it cannot be said that there is anything inherently unfair in this. On the contrary, it seems to me to be eminently fair that the capital value should be fixed at such a figure as, experience has shown, a willing purchaser would pay for the land if it were offered for sale at a public auction. The price then is controlled by the market i.e. by the public, It is not fixed in accordance with the caprice of some individual; and in this case it is significant that the plaintiff does not challenge the fairness of the figure $375 per square foot.

As regards the interest figure of 5%, if one assumes that the "price" or

"premium" in respect of a sale of a 75-year lease is something due and payable at the commencement of the lease, 5% interest on any deferred payments of that premium is a very low rate of interest for Hong Kong. The normal rate of interest awarded by the courts is 8%; and it is probably common knowledge that in Hong Kong during the last 15 years or so, a very common rate of interest on money lent on a first mortgage of land has been 1.2% per month, or 14% per annum.

The crux of the learned judge's decision is contained in two passages in his judgment. In the first passage he says :-

> "It is to be noted that the proviso does not state that the full market rental value is to be fixed, which could easily have been stated if that were the intention, but the rent is restricted to being a fair and reasonable rental, and it thus seems to me that the Director is thereby restricted from fixing the best rent which the defendant could obtain in the open market, that is the full market rental value and is restricted to fixing a fair and reasonable rent. In contrast, the proviso in the lease which immediately precedes the relevant proviso, and which deals with resumption and payment of compensation, states:-
>
> > 'Provided also ..... that His said Majesty shall have full power to resume ..... a full and fair compensation for the said land and the buildings thereon being paid to the said lessee at a valuation to be fairly and impartially made .. ..'

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> It is to be noted that it does not state that 'fair and reasonable' compensation is to be paid, but that 'full and fair' compensation is to be paid."

The learned judge appears to have found support for his view in the decision of the Court of Appeal in John Kay Ltd. v. Kay and Another(6) because he concludes this part of his judgment with these words:-

> "..... I think that, in all the circumstances, as was thought in Kay's (6) case, a reasonable rent would be some rent below the open market rent."

In Kay's (6) case, the Court of Appeal was concerned with the Leasehold Property (Temporary Provisions) Act, 1951, the long title of which reads:-

> "An Act to make temporary provision for the protection of occupiers of residential property against the coming to an end of long leases, and for the renewal of tenancies of shops; and for purposes connected with the matters aforesaid."

S.12(1) reads:-

> "12(1) .... the court may, if in all the circumstances of the case it appears reasonable so to do, order that there shall be granted to the tenant a tenancy for such period, at such rent and on such terms and conditions as the court in all the circumstances thinks reasonable ....."

At p.816, the Master of the Rolls said :-

> "The landlords here could obtain in respect of 15 St. Stephens

(6) (1952) 1A.E.R. 813.

Street a tenant willing to pay for a term of twenty-one years a rent of £750 and a premium of £1,500, and that might be said, at any rate with some show of justice, to be the present market value of the premises. The phrase 'economic rent' has been used during the argument, but I prefer to avoid it since the phrase has, in some contexts and to economists, as I believe, a particular and technical significance. The market value of certain premises is one thing, and, as I read this Act, it seems to me that the reasonable rent may be something different. The reasonable rent seems to be a rent arrived at by applying the subjective test of what the judge thinks is right and fair, as distinct, for example, from the objective test of what the evidence shows is the market value."

At p.821 Jenkins L.J. said :-

"It is manifest that the object of this enactment was to protect sitting tenants, as they are called, at the end of their leases from being faced with the choice between the disturbance caused by removing their business to some other premises, if they could find any, and being compelled to pay an inflated rent for their existing premises. That clearly was the state of affairs which the Legislature set out to deal with, and, in my view,

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to meet that state of affairs it was necessary that the court should be given the greatest latitude in determining what would be a reasonable rent. If the only power the court had was to ascertain and fix the open market rent as the reasonable rent to be paid under a new tenancy, plainly this legislation, so far as it is concerned with shop tenants, would be in great measure defeated, because the whole difficulty which has to be met is that, in conditions of scarcity, the open market value may be forced up to a point which exceeds all reason, and it is essential, to make legislation of this kind effective, that the tribunal which is to fix the rent should be able to discount contemporary open market value to the extent necessary in its opinion to arrive at a fair result. The judge came to his conclusion on the principle, with which I entirely agree, that the court is not asked to ascertain the open market rent in the face of scarcity and inflation, but is required to form an opinion as to the reasonable rent, and, in my view, it would be wholly wrong for this court to disturb his decision."

It seems to me that if the Director's duty under the proviso was simply to form an honest opinion as to what was a fair and reasonable rent, in the absence of any suggestion of bad faith on his part, it is doubtful whether this court would have

jurisdiction to review his decision. However, this question did not really arise on the appeal which was argued on the basis that the correct approach was an objective one, the question being: did the Director fix what this court considers to be a fair and reasonable rental value of the ground.

In my view the position of a judge considering an application under s.12(1) of the Leasehold Property (Temporary Provisions) Act 1951, is very different from the position of the Director under the proviso in the plaintiff's lease. The whole object of the 1951 English Act was to fix rents payable by a certain class of tenants below what was regarded by the legislature as inflated rents by reason of scarcity. On the other hand, there appears to be nothing in the proviso to suggest that in 1936 the parties contemplated that Crown lessees should be protected against rising land values and exorbitant demands for rent on the part of the Crown. The cry in Hong Kong during the last twenty years has been that there should be more legislation to protect the tenants of those Crown lessees against, what the tenants say are, rapacious landlords taking full advantage of the rising property market. Unquestionably, there has been a tremendous increase in land values in the post-war years; and many landlords have made fortunes out of land. But, in my view, Kay's (6) case is 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 Director's duty was not to fix what he thought was "a fair rent"; his duty was to fix "a fair and reasonable rental value of the ground"; and why should that not be fixed on the basis of full market value? How can it be argued that in Hong Kong something fixed on the basis of the open market value is unfair or unreasonable? With respect to the learned trial

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judge the fact that the word "full" occurs in one proviso in the lease and not in another does not appear to me to be material.

The second passage from the judgment to which I would refer reads:-

> "..... it having been agreed that the lessee was to pay no fine or premium, it seems to me to be hardly fair (or for that matter reasonable) to so 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."

Although the learned judge found that the figure $60,764 fixed by the Director was rent and that it did not contain any element of what counsel for the plaintiff described as "hidden premium", nevertheless, it would appear from the above passage that the learned judge must have considered that the figure fixed by the Director did contain an element of "hidden premium". As this appears to have been his view, I would have thought that he would then have come to the conclusion that the rental value of the ground payable by the plaintiff should be the Zone Crown Rent only, as is claimed by the plaintiff. But, instead, he simply makes a declaration that the rent had not been fixed as required by the lease.

The proviso stipulates that the lessee "shall ..... be entitled to a renewed lease ..... for a further term of seventy-five years without payment of any fine or premium therefor and .... .at such rent as shall be fairly and impartially fixed by (the Director) as the fair and reasonable rental value of the ground at the date of such renewal". According to the plaintiff the fair and reasonable rental value of the ground (if fixed by the Director fairly and impartially) should be the nominal Zone

Crown rent of $378 (which works out at 11 cents per square foot) because, he says, in arriving at this fair and reasonable rental value the Director ought to have interpreted the words "without fine or premium" as implying that the plaintiff should be given credit for the very large sum which he would have had to pay as a premium if he had had to bid for it in 1963 at a public auction.

If the plaintiff's submission is correct, it is indeed surprising that the proviso does not simply say that the rent for the renewed lease would be the Zone Crown rent; and if the words "fair and reasonable rental value of the ground" are synonymous with "Zone Crown rent", why did the parties take the trouble to appoint the head of the Public Works Department to carry out a simple mathematical calculation which could be done by any clerk? What was the necessity for the words "fairly and impartially" in the proviso? There would then be no room for unfairness or partiality because everyone knows what is the Zone Crown rent per acre at any given time. Indeed the lessee could have worked it out himself.

In my view the words "without payment of any fine or premium" do not qualify the plain meaning of the words "rental value of the ground"; and I see nothing unfair or unreasonable in the fact that in 1963 the Director fixed the rental value of the plaintiff's ground on the basis of full market value decapitalised over the whole renewal period of 75 years at 5%.

What, then, is the meaning of the words "without fine or premium"?

The word "premium" has a variety of meanings, and it has been judicially noticed in a number of English cases. For example in King v. the Earl of Cadogan (7) Warrington L.J. said :-

(7) (1915) 3 K.B. 485 at 492.

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"Now the legislature in expressing its intention has chosen to use two words - 'rent' and 'premium' - both of which in connection with leases have perfectly well-known legal meanings. I need not say anything about the word 'rent', but 'premium' as I understand it used as it frequently is in legal documents, means a cash payment made to the lessor, and representing or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is a very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease."

In Hill v. Booth, (8) Scrutton L.J. said:-

"Ordinarily a premium is paid to obtain a lease ..... the premium is payable for the grant of the lease .... why the premium is described in the lease as 'reserved' I do not understand. It is not a reservation in any way. A reservation technically is the grant out of the subject matter conveyed of something not previously existing, as a rent or an easement. This in my view is not a grant out of the land and buildings; it is a separate personal covenant to pay the premium because the lease has been granted."

In the 26th Edition of Woodfall on Landlord & Tenant the following passage occurs at p.329 (para. 759) :-

"A fine or premium given by the lessee to the lessor at the time of taking or renewing a lease has been said to be in the nature of a fore-hand rent

(8) (1930) 1 K.B. 387.

and has to be considered as an improved rent. Its true nature is, however, that it is a sum paid for the granting of the lease, even though it may be made payable by instalments."

In Hong Kong the word "premium" occurs in s.11(1) of the Landlord & Tenant Ordinance. This section makes it an offence to :-

"....demand or receive any consideration ..... whether by way of rent, fine, premium or otherwise, for the grant ..... renewal ..... of any tenancy;"

that is to say any tennacy to which the Ordinance applies. And, as I have said, the price for which a lease of land is sold at a public auction is termed a premium.

In my view the words "without payment of any fine or premium therefor" in the proviso of this lease do not mean that in the event of the lessee opting for a new term he would be given full credit for the "price" or "premium" which a purchaser at an auction in 1963 might be expected to have to pay, so that the lessee's only obligation to his landlord during the next 75 years would be the payment of nominal Zone Crown rent annually. I do not think for a moment that this was what was in the contemplation of the parties. What the parties primarily had in mind in 1936 was the price of the option, and, in my view, the words "without payment of any fine or premium therefor" 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.

If, on the other hand, the word premium is to be taken as including also the "price" which is ordinarily paid for a lease at a public auction, then, in the

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context of the proviso looked at as a whole, it can only mean 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 lease at the commencement of the lease as in the case of a sale by public auction. This, too, could be a thing of considerable value to a lessee. If at the time of the renewal he happened to be spending large sums on redevelopment, he might find it impossible to raise sufficient funds to pay a sum equivalent to the premium which he would have had to pay if he had had to bid for the renewed term at a public auction. Be that as it may, I am satisfied that it was never the intention of the parties that the words "without payment of any fine or premium" should be interpreted in such a way as to result in the expression "rental value of the ground" being synonymous with "Zone Crown rent".

If this is the correct view, there is really no difference between the position of a holder of a non-renewable lease and the holder of a lease containing an option to renew except that in the case of the former the lessee pays the "price" of the lease at the commencement of the term and in the case of the latter the consideration is spread over the whole period of the term, the annual payments being calculated on the basis of the full market value decapitalised over the whole renewal period of 75 years.

There is one final question which has to be considered. By notice dated 30th January 1967, the plaintiff required the defendant to produce the Government file numbered L.S.O. 5296/53 which was referred to by the Superintendent Crown Lands & Surveys (Mr. Hughes) in his minute of 28th March 1963 addressed to the Director. The plaintiff's object, of course, was to

force the Crown to disclose decisions of the Executive Council and other highly confidential matters affecting land alienation and/or land valuation. On 1st July 1967 the Colonial Secretary signed a certificate in the following terms :-

"I refer to the Notice to Produce Documents at Trial dated 30th January 1967, requiring the defendant to produce, inter alia, at the hearing of the above action 'the whole file of L.S.O. 5296/53'.

I am of the opinion and hereby certify 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. The file contains Executive Council Minutes and policy decisions affecting land in the New Territories which, if they became known to the public, could fundamentally affect that policy.

I therefore direct that the defendant shall claim privilege in respect of the said file required to be produced and if required he shall produce this certificate as witness of my instructions and decision in this matter.

1st February 1967.
(sgd) M.D. Irving Gass.
Colonial Secretary"

On 2nd February 1967 the Colonial Secretary swore an affidavit as follows :-

"I refer to certificate under my hand dated 1st February 1967 relative to file No.L.S.O.5296/53.

I am myself of opinion that in view of the contents of the said

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file which include 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."

In regard to this claim of privilege, on 3rd February 1967 the trial judge ruled as follows :-

"In my opinion the objection has been taken by the appropriate person and in sufficient form and shows that the Colonial Secretary has personally considered the matter and reached the conclusion that the production of the file in question in open court will be against the public interest. I am, therefore, of the opinion on the authority of W.S. Edwards and K.M. Almo ((1957) Hong Kong Law Reports, 365) the rationes decidendi of which are binding on this court, that the objection is conclusive.

I may also add further that in my opinion it is clear from the certificate and the affidavit of the Colonial Secretary that the file contains papers which may be termed as the equivalent in Hong Kong to Cabinet papers in England, in each case the paper being those of the highest Government executive body, and that, in the circumstances, the file should not be produced.

For these reasons the objection is upheld."

Of course, the learned trial judge dealt with this question in accordance with the law as it stood prior to the decision of the House of Lords in Conway v. Rimmer (9); and the question which arose on the appeal

(9) (1968) 1 A.E.R. 874.

was whether we should now look at file L.S.O.5296/53 in order to decide whether the contents thereof should be disclosed.

There are a number of passages from the judgments in Conway v. Rimmer(9) which appear to be relevant on the question whether this Court should even look at that file. Turning first to the judgment of Lord Reid. At p.882, he said:-

> "A minister's certificate may be given on one or other of two grounds either because it would be against the public interest to disclose the contents of the particular document or documents in question or because the document belongs to a class of documents which ought to be withheld whether or not there is anything in the particular document in question disclosure of which would be against the public interest. It does not appear that any serious difficulties have arisen or are likely to arise with regard to the first class. However wide the power of the Court may be held to be cases would be rare in which it would be proper to question the view of the responsible Minister that it would be contrary to the public interest to make public the contents of a particular document."

Another passage from the judgment of Lord Reid (p.888) is as follows:-

> "..... there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest..... the most important reason is that such disclosure would

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create or fan ill-informed or captious public or political criticism. The business of Government is difficult enough as it is and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind and that must in my view also apply to all documents concerned with policy-making within departments including it may be minutes and the like by quite junior officials and correspondence with outside bodies."

At page 900 Lord Morris of Borth-y-Gest said :-

"The inherent power of the court must include a power to ask for a clarification or an amplification of an objection to production though the court will be careful not to impose a requirement which could only be met by divulging the very matters to which the objection related. The power of the court must also include the power to examine documents privately, a power, I think, which in practice should be sparingly exercised... .. .. "

At page 905/6, Lord Hodson said :-

".....documents exemplified by cabinet minutes are to be treated, I think, as cases to which Crown privilege can be properly applied as a class without the necessity of the documents being considered individually. The documents in this case, class documents though

they be, are in a different category, seeking protection not as state documents of political or strategic importance but as requiring protection on the ground that 'candour' must be ensured."

Lord Pearce, at p.907, said :-

"Although private inspection may not be desirable as a general rule, when it can be avoided, the court has the power and should clearly use it where necessary."

And finally at p.910, Lord Pearce said :-

"Obviously production would never be ordered of fairly wide classes of documents at a high level. To take an extreme case, production would never be ordered of Cabinet correspondence letters or reports on appointments to office of importance and the like."

The Executive Council is the Hongkong equivalent of the British Cabinet; and in my view, the approach of the Hongkong courts to disclosure of the minutes of the Executive Council should be the same as the approach of the British courts to disclosure of cabinet minutes. Such minutes clearly fall within a class of documents which, irrespective of their content, should not be disclosed to public gaze. The same applies to all documents concerned with policy-making within departments including, as Lord Reid says, minutes and the like by quite junior officials. There is a vast difference between documents of this sort and, say, a routine report on a junior police officer - which was the subject matter of the issue raised in Conway v. Rimmer.(9)

In his certificate of 1st February 1967 the Colonial Secretary put his objection

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to disclosure on a "class" basis; but in his affidavit he takes the matter one stage further. He says that this particular file includes legal opinions, minutes of Executive Council meetings and policy matters of a highly confidential nature and that it would be against the public interest to disclose those actual documents and minutes.

The cases must be rare in which the courts of this Colony would question the Colonial Secretary's view on such a matter. As Lord Reid says, the business of Government is difficult enough as it is, and "No government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind".

The observations of Lord Pearce and Lord Morris should also be borne in mind viz. that private inspection by the court is not desirable as a general rule and that in practice the court's power to inspect should be sparingly exercised. In my view no useful purpose would be served by our looking at file LSO 5296/53. I have not looked at it; and I do not propose to do so. My judgment is based on the evidence which was before the trial judge.

In my view the Director fixed the rental value of the ground fairly and impartially in accordance with the proviso in the lease; and for the above reasons, I think that the appeal should be allowed and that the declaration made in the court below should be reversed.

(W.A. Blair-Kerr)
Appeal Judge

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IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO.33 OF 1967

(On Appeal from O.J Action No.1382 of 1965)

- - - - - - - - - - -

B E T W E E N:

CHANG LAN SHENG Plaintiff

and

THE ATTORNEY GENERAL Defendant

Coram: Rigby, S.P.J.
Blair-Kerr, J. &
Huggins, J

J U D G M E N T

Huggins, J : I have had the advantage of reading the judgment of Mr. Justice Blair-Kerr and I entirely agree with conclusion which he has reached. It is not an altogether easy case and it has not been made any easier by the prolixity of some of the arguments addressed to us on behalf of the respondent. I shall refer only to those points which appear to me to relate to the substance of the matter.

At the outset I ought perhaps to say a word on the vexed question which was aired when we were asked to inspect a file produced by a Government official. The learned trial judge declined to look at the file, but the respondent submitted that he was wrong. The basis upon which the courts should act when it is suggested that disclosure of

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official papers is contrary to the best interests of the state has now at last been established by Conway v. Rimmer(1), but difficulties may yet arise in deciding just how far the court's right of inspection should be carried. I have always been of the view that the courts must be jealous to ensure that their duty to give justice to a subject is not made impossible of fulfilment by reason of some wholly unjustified fear of damage to the interests of the state. But one must not be unrealistic and overlook the fact that the power of the courts to do justice is interdependent upon the ability of the Executive to perform its functions efficiently. The efficient carrying out of the executive function requires that a degree of secrecy should sometimes be afforded. I would not wish to go further than is necessary for the decision of this particular case and I see possible difficulties of definition if one grants a blanket protection to classes of documents such as "cabinet papers". At one point in his speech Lord Reid referred to "cabinet minutes", which is a rather more limited phrase. We have the affidavit of the Colonial Secretary and the certificate therein referred to indicates that the file in question here contains minutes of the nearest equivalent in Hong Kong to the British cabinet. The file may also contain other papers of an entirely different character and it might be that in another case we would have to inspect a file to see which of its contents we thought should be disclosed. Here, however, it has been made clear to us that the purpose of the application for disclosure is to reveal what decisions have been made affecting the land policy of the Government and the reasons for those decisions. I do not think we should consent to such disclosure and it follows that I think it unnecessary to inspect the file at all.

(1) (1968) 1 All E.R. 874

The first question which arises on the argument of counsel for the respondent is: has any fine or premium been demanded for the new lease to which the respondent was entitled upon his exercise of his option? With respect this seems to me to be putting the cart before the horse. He relied upon such cases as Miramar Hotel & Investment Co. Ltd. v. The Collector of Stamp Revenue (2), where it was held that the court is not bound by the label which the parties attached to a sum of money which is payable under a lease. In my view those cases do not assist us in deciding the present case and they really beg the question which we have to answer. This lease expressly provides that no premium is to be paid for renewal and the Director was clearly well aware of that fact. He was concerned solely with the fixing of the rent and that is all he purports to have done. If the figure is excessive, so that the Collector of Stamp Revenue might have assessed duty on the basis that the premium was being paid in addition to rent (as in the Miramar Hotel Case(2)), it does not follow that what has been fixed is not a rent - a periodic payment reserved from the land demised: it merely means that the rent has not been fixed in accordance with the terms of the lease. It is clear (nor has the respondent sought to suggest otherwise) that the figure of $60,764 is greatly in excess of the zone Crown rent current at the material time. The zone Crown rent was fixed in 1952 and counsel for the respondent concedes that it would not be unreasonable for the Director to assess a rent which made allowance for the general increase in rents in the Colony since that date: he said that even a 100% increase might not have been opposed, but certainly it should be no more. If he be right then the rent fixed cannot be justified and it must be reduced. To say that the figure fixed must then include "a hidden premium" is to confuse the real issue.

(2) (1961) H.K.L.R. 673.

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It seems to me that there are two basic questions which have to be answered:

(a) has the rent be fairly and impartially fixed by the Director?

(b) can the figure arrived at by the Director be said to be the fair and reasonable rental value of the ground at the date of the renewal?

It has been urged upon us, as it was urged upon the trial judge, that the rent has not been fixed by the Director at all and that even if it was fixed by him it was not fairly and impartially fixed. The learned judge rejected these arguments and I think he was right. What the Director did was to adopt a formula for the assessment of rent, that formula containing an unknown, namely the estimated price per square foot of the land (or "premium") if it were offered on the open market for a term of 75 years at the zone Crown rent. This unknown was fixed by the Director, who then left the actual calculation to someone else. It seems to me unrealistic to say that the Director must himself do the calculation: certum est quod certum reddi potest.

But was the rent fairly and impartially fixed? First counsel for the respondent say that the Director wrongfully failed to hear representations on behalf of the respondent and second they say that he allowed matters of Government policy to colour his assessment. It has been submitted that the Director was, for the purposes of fixing this rent, either a "quasi-arbitrator" or a valuer and that whichever he was it was incumbent upon him in the circumstances to invite representations from the respondent. It is not, I think, contested that if the Director was an arbitrator or "quasi-arbitrator" he was under a duty to hear both sides, nor is it suggested that he did hear both sides. The appellant contends that the position of a person nominated in a contract to fix part of the consideration is not that of an

arbitrator at all, since an aribitrator is a person appointed to do what otherwise the courts might have to do, namely to decide a dispute which has arisen between the parties. As I understand him Mr. Bernacchi for the respondent did not say that there was a dispute between the parties which would call for the services of an arbitrator, but rather that the Director must, since he himself says he is not an expert valuer, necessarily have been an arbitrator. I am well satisfied that the Director was not appointed as an arbitrator and that he was never intended to act as such. Undoubtedly the parties could have contracted for a reasonable rent and have provided that in the event of their failing to agree the Director should act as arbitrator. That is not what they did: they provided that the Director should fix the rent and no dispute arose or could have arisen until he had purported to do so. That does not, in my view, put him in the same class as a certifying architect (see Chambers v. Goldthorpe(3)) for the architect has to judge whether work has been done in accordance with the building contract. Whether or not the test for distinugishing between a valuer and an arbitrator as stated at 39 Halsbury (3rd ed.) 4 (para.6) is absolute, it is in my judgment sufficient for our purposes:

> "..... an arbitrator is appointed to determine a certain matter, such as the price of goods, for the purpose of settling a dispute which has arisen between the parties, but ... a valuer is appointed to determine such a matter before any dispute has arisen and with the object of preventing any dispute."

I do not find it helpful to review the decided cases which fall on each side of the line. The fact that the Director was

(3) (1901) 1 K.B.D.624

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not an expert valuer might lead one to expect that he was not intended to act as a valuer, but I find nothing in the lease which leads me to think that the parties ever contemplated that the Director should act as an arbitrator, i.e. that he should exercise functions of a judicial character, It is true that the Director is not an expert valuer in the sense that he has a professional qualification as a valuer, but by virtue of his office he is a person who might be better equipped than most to fix a fair rent for premises leased from the Crown. If it be necessary to classify him at all I would think that he should be regarded as a valuer. If that be correct then this court should not interfere with his assessment unless it can be shown to be wrong: see per Lord Justice Denning in Dean v. Prince(4). The learned trial judge thought that there was an error in the Director's mode of assessment but rejected the contention that he acted improperly and, indeed, found as a fact that he "acted quite impartially in fixing what he considered to be a fair and reasonable rent". The whole purpose was to leave the fixing of the rent in the hands of a man who was thought to be in a particularly good position to know what was a fair rent and it must have been intended that he should take advantage of that position, and of the experience, information and advice which it afforded him, in making his determination. The proviso did not refer to a fair and impartial fixing of the rent as indicating that there should be something in the nature of a judicial enquiry nor did it bar the Director from taking such advice as he might think necessary. Mr. Sanguinetti conceded that he was entitled to take advice but not, he said, from one of the parties. If the parties had appointed a professional man in private practice to fix the rent I cannot see that objection could properly have been taken to his consulting his assistants. I do not see that any different principle should apply where the parties choose to appoint a person who,

(4) (1954) 1 All E.R. 749, 758.

although employed by one of them, is of such high standing that they are obviously satisfied he will be able to show that independence which will be necessary for the making of a fair decision. It is not the "fault" of the Director of Public Works that his assistants were also employed by one of the parties to the lease nor did the fact that they were so employed disentitle him from asking their advice.

I think a distinction must be drawn between what the Director did and hearing evidence or argument. I agree that even if he was a valuer he should not hear one side only, but that principle must be applied with due consideration to all the circumstances and in particular to the manifest intention of the parties. While sharing the doubts expressed by the learned judge as to the wisdom of appointing a Government official to fix the rent I am not persuaded that the Director did anything improper. Equally I cannot see why, once it is accepted that the Director was entitled to take advice, it should then follow that he was bound to accept any advice which was given to him, especially when there is reason to believe that the advisers may have been persuaded that their figures were not entirely logical in view of the other values in the vicinity. We are not here concerned with construing a statute but a business document and on a proper interpretation I think the words "fairly and impartially" were nothing more than an emphasis that the Director was to act for both sides: it is possible to be partial even in making a determination of "the fair and reasonable rental value, but the Director was to be impartial. I do not agree that for him to take into account what was the Government's policy was for him to act partially. Indeed, in circumstances where Government policy plays so large a part in determining the level of rents it seems to me that he would not have been doing his duty had he not considered it in so far as he

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thought it was material. It has not been shown that he gave undue weight to it.

That leaves the second of the basic question, can the figure arrived at by the Director be said to be the fair and reasonable value of the ground at the date of the renewal? I attach no significance to the undoubted fact that the valuation was made several months before the actual date of the renewal, because if any error resulted (and none has been shown to have resulted) I have no doubt that it would have benefited rather than prejudiced the respondent.

Stripped of all the complications which it has been sought to engraft upon the case the issue is a short if difficult one, whether the parties who entered into the lease of 1936 intended that the rent which was to be assessed by the Director upon any exercise of the option to renew was to be a restricted "Crown" rent as contended for by the respondent. It is not in dispute that for upwards of a century the Government had made grants of land in return for payments based on the formula "high premium, low rent", a phrase which, during the course of the hearing, appeared to take on the nature of a magic incantation. In recent years Crown rents have been "zoned" but the change of name to "zone Crown rent" has not introduced any change in general policy because all along Crown rents have been based on an assessment of the relative demands for land in various parts of the Colony. From time to time there has been an all round increase in the range of Crown rents but at no time have they approached what would be economic rents for the land. It is argued for the respondents that when the parties contracted for re-assessment of the "rent" it was their manifest intention to refer to a comparable, restricted rent and not to an economic rent. Thus the respondent's argument rests upon a continuation of the Government policy enshrined in the formula "high premium, low rent" and

requires us to construe the proviso in the lease as implying that the parties intended to contract on the basis that the policy would be continued. That requires that we should read the proviso as though the words requiring the assessment by the Director of Public Works of a rent which would represent "the fair and reasonable rental value of the ground at the date of ... renewal" meant the assessment of what is most easily described as a new "zone Crown rent". If that was really the intention it seems to me that the parties could very easily have said so in unmistakable terms. Granted that the policy of the Government in relation to land values had not changed for over a century it is a policy which, as it appears from the evidence, has been under fire for some time. Suppose that between 1936 and 1963 the policy had been changed, premiums abolished and zone Crown rents assessed at what were thought to be economic rents. Could the respondent still have contended that he was entitled to a "low" rent or would he have been harnessed to the zone Crown rent, as he now claims? He could have claimed the "low" rent only if it was an implied term of the lease that the Government policy would not be changed in this way and I cannot believe the Crown ever intended so to bind itself. If the policy had been changed what would have been the yard stick for assessing the "low" rent when there would ex hypothesi be no comparable rents? The respondent can, of course, say that since the Government policy has not in fact changed this question need not be answered, but I think the possibility that such difficulties might have arisen may properly be borne in mind when considering whether the parties are likely to have contemplated an assessment on the lines contended for by the respondent and I am not persuaded that they did so.

What the Director was trying to do was to assess the rent which could have been obtained in the open market. He could not do this by reference to similar rents owing to

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the established practice relating to grants of land in the Colony. Under that practice purchasers compete by bidding a lump sum for the grant of a term at the zone Crown rent. The Director therefore sought to reach an equivalent figure to the market rent by estimating what a willing purchaser would have paid for a similar term at the zone Crown rent and then adding the zone Crown rent. The respondent says that thereby he has introduced into the rent what is in effect a hidden premium, which is contrary to the spirit of the lease. This contention is based on the fact that when the new lease was granted in 1936 a premium of $1,238.38 was paid. It is common ground that the premium was assessed in accordance with the established Government policy and that the grantee was so informed. It is also admitted by the appellant that the premium was assessed on the basis that the option for a renewal of the lease would be exercised. What the respondent submits, therefore, is that, having regard to the history of Crown grants, the premium then paid was in effect the purchase price of a lease of 102 years: thus when the rent came to be fixed in 1963 it should have been fixed on the basis that the land was encumbered with a sitting tenant whereas in fact the Director based his calculation on what would have been obtained had the land been put up for auction in the usual way. I find no justification for this criticism and it seems to me that it disregards the very nature of an option to renew. Naturally the degree of possibility, or even probability, that an option will be exercised is likely to affect the price which a grantee will be willing to pay for it and where the probability is high the grantor may well, as here, treat it as a certainty. However, the method the Crown chose to adopt in fixing the 1936 premium seems to me irrelevant: it may have been a good method or a bad method but what the premium was being paid for remained the same. In this case there necessarily existed a

possibility, however slight, that the grantee would not exercise the option. Consequently, the premium could at most represent only (a) a capitalized part of the rent for 27 years and (b) the price of the option. Mr. Bernacchi seemed to suggest that the Director was treating the 1936 premium as containing both possible elements but, while I do not think this is material, in my view there is nothing to show that it represents anything more than the mere price of the option. Indeed, it was perhaps not the whole price of the option, for the rent for the remaining 27 years of the original 75 year term was also increased. "The fair and reasonable rental value of the ground" must, as I see it, be construed as meaning precisely what it says and the provision that the grant must be "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. The fact that in the long run the plaintiff will be no better off than someone who had to "purchase" a term of 75 years from 1963 instead of exercising an option to renew seems to me irrelevant, nor can the rent fixed fairly be said to include "a hidden premium".

As I have said, the Director's calculation was based on what he thought the purchaser of a term of 75 years would have been willing to pay in 1963. It was contended that in arriving at his starting figure the Director did not consider matters which he ought to have considered, but I am not persuaded that he failed to consider anything which was relevant. The fact that a premium was paid in 1936 for the option to renew could not affect the rent which a purchaser would pay for a subsequent lease, nor could expenditute on rates, water, electricity or taxes affect the estimate of potential rental income. The fact that there was a building covenant in the lease could not, having regard to the term of that covenant, affect the matter. It was not a restrictive covenant and clearly anyone

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contemplating taking a lease of this land in 1963 would do so with an eye to its potential for development. It would in my view have been quite wrong for the Director to assess a rent on assumption that the character of the area had not changed and would not change further.

The only matter which gave me any real anxiety was the argument that the Director's valuation included interest upon interest, with the result that he reached an improperly inflated figure. As I now understand it the fallacy here is in not appreciating the significance of Parry's Valuation Tables. I accept that these are designed to provide an annual sum made up of (a) 5% simple interest on the capital sum (a rate of interest which the learned judge appears to have found was a reasonable basis for valuation purposes) and (b) a sinking fund which will yield the capital sum over the relevant period at compound interest. If that be correct it seems to me that there is nothing inflated about the figure produced by use of the Tables. Mr. Bernacchi says that the Crown will get back the land at the end of the term and will therefore gets its capital back twice. A sinking fund is designed to protect the landlord against the destruction of a wasting asset such as buildings and it is clear that in the present case we are concerned only with the rental value of the ground. The argument seems to be, therefore, that the valuation is in some way based upon the value of the buildings. That would be so if the calculation were not based on the "purchase price" of a leasehold rather than the purchase price of a freehold. The figure of $1,234,859.- to which the multiplier is applied is the premium 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. The rent in fact fixed by the Director was slightly less than the figure obtained by

direct application of the Tables using 5% as the rate of simple interest, but that was due to the fact that the Tables are based on the assumption that the annual payment is to be made in arrears whereas under this lease the rent was payable half yearly in advance.

The learned judge construed the proviso as requiring that the rent to be fixed should be "restricted" to a fair and reasonable rental and concluded that that restricted him from fixing the best rent which the rent could obtain in the open market, "that is the full market rental value". He referred to John Kay Ltd. v. Kay(5) and I hope I am not misconstruing the judgment when I say that it seems to me the Solicitor General is right when he says the judge thought himself bound by that case to hold that the rent fixed must be a rent below the open market rent. What he said was that "in all the circumstances, as was thought in Kay's Case(5), that (sic) a reasonable rent, would be some rent below the open market rent". However, that case seems to me, with respect, to be dealing with an entirely different type of assessment and to be of no real assistance to us : the assumption is being made that the intention of the parties in including the words which we have been called upon to construe was the same as the intention of legislature in enacting s.12 of the Leasehold Property (Temporary Provisions) Act 1951. This is an assumption which does not appear to me to be justified but rather to be contrary to the indications contained in the proviso.

Mr. Sanguinetti has submitted that the assessment is wrong because on the face of it the Director has added the zone Crown rent as an element in the final figure: it is argued that the market value should include the zone Crown rent. Here again, it seems to me, one must not lose sight of the difficulty that the Director found himself in in having to base his whole calculation on what a willing

(5) (1952) 1 All E.R. 813

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"purchaser" would have paid in 1963, i.e. a zone Crown rent and a premium.

Mr. Justice Blair-Kerr has gone at length into the method of calculation adopted by the Director and the attacks that have been made upon it. I do not think any useful purpose would be served by my reproducing all the figures and it is sufficient for me to say that I am not persuaded the rent fixed by the Director was unfair or unreasonable. Accordingly I agree that the appeal should be allowed. 10

25th September 1968.

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IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.33 OF 1967

(On Appeal from Original Jurisdiction Action No.1382 of 1965)

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B E T W E E N:

CHANG LAN SHENG — Appellant (Plaintiff)

and

THE ATTORNEY GENERAL — Respondent (Defendant)

- - - - -

(Sd.) Simon Mayo
Assistant Registrar
13.11.68

BEFORE THE HONOURABLE MR. JUSTICE RIGBY, THE HONOURABLE MR. JUSTICE BLAIR-KERR AND THE HONOURABLE MR. JUSTICE HUGGINS.

DATED THE 25TH DAY OF SEPTEMBER 1968.

J U D G M E N T

UPON reading the Notice of Motion dated the 4th day of August 1967 on behalf of the above-named defendant by way of appeal from the judgment of the Honourable Mr. Justice Scholes given on the 24th day of June 1967 whereby it was adjudged and declared that the rent had not been fixed as required under the terms and provisions of the Crown Lease and that the defendant do pay three-quarters of his costs of action to be taxed AND UPON reading the said judgment AND UPON hearing Counsel for the defendant and Counsel for the Plaintiff IT IS ORDERED:

1. that this appeal be allowed;

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2. that the said judgment of the Honourable Mr. Justice Scholes be set aside and that in lieu thereof judgment be entered for the defendant; and

3. that the matter of the costs both of the trial before the Hon. Mr. Justice Scholes and of this appeal do stand adjourned for further argument to an early date to be fixed by the Registrar.

Sd.
(L.S.) Assistant Registrar. 10

No.15
Decision of the Hon. Sir Ivo Rigby - 5th October, 1968.

IN THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

CIVIL APPEAL NO.33 OF 1967

(On appeal from Original Jurisdiction Action No.1382 of 1965)

BETWEEN:

Chang Lan Sheng Plaintiff

and

The Attorney General Defendant

DECISION

5th October 1968.

Rigby, S.P.J.:

I regret that I should take a different view to the other members of the court.

In his original action the plaintiff claimed, inter alia, a declaration that the rental value of the land in question had not been fixed as required under the terms and provisions of the Crown lease. After a very lengthy hearing before the learned trial judge he gave judgment in favour of the plaintiff in the terms of that declaration. Upon appeal, this court has reversed that decision. It is, I think, necessary to remind oneself very briefly what were the basic facts of the case.

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No.15
Decision of the Hon. Sir Ivo Rigby - 5th October 1968 (Contd.).

In January, 1948, the plaintiff, for a sum of $80,000, purchased by way of assignment the residue of a 75-year Crown lease from the then lessee, a Madam Chu De Yau. That lease was due to expire on the 23rd of June 1963 so that the lease had about 15½ years to run. It is not in dispute that at the time of entering into that lease with the Crown Madam Chu paid a premium of $1,238.38. The lease contained an option to renew"..... for a further term of 75 years without payment of any fine or premium therefor ..... at such rent as shall be fairly and impartially fixed by (the Director of Public Works) as the fair and reasonable rental value of the grant at the date of such renewal".

The Crown rental was increased from time to time during the time Madam Chu held the tenancy but it is, I think, correct to say that at all material times the plaintiff was in possession as tenant, the rental paid by him was $76 per annum. In February 1963 the plaintiff exercised his option to renew, the lease itself being due to expire in June 1963. However, it was not until December 1964 that the plaintiff was informed that the rent in respect of the new lease was being increased from $76 per annum to $60,764 per annum. Bearing in mind, first, that the lease expired on the 23rd of June 1963 and that it was therefore essential that the plaintiff should exercise his right of option - assuming he wished to renew the lease - before that date and, secondly, that he was not informed until the 2nd December 1964 that the rental had been fixed at $60,764 per annum, it seems to me hardly surprising that the plaintiff resisted what he considered to be an exorbitant increase in the rental of the land, that he considered that a very substantial part of this vastly increased new rental was, in reality, the imposition of a premium decapitalized over the term of years and

therefore in breach of the express provision contained in the proviso that no premium should be imposed on the exercise of the option to renew, and that he was accordingly constrained to institute these proceedings. There is further factor, to which Mr. Bernacchi has referred, that in February 1963 at the time he exercise his option to renew, the plaintiff had pulled down the building already existing on the land and his plan for a new ten-storey building had already been approved. It is at least open to argument in the plaintiff's favour that he would, or might, not have embarked on such an extensive new building project if he had been informed within a reasonable time of exercising his option - and not some 18 months later - what the rental was going to be.

It was, I think, admitted in the course of the argument before us that there were a very large number of Crown leases now falling due for renewal at the option of the lessee, each containing a clause for the manner of fixing the new rental - in the event of the option to renew being exercised - in terms precisely the same as the clause under consideration in this case, and that the basis for fixing the new rental value adopted in this case by the Director of Public Works - if that in fact was the correct basis - involved very great financial value and importance to the Crown. In short, Mr. Bernacchi submitted that although this was not a test ease in the strict sense of the word in which that expression was used in the case of Healey & Oths. v. Waddington and Sons Ltd. and Oths.(1), it was a case the outcome of which, in so far as the basis of assessment adopted by the Director of Public Works in relation to the common form clause dealing with rental value on a renewed lease, was tested and determined by a court and the decision was, therefore, of the greatest possible importance to the Crown. It involved a novel point of

(1) (1954) 1 A.E.R. 861

In the Supreme Court of Hong Kong

No.15
Decision of the Hon. Sir Ivo Rigby - 5th October 1968
(Contd.)

complexity and great importance. For myself, I would have agreed with these arguments, and subject to what I am about to say, I would have thought this a proper case in which to make no order for costs. However, Mr. Leonard, Crown Counsel, has submitted that the plaintiff's case was presented with a great deal of unnecessary prolixity. Even a superficial view of the voluminous record in the trial court does, in my view, amply support that contention.

In the result, the order that I would have thought it right to make, and which I would myself have made, would be that the Crown should be entitled to its costs, both here and in the court below, save on such issue of the case as was directed to a consideration of the proper construction of the proviso to the lease and a consideration of whether the rent as fixed by the Director of Public Works in accordance with the proviso was a fair and reasonable rent. As to that issue in the case - which was, in effect, the main issue - I would myself have made no order, both here and in the court below, so that each side should bear its own costs in relation to this issue.

Bern. Q.C. & Sanguinetti (Peter Mark & Co.) for Plaintiff.
Leonard, P.C.C. for Defendant.

No.16
Ruling of the Hon. Mr. Justice Blair-Kerr - 5th October, 1968.

In the Supreme Court of Hong Kong

No.16
Ruling of the Hon. Mr. Justice Blair-kerr - 5th October 1968

IN THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

CIVIL APPEAL NO.33 OF 1967

(On appeal from Original Jurisdiction Action No.1382 of 1965)

B E T W E E N:

Chang Lan Sheng Plaintiff

and

The Attorney General Defendant

R U L I N G

5th October, 1968.

Blair-Kerr J:

We were told by counsel that the Crown had paid the respondent his costs in the court below, but that the understanding between the parties was that such costs would be refunded to the Crown in the event of the appellant being successful provided this court directed that the costs should be refunded. The appellant now ask for an order for :-

(1) the refund of the costs which have already been paid;

(2) his costs of this appeal;

(3) his costs in the court below.

Mr. Bernacchi for the respondent does not dispute that his client is bound to refund

In the Supreme Court of Hong Kong

No.16
Ruling of the Hon. Mr. Justice Blair-kerr - 5th October 1968 (Contd.)

the costs of the proceedings in the court below; but he submits that the court should make no order as regards the costs of this appeal or in regard to the appellant's costs in the court below.

It is not in dispute that the court has complete discretion in the matter of costs. On the other hand, it is equally clear that the court's discretion must be exercised judicially, and that the normal rule of practice is that costs follow the event. At page 794 of the (1967) Supreme Court Practice there is a list of cases in which successful appellants, for one reason or another, have been awarded only the costs of the appeal but not costs in the court below, or no costs in either court, or only part of the costs.

The respondent does not suggest that the cases cited are authorities for his proposition that the successful appellant in this case should be deprived of his costs of the appeal and in the Court below; nor does he suggest that there was any agreement between the parties and other potential litigants that this should be treated as a test case. Nevertheless, he submits that having regard to the fact that there are a large number of Crown leases in Hong Kong which contain a proviso for renewal framed in precisely the same terms as the proviso in the respondent's lease, his client should be regarded by this court as a sort of "guinea pig" who has fought the battle single-handed not only on behalf of himself but on behalf of all the other Crown lessees who would also have wished to maintain that the "rental value of the ground" should be taken as being synonymous with "zone Crown rent"; and that having regard to the overall financial implications, the Crown was far more interested in obtaining a favourable decision in this matter than the respondent was. Mr. Bernacchi further submitted that

whatever the position might be as between citizen and citizen, the same principles should not apply in cases where the Crown is a party and the point involved is a novel one of much general importance and of some difficulty.

I find myself quite unable to accede to the suggestion that the Crown should be treated differently from any other litigant in these courts. The modern approach to the question of costs in proceedings to which the Crown is a party is clearly set out in the Supreme Court Practice 1967 at p.801 in these words :-

> "The ordinary rule used to be that the Crown neither paid nor received costs (Rowland v. Air Council/1923/ W.N.72), but now, having regard to the Crown Proceedings Act 1947, and in particular to section 24(2) of that Act (Pt.9,B) the ordinary rules as to liability for costs apply to proceedings to which the Crown is a party."

Proceedings to which the Crown is a party usually to involve points of general importance and a decision in any such proceedings is frequently of interest to persons other than the parties to such proceedings; but unless there is some understanding with the Crown and other potential litigants that the case shall be treated as a test case and the Crown agrees to forego their costs, in my view there is no justification nowadays for treating the Crown differently from any other litigant in the matter of costs.

In support of his submission that the court may deprive a successful litigant of his costs if the point involved in the case is a novel one of much general importance and of some difficulty, Mr. Bernacchi cited In re Mersey Railway Company(1)

(1) (1888) 37 Ch.Div.p.610.

In the Supreme Court of Hong Kong

No.16
Ruling of the Hon. Mr. Justice Blair-kerr - 5th October 1968 (Contd.)

and Commissioner of Inland Revenue v. Wah Feng & Co.(2). In the Wah Feng & Co.(2) case, judgment was given in favour of the appellant, but the Court made no order as to costs. The report of the case does not indicate that this order was made by consent; but I have checked my note of the proceedings, and the note reads as follows :- "By consent: execution of judgment stayed for 2 weeks; no order as to costs in the present appeal." The case, therefore, does not appear to assist the respondent.

The ratio decidendi of the Mersey Railway Company(1) case is stated clearly in the headnote, the point being that a judgment creditor gains no priority by obtaining a receivership order under s.4 of the Railway Companies Act 1867. There is no mention of costs in the headnote; and at p.616 Cotton L.J. said :-

> "Sect.4, in order to prevent public inconvenience, deprives a judgment creditor of the right he had to take in execution the stock and plant of a railway company. It substitutes another remedy, which is that an order may be made on the application of the judgment creditor for the appointment of a receiver and manager of the undertaking of the company, who will receive the profits which come from the undertaking."

A judgment creditor of the Mersey Railway Company obtained against the company an order for the appointment of two receivers. Subsequently another judgment creditor (apparently under the mistaken impression that an application for the appointment of a receiver gave a judgment creditor some sort of priority) applied for the appointment of the same two receivers. In granting this second application, Kekewich J. said :-

(2) (1960) H.K.L.R. p.94.

"..... I think that as a special remedy is substituted for the common law remedy, and the judgment creditor cannot have that special remedy, whatever it may be worth, without the appointment of a receiver and manager, the appointment ought to be made appointing the same persons to be receivers and managers without prejudice to the order of the 23rd December 1887, the receivers not to act without leave of the judge. The costs of the petitioners will be added to their debt."

On appeal it was held that s.4 did not give any priority to the creditor who obtains an order for the appointment of a receiver. Cotton L.J. said (p.619):-

"The Legislature cannot have intended that the idle form should be gone through of appointing a second receiver who cannot receive anything, there being a receiver in possession under an earlier order. It is absurd to appoint a second receiver who cannot do anything. We are of the opinion, therefore, that no such second receivership order as that under appeal ought to have been made since it only causes useless expense without giving the applicant any benefit. The order must be discharged, but without costs, as it would be hard to order the judgment creditor to pay them in a novel case of so much general importance and of some difficulty."

The vast majority of questions which are litigated involve novel points of difficulty. If there is authority on a point, there is no need for litigation. Furthermore, decisions frequently involve

In the Supreme Court of Hong Kong

No.16
Ruling of the Hon. Mr. Justice Blair-kerr - 5th October 1968 (Contd.)

questions of general importance. If, in every case, which involved a novel point of much general importance and some difficulty, the court were to deprive a successful party of his costs, very serious inroads would be made on the general rule that costs follow the event; and I do not think that it was the intention of the Court of Appeal in the Mersey Railway Company (1) case to lay down any such exception to the general rule. All that can be said is that, having regard to the facts of that particular case, the court chose to exercise its discretion in that way.

Mr. Bernacchi argues that the respondent has been prejudiced by the conduct of the Crown in that the Crown did not inform the respondent of the amount of the revised rent till December 1964. When the respondent opted for the new term in February 1963 he had pulled down the 1952 5-storey building and his plans for the new 10-storey building had been approved. The suggestion is that he might not have embarked on the erection of the new 10-storey building if he had known what the revised rent was going to be.

I do not think there is anything in this suggestion. The Crown was under no obligation to inform the respondent what the revised rent was going to be before he exercised his option; and having regard to the rising value of land (i.e. prior to the fall in land values in 1965) there is nothing in the evidence to suggest that in 1963 the respondent would not have proceeded with the erection of the new building even if he had been informed immediately what the revised rent was going to be.

The parties to the lease contracted with their eyes open and their hands unfettered. The respondent considered that

the Director of Public Works had not fixed the rent in accordance with the proviso. It is not for us to speculate what the Crown would have done if the respondent had simply refused to pay the revised rent. It would certainly have been open to them to re-enter on the land, and the correspondence indicates that they threatened to do so. The respondent chose to seek a declaration from the Court that the rent had not been fixed in accordance with the proviso. The learned judge in the Court below made the declaration sought. His judgment has now been reversed; and I see no reason why the appellant should not have his costs of the appeal and his costs in the court below; and, in my view, this court should order that the costs already paid by the appellant be refunded to him.

(W.A. Blair-Kerr)
Puisne Judge.

In the Supreme Court of Hong Kong

No.17
Judgment of the Hon. Mr. Justice Alan Huggins (as to cost)

No.17
Judgment of the Hon. Mr. Justice Alan Huggins - (as to cost)

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

(On Appeal from O.J. Action No.1382 of 1965)

B E T W E E N:

Chang Lan Sheng Plaintiff

and

The Attorney General Defendant

Coram: Huggins, J.

J U D G M E N T

Huggins, J: The appellant asks that costs of the appeal and in the court below should follow the event, but the respondent asks us to make no order other than one for repayment by him of the costs which he has received under the order of the trial judge. The first contention is that because this case had something of the nature of a test case we should exercise our discretion so as to deprive the appellant of the costs which a successful appellant would normally be awarded. I will assume for the moment that this case has something of the nature of a test case, but no case has been cited to us which decides that the costs in a test case should not, in the absence of agreement or of special circumstances, follow the event. The fact that the successful party may be

saved the embarrassment of further actions by the other persons who have agreed to be bound is not of itself, as it seems to me, sufficient justification for depriving him of his costs in the test action. What may well happen is that the other persons concerned in the point in issue agree to share the burden of paying the costs of the party who is taking their side in the test action, but I am not persuaded that there is any rule of law or practice applicable only to the costs of a test case. Bogulawski v. Gdynia Ameryka Linie(1), which was cited to us, appears to me to have no relevance to the question we have to decide.

That disposes of the first contention, but I would add that I agree with counsel for the appellant that there is in any event no justification for treating this as a test case. The essence of a test case is that the various parties to pending or threatened litigation bind themselves to recognise the decision in one action as effectively deciding the rights and liabilities of those of them who are not parties to that particular action: see Healey v. A. Waddington & Sons Ltd.(2). Here there was admittedly no such agreement.

The main argument appears to be that this case raises an issue which is of general importance (in that it will lay down the law affecting all tenants under similarly worded Crown leases) and which is of difficulty. Reliance is placed on In re Mersey Railway Company (3), where Lord Justice Cotton said at p.619:

> "The order must be discharged, but without costs, as it would be hard to order the judgment creditor to pay them in a novel case of so much general importance and of some difficulty."

(1) 1951 2 K.B. 328. (2) 1954 1All E.R.861,862
(3) (1888) 37 Ch.D. 610.

In the Supreme Court of Hong Kong

No.17
Judgment of the Hon. Mr. Justice Alan Huggins (as to cost) (Contd.)

and Lord Justice Lindley said at p.621:

> "I agree as to the costs, for the question is new and difficult."

I am quite satisfied that the learned lords justices did not intend to lay down any such principle as that contended for by the respondent here. The emphasis was not upon the novelty and difficulty of the case but upon the fact that the unsuccessful party was a judgment creditor: the judgment creditor was, if I may borrow a phrase from another branch of the law, guilty of having taken a wrong step in the agony of the moment, the situation having been created by the successful party. The Crown has done nothing to bring this litigation upon itself beyond what the respondent has done, namely enter into the lease which we have had to construe. I cannot accept that there is any rule of law that in every case which may be described as a "leading case" because it establishes a legal principle the successful party should be deprived of his costs.

What, I think, is really at the root of the present application is that the successful party is the Crown and it is suggested that a subject is entitled to receive more generous treatment from the Crown than he might expect from a private litigant. I say this because it is significant that in the court below the respondent was not disposed to show the magnanimity which he hopes to receive at our hands; he asked for, and was awarded, the costs of the trial save those relating to a point on which he failed. If there ever was such a right as that which is suggested then I respectfully agree with what Mr. Justice Balir-Kerr said in the course of the argument, that with the passing of the Crown Proceedings Ordinance the Legislature has shown an intention that within certain limits the Crown should be

in the same position as any other litigant, one of the results being that the Crown should be in no different position as regards costs. But I do not believe there was previously a right to more generous treatment from the Crown. Counsel for the respondent has referred to two revenue cases, but inquiry has shown that in both of them the orders as to costs were made by consent. It has, indeed, always been my understanding of the matter that the Crown frequently does, as a matter of grace, agree to bear the costs of litigation where it would be a hardship on a subject to pay costs which may be out of all proportion to his interest in the matter in dispute. Courts on the ground of hardship of this kind not infrequently persuade a party asking leave to appeal to agree to pay part or all of the costs of the appeal in any event as a condition of granting leave. In revenue cases one can readily see the justice in limiting the costs of a subject who is reasonably contesting the imposition of a charge which the Crown itself has been instrumental in creating, but where a party enters into a contract with the Crown I can see no basis in law (or, since some hint of immorality was made, in morals) for expecting the Crown to subsidize an action against itself. I readily accept that we have an absolute and unfettered discretion over the costs (Donald Campbell & Co. v. Pollak)(4) but, if I may say so without disrespect, we are no more entitled to refuse to give a party his costs becuase of some prejudice due to his character as the representative of the Crown than we are because of some prejudice due to the colour of his hair. Such cases as In re Yates' Settlement Trusts(5), which Mr. Bernacchi cited as an example of the application of the principle in Donald Campbell & Co. v. Pollak(4), I find of no assistance: with respect I do not think the practice applied in cases which relate to trusts and which originate in the

(4) 1927 A.C. 732, 811 (5) 1954 1 W.L.R.564

In the Supreme Court of Hong Kong

No.17
Judgment of the Hon. Mr. Justice Alan Huggins (as to cost) (Contd.)

Chancery Division are comparable.

As to the costs of the appeal itself some correspondence has, by consent, been placed before us and it appears that a suggestion was made by the solicitors for the respondent that the appellant should agree to bear his own costs in this court in any event. No agreement was reached because the appellant was prepared to consider the suggestion only if the respondent were willing to limit the argument to the one point which could fairly be regarded as governing the rights of the other potential litigants. The fact remains that the respondent contested the appeal at length in full knowledge that the appellant had indicated his unwillingness to pay his own costs if he were successful.

The only factor which has led me to have some sympathy with the respondent is the fact that at the date when he was required to exercise his option he did not know the extent to which the rent would be increased. It seems to be admitted that he did not inquire, but he would no doubt say that he never dreamed of such an increase as that with which he was ultimately faced. In fact he was not informed what the rent would be until many months after the date fixed for the exercise of the option, but the length of the delay is immaterial: his position would have been no better if the delay had been only one day. I do not necessarily criticise him for not inquiring: he might not have been told had he inquired, for the Director was not under any obligation to fix a rent until the option had been exercised. Nor do I criticise the Crown's representatives for not notifying the appellant in advance what the rent would be. The position arose out of the very terms of the lease and the fact that it did arise does not mean that anyone acted discreditably. The respondent has a substantial interest in the result of this litigation and as a matter

of legal principle I cannot see that the difficulty in which he found himself is sufficient basis for our exercising our discretion so as to deprive the Crown of its costs. Whether the Crown will see fit to execute in respect of the whole sum which I think must be awarded is a matter which must be left to its advisers. Having said that I ought perhaps to say that had the respondent been successful I think we would have had to consider very carefully to what extent the argument on the appeal was unnecessarily prolonged and I think we might have had to give an express direction to the taxing officer to disallow the costs of copying the very large number of documents which were not even referred to in the course of the argument. Some of the documents are even in duplicate.

I cannot leave the case without mentioning the submission that as the Crown had not been compelled to engage additional permanent counsel to contest this case the appellant should not be allowed his costs. In the hope that we shall never hear such an argument again in this court I would say that I see no justification for allowing a private litigant to benefit from the fact that the Crown in Hong Kong sees fit to employ permanent counsel rather than to brief counsel in the ordinary way.

I would order that the respondent pay the costs here and below.

In the Supreme Court of Hong Kong

No.17A
Order of the Full Court - 23rd October, 1968.

No.17A
Order of the Full Court - 23rd October, 1968.

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IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.33 OF 1967

(On Appeal from Original Jurisdiction Action No.1382 of 1965)

- - - - -

B E T W E E N:

CHANG LAN SHENG — Appellant (Plaintiff)

and

THE ATTORNEY GENERAL — Respondent (Defendant)

- - - -

Sd. Simon Mayo
Assistant Registrar
13.11.68

BEFORE THE HONOURABLE MR. JUSTICE RIGBY, THE HONOURABLE MR. JUSTICE BLAIR-KERR AND THE HONOURABLE MR. JUSTICE HUGGINS.

The 23rd day of October 1968.

O R D E R

WHEREAS on the 25th day of September 1968 it was ordered that this appeal be allowed and that the matter of the costs both of the trial before the Honourable Mr. Justice Scholes and of this appeal do stand adjourned for further argument to an early date to be fixed by the Registrar UPON hearing Counsel for the Plaintiff and Counsel for the

Defendant AND UPON mature deliberation IT IS ORDERED -

1. that in lieu of the judgment for costs passed by the Honourable Mr. Justice Scholes the defendant do recover from the plaintiff costs to be taxed;

2. that the costs of this appeal be paid by the respondent to the appellant, such costs to be taxed by a Taxing Officer.

In the Supreme Court of Hong Kong

No.17A
Order of the Full Court - 23rd October 1968.
(Contd.)

Sd.
(L.S.) Assistant Registrar.

In the Supreme Court of Hong Kong

No.18
Notice of Motion - 1st October, 1968.

No.18
Notice of Motion - 1st October 1968

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IN THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.33 OF 1967
(On Appeal from Original Jurisdiction Action No.1382 of 1965)

- - - -

B E T W E E N:

CHANG LAN SHENG — Appellant (Plaintiff)

and

THE ATTORNEY GENERAL — Defendant (Respondent)

TAKE NOTICE that the Full Court will be moved on Wednesday the 2nd day of October, 1968 at 2:30 o'clock p.m. or so soon thereafter as Counsel can be heard by Counsel for the abovenamed Appellant FOR LEAVE TO APPEAL to the Privy Council against the judgments of the Full Court herein delivered on the 25th day of September 1968 as the matters in dispute are of the value of more than $5,000:00 and involves questions respecting property of more than $5,000:00 and/or the question is of great general and public importance AND for such further or other orders including such stay of execution as this Honourable Court shall think appropriate.

Dated this 1st day of October 1968.

(sd.) PETER MARK & CO.
Solicitors for the Appellant.

To: The Registrar of Supreme Court, Hong Kong; and
The Attorney General,
Hong Kong.

No.19
Order of the Full Court giving conditional leave to appeal to Her Majesty in Council - 5th October , 1968.

In the Supreme Court of Hong Kong

No.19
Order of the Full Court giving conditional leave to appeal to Her Majesty in Council 5th October 1968

IN THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.33 OF 1967
(On Appeal from Original Jurisdiction Action No.1382 of 1965)

B E T W E E N :

CHANG LAN SHENG — Applicant (Plaintiff)

and

THE ATTORNEY GENERAL — Respondent (Defendant)

BEFORE THE HONOURABLE MR. JUSTICE RIGBY, THE HONOURABLE MR. JUSTICE BLAIR-KERR AND THE HONOURABLE MR. JUSTICE HUGGINS.

THE 5TH DAY OF OCTOBER, 1968.

O R D E R

Upon hearing Counsel for the Applicant and Counsel for the Respondent and upon reading the Notice of Motion of the Applicant filed herein on the 1st day of October, 1968 and the Affidavit of Peter Wei Hing Mark filed herein on the 1st day of October, 1968 IT IS ORDERED THAT leave be granted to the abovenamed Applicant to appeal to Her Majesty the Queen in Her Privy Council against the Judgment of the Court herein dated the 5th day of October, 1968 conditional upon the Applicant's within 21 days from the date

In the Supreme Court of Hong Kong

No.19
Order of the Full Court giving conditional leave to appeal to Her Majesty in Council - 5th October 1968
(Contd.)

hereof entering into good and sufficient security in the sum of $15,000.00 to the satisfaction of the Registrar of the Court for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Applicant's not obtaining an Order granting him final leave to appeal or of the Appeal's being dismissed for non-prosecution or of Her Majesty in Council ordering the Applicant to pay the Respondent costs of the Appeal (as the case may be). AND IT IS ORDERED THAT the Applicant prepare and despatch to England the record of these proceedings within a period of three months from the date hereof AND IT IS ORDERED THAT any judgment which may be entered upon the Appeal to the Court whereby the Respondent shall be liable to pay the Applicant's costs or any part thereof shall be suspended until final disposal of the Appeal to Her Majesty in Council on condition that the Respondent do furnish to the Applicant a bank guarantee in terms to be approved by the Court for the payment of any such costs with interest at the rate of 8% per annum from the date of the allocatur of the Taxing Officer.

AND IT IS FURTHER ORDERED THAT there shall be general liberty to apply.

(Sealed by) (Sd.) S.H. Mayo

Assistant Registrar.

No.20

Order of the Full Court leave be granted to the applicant to correct an error and granted to extend the time of preparing and despatching to England the record of proceedings - 23rd December 1968.

In the Supreme Court of Hong Kong

No.20

Order of the Full Court leave be granted to the applicant to correct an error and granted to extend the time of preparing and despatching to England the record of the proceedings - 23rd December, 1968.

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IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.33 OF 1967

(On Appeal from Original Jurisdiction Action No.1382 of 1965)

- - - -

B E T W E E N:

CHANG LAN SHENG — Applicant (Plaintiff)

and

THE ATTORNEY GENERAL — Respondent (Defendant)

- - - -

BEFORE THE HONOURABLE MR. JUSTICE RIGBY, THE HONOURABLE MR. JUSTICE BLAIR-KERR AND THE HONOURABLE MR. JUSTICE HUGGINS.

DATED THE 23RD DAY OF DECEMBER 1968

O R D E R

Upon hearing Counsel for the Applicant and Counsel for the Respondent And upon reading the Notice of Motion of the applicant filed herein on the 20th day of December, 1968 and the affidavit of Peter Wei Hing Mark filed herein on the 20th day of December, 1968 IT IS ORDERED THAT leave be granted to the applicant to correct an error found in the Order dated the 5th day of October, 1968, by deleting the words "5th day of October, 1968" appearing in the 8th line of the said Order and substituting thereto the words "25th day of September, 1968" AND IT

In the Supreme Court of Hong Kong

No.20

Order of the Full Court leave be granted to the applicant to correct an error and granted to extend the time of preparing and despatching to England the record of proceedings - 23rd December 1968.

(Contd.)

IS FURTHER ORDERED THAT the time granted to the Applicant to prepare and despatch to England the record of the proceedings be extended by one month as from the 4th day of January, 1969. No order as to costs of this application.

(Sd.) S.H. Mayo
Assistant Registrar.
(L.S.)

No. 3 of 1969

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 33 OF 1967
(On appeal from Original Jurisdiction Action No. 1382 of 1965)

BETWEEN

CHANG LAN SHENG — **Appellant**

- and -

THE ATTORNEY GENERAL — **Respondent**

RECORD OF PROCEEDINGS

Volume II

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Solicitors for the Respondent