Privy Council Appeal No. 3 of 1969

Chang Lan Sheng - - - - - - - - *Appellant*

v.

The Attorney General - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL 1970

Present at the Hearing:

LORD HODSON

LORD GUEST

LORD WILBERFORCE

[*Delivered by* LORD WILBERFORCE]

This appeal is from The Supreme Court of Hong Kong (Appellate Division) whose unanimous judgment reversed a decision of Scholes J. in the Original Jurisdiction of the Supreme Court.

The question for decision is whether the Director of Public Works of Hong Kong has acted correctly in fixing a rent for a property at Carnarvon Road, Kowloon, of which the appellant is the lessee. The action was brought by the appellant against the Attorney General representing the Crown in its right of Government of Hong Kong.

The history of this matter goes back to 1888, when by a lease dated 3rd October of that year the Crown demised to John David Humphreys Kowloon Inland Lot No. 539 for 75 years from 24th June 1888 in consideration of a premium of $528 and an annual rent of $484. Lot No. 539 was later subdivided into a number of sections of which one is Kowloon Inland Lot No. 3,793, the property the subject of the action. In 1936 Madam Maria Chu de Yau had become the lessee by assignment of Lot No. 3,793. It appears that at that time the rent of Lot No. 539, or of some sections of it, was in arrear. An arrangement was made by which the Crown re-entered and offered new leases to the lessees of the separate sections. Lot No. 3,793 was demised to Madam Chu de Yau for 75 years from 24th June 1888 in consideration of a rent of $76 per annum: in addition it appears, and is agreed, that Madam Chu de Yau paid a premium of $1,238·38. This new lease contained an option for renewal which was in the following terms:

> " Provided also and it is hereby further agreed and declared that the said Lessee shall on the expiration of the term hereby granted be entitled to a renewed Lease of the premises hereby expressed to be

demised for a further term of SEVENTY FIVE YEARS without payment of any Fine or Premium therefor and at the Rent hereinafter mentioned and that His said Majesty will at the request and cost of the said Lessee grant unto him or them on the expiration of the term hereby granted a new Lease of the said premises for the term of Seventy five years at such Rent as shall be fairly and impartially fixed by the said Director as the fair and reasonable rental value of the ground at the date of such renewal."

This lease was assigned to the appellant by Madam Chu de Yau on 27th January 1948.

In February 1963, in which year the appellant's lease was due to expire, the appellant exercised the option to renew. In December 1964 he was informed that the rent payable on the renewal would be $60,764 per annum. On 17th June 1965 he commenced the present proceedings, in which he sought various declarations to the effect that the rental value for his property had not been fixed in accordance with the terms of the proviso quoted above. Scholes J. after prolonged hearing decided in his favour on the ground that, although in the proviso it was stated that no fine or premium was to be payable the rent had been fixed in a manner which involved taking a premium into account: for this reason the rent was not fair or reasonable. He also held that a reasonable rent ought to be some rent below the full market rental value and that the Director, in taking the latter, had not acted in accordance with the terms of the proviso. The respondent appealed to the Supreme Court (Appellate Jurisdiction) which reversed the learned judge's decision and dismissed the action.

Before they examine the manner in which the rent was fixed by the Director of Public Works, their Lordships will refer shortly to the manner in which the Crown in Hong Kong has for many years disposed of land in the Colony. This was described in some detail in a memorandum of the Superintendent of Crown Lands which was produced at the trial. From this it appears that from 1851, in consequence of a despatch from the Secretary of State, it became the practice to offer Crown lands for lease at a moderate rent and that any competition for such lands should be in the amount offered by way of premium for the lease at the rent so fixed. Between 1875 and 1880 it became the practice to grant leases for 75 years without the option of renewal: about 1898 the standard period became 75 years renewable for a further 75 years at a rent to be fixed in a manner similar to that set out in the proviso.

The " moderate rent " above referred to appears to have been fixed on a uniform basis for prescribed districts or zones and was known as Zone Crown Rent. Rents of this kind, with the fall in the value of money and the rise in property values, have for some time ceased to bear any relation to the values of the properties affected. They have been the subject of periodic increases: in the area in which the appellant's leased property is situated, namely Tsimshatsui, the current Zone Crown Rent is $5,000 per acre which gives, for the appellant's property, $378 per annum. But it is no doubt correct to describe, as the memorandum does, even these revised rentals as " low Arbitrary Zone Crown Rents ". It was the main contention of the appellant at the trial that the new rent payable throughout the 75 year extension period should be at the figure just quoted.

The new rent, as stated, was fixed at $60,764 per annum which represents about 800 times the annual rent paid for the first 75 years. The witnesses called for the respondent explained in detail how this was arrived at. Because of the nature of the system of land tenure, and the manner in which leases had been granted, it was not possible to arrive at a figure by the use of " comparables ". There was only one property which could be

regarded as similar, namely a plot also in Carnarvon Road, opposite the appellant's property: but the rent for that had been fixed according to the same method as that adopted in relation to the appellant's property and it was this method that was being challenged.

The method adopted by the Director was to ascertain the capital value of the appellant's property, *i.e.*, the capital sum which would be paid for a lease at the current Zone Crown Rent of $378 per annum for 75 years. For this purpose he placed upon the appellant's land a value of $375 per square foot; its area was 3,293 square feet so that the capital value was (by simple multiplication) $1,234,875. This figure was then "decapitalised" *i.e.*, converted to an income figure spread over 75 years. A 5% rate of interest was taken and from valuation tables, and, after certain adjustments, a multiplier of 0·0489 was arrived at, which when applied to the capital sum produced $60,386. To this was added the Zone Crown Rent namely $378 making the total of $60,764.

At the trial a number of criticisms were made by the appellant of the manner in which the new rent was fixed and of the Director's procedure. These were meticulously examined both by the trial judge and by the learned judges on appeal. Before their Lordships only three were persisted in, and their Lordships' examination will be confined to them: in view of the ample discussion of these points in the courts below, their Lordships are able to deal with them fairly concisely.

The first point arises out of the words in the proviso "without payment of any fine or premium". The appellant's contention is that the capital sum of $1,234,875 referred to above, represents nothing other than a premium, it being, as it admittedly is, the sum which a purchaser would pay for a 75 year lease of the property at $378 per annum. To have charged the lessee with this sum, as a condition of a new lease, would be contrary to the express terms of the proviso. It is said to be equally contrary to the proviso to charge the lessee with the annual equivalent of this sum spread over 75 years.

It is to be observed that this argument, superficially attractive, leads to a remarkable result: for, if it is correct, it ought logically to follow that the appellant is entitled to a new lease at the Zone Crown Rent—a derisory sum. This was the appellant's contention at the trial, yet the learned trial judge, though accepting his argument, did not accept the consequence, since he declined to fix either that or any figure for the rent and merely remitted the matter to the Director. This course was also urged upon their Lordships. The fact that the logical conclusion appears so generally unacceptable must cast some doubt on the validity of the argument.

In fact, in their Lordships' opinion, the argument is fallacious. What is called a premium, is merely a description, and a reflection, of the fact that the rent payable by the lessee is less than the market, or full, or fair (for present purposes no distinction need be made between these terms) rent for the property. It was so described by Warrington L.J. in *King v. Cadogan* [1915] 3 K.B. 485, 492. Indeed the consideration payable for a lease of any property may be expressed, in varying proportions in terms of a capital sum, called premium, and an annual sum called rent, according to a spectrum from a peppercorn rent plus a large capital sum to a rack rent plus a nominal or zero capital sum. In the present case, the proviso requires the Director to fix "the fair and reasonable rental value of the ground". Clearly the Zone Crown Rent was not a value of this description so some additional consideration fell to be paid by the lessee to represent the difference between the Zone Crown Rent and the fair and reasonable rental value. This difference is capable of being expressed either as a capital sum, or as an additional rent, or as a combination of both. And

in their Lordships' opinion all that the proviso requires is that it should not be expressed, either wholly, or even in part, as a capital sum. To go further and say that the lessee was not to pay such additional rent as when added to the Zone Crown Rent would make up a fair and reasonable rent, would be to defeat entirely the purpose of the clause. And their Lordships cannot agree that the fact, that one of the factors used in calculating the annual rent was a capital sum, entitles the lessee to claim that the annual rent ultimately fixed was in any sense a premium. It was simply a rent. Their Lordships cannot agree with the learned trial judge in acceptance of this argument.

The appellant's second contention was that the Director had erred in not taking account, in fixing the new rent, of the existence of the right of renewal contained in the proviso. This should, the appellant argued, have been regarded as analogous to a charge or incumbrance, and the capital value, or the rental value, of the property should have reflected its existence. This argument was advanced by the appellant in both courts below and by both was summarily rejected, in their Lordships' view rightly so. If a man enters into a binding contract to aquire property at a fair price to be assessed, he could hardly expect serious consideration to be given to an argument that the mere existence of the contract should have any effect on the price, or in any way operate to reduce it. If a man has, instead of a binding contract, an option, which if exercised, produces a binding contract, how can the position be different? What ground can there be for fixing any price other than what the contract, or option, as the case may be, prescribes? Their Lordships are quite satisfied on this point to adopt the reasoning, including a homely but useful illustration, of the courts below: this contention must fail.

The third argument of the appellant was more substantial. The Director, it was said, had fixed the rent by reference to what a willing purchaser would be prepared to pay, *i.e.*, by reference to full market value. But the proviso requires the Director to fix a " fair and reasonable rental ". The use of these words indicates, it was claimed, an intention that the standard should be something other than the full market value, and, since the proviso was evidently intended to confer a benefit on the lessee, that it should be lower than the full market value. To support this argument the appellant relied on the decision in the English Court of Appeal in *John Kay Ltd. v. Kay and Another* [1952] 2 Q.B. 258. This was a case under the Leasehold Property (Temporary Provisions) Act 1951 by which a certain class of tenants was entitled to apply for a new tenancy " for such period, at such rent and on such terms and conditions as the Court in all the circumstances thinks reasonable ". The trial judge had found what the rental in the open market would be and had fixed a lower rent: the question on appeal was whether he was entitled to do so. The Court of Appeal held that he was. The key to the decision may be found in a passage in the judgment of Lord Evershed M.R. where he said:

> " The market value of certain premises is one thing, and as I read this Act . . . the ' reasonable ' rent may be something different."

He held in effect that the judge was entitled in the circumstances—viz. of the post-war shortage of housing—to hold that it was different. The approach of Jenkins L.J. was similar: he said that " that form of words (as the Court in all the circumstances thinks reasonable) was plainly used with the intention of giving the court the greatest latitude in the matter and not tying it down to the figure found to represent the actual contemporary letting value in the open market ".

Their Lordships fully accept what was there said: but it would be a misunderstanding of them to read either of these passages as saying that in

all cases, by definition, a reasonable rent must be something different from the full market rent. It must be obvious that whether a full market rent is " reasonable " or " fair " depends upon the nature and condition of the market. In many cases the market is the only, or at least the best test of what, between bargaining parties is fair: and though in certain areas, particularly perhaps that of landlord and tenant, distortions may occur in the market, the fact that this is so, and that the courts recognise it, is not sufficient foundation for a general rule that fairness and market value are necessarily different. As illustrations of the varying manner in which these criteria may be related, their Lordships would refer to *Eales v. Dale and Another* [1954] 1 Q.B. 539 and *Talbot v. Talbot* [1968] Ch. 1.

Their Lordships in the Court of Appeal were saying no more than that the trial judge was justified in the context and on the wording of the statute in finding that the market value was not necessarily the test of what was reasonable. Thus the case of *John Kay Ltd. v. Kay and Another* (*ubi sup.*) in their Lordships' opinion, provides no support for an argument that the use of the words " fair and reasonable ", in this contractual context, of themselves required a rent to be fixed which differed from the market rent.

But this is not the end of the matter. The words used are " fair and reasonable " and since, as has been shown, there is no necessary identity between the market value and what is fair and reasonable it would be open to the appellant to show, if he could, that the Director had not fixed the rent in accordance with the required criteria. If nothing more appeared than that the Director had fixed the full market rent, he could contend, with some prospect of success, that the assessment was vitiated and should be set aside. But the appellant was unable to show this. Their Lordships considered the evidence given on the Director's behalf by Mr. Lyons, Senior Estate Surveyor in the Hong Kong Government, an official of great experience. This gave full and explicit details concerning the manner in which he fixed the rent. Certainly he took as a starting point the capital sum which would be paid in the market for a lease of the property—arriving (as explained above) at $1,234,875. But then he had to arrive at an annual rent, which would produce this sum over the rental period of 75 years, and for that purpose to select a rate of interest. His evidence shows that in carrying out this operation he paid regard to what the lessee fairly and reasonably ought to pay, that he considered what return the lessee might expect to gain for his expenditure on buildings and correspondingly what return the Government would be obtaining; that he took as his rate of interest 5%, which was very low by comparison with rates prevailing in Hong Kong, and that the multiplier appropriate for that rate was further reduced to allow for the payment of rent in advance. The appellant called no expert evidence to put forward figures opposed to those of Mr. Lyons, or to criticise the latter. The position therefore as their Lordships see it is that the Director, through Mr. Lyons, gave proper consideration to the question what rent should be regarded as fair and reasonable to both lessor and lessee and that no evidence was called to show that the results of this consideration were in themselves wrong. All that was shown was that there was a minor inaccuracy in the ultimate figure through the use of four places of decimals instead of six places, but, in agreement with the Supreme Court (Appellate Division) their Lordships regard this as minimal, and in any event as falling outside the reviewing function of the Board (see *Aik Hoe & Co. Ltd. v. Superintendent of Lands and Surveys* [1969] A.C.1).

In their Lordships' opinion the appellant's attack on the rent fixed by the Director fails and their Lordships will humbly advise Her Majesty that the appeal should be dismissed. In accordance with an agreement of the parties no order as to costs is required.

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In the Privy Council

CHANG LAN SHENG

v.

THE ATTORNEY GENERAL

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LORD WILBERFORCE

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