

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

HANG WAH CHONG INVESTMENT  
COMPANY LIMITED

Appellant

- and -

THE ATTORNEY GENERAL OF  
HONG KONG

Respondent

10

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by leave of the Supreme Court of Hong Kong given on the 25th day of April 1980 from an Order of the Court of Appeal of Hong Kong (Huggins J.A. Cons and Zimmern JJ.) dated the 31st day of October 1979, dismissing with costs the Appellant's appeal from an Order of Yang J. in the High Court of the Supreme Court of Hong Kong dated the 18th day of August 1978 whereby it was ordered that the declarations sought by the Appellant be refused with costs to the Defendant.

P. 208

p. 195

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2. The declarations sought by the Appellant were:-

"(1) A Declaration that the Plaintiff as the owner of Kowloon Inland Lot No. 2657 Section Dss 1 and 2 and the Remaining Portion ("the said premises") is entitled to proceed with the redevelopment of the said premises by constructing thereon 4 blocks of flats for residential purposes in accordance with plans submitted to and approved by the Building Authority by letter dated 26th October 1976 under reference 2/4299/76.

p. 1

lines 30-36

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(2) A Declaration that for the purposes of the said proposed redevelopment no modification of lease conditions is required.

p. 1

lines 36 &  
37

RECORD

- p. 1 lines  
38 & 39 (3) A Declaration that the Crown is not entitled to charge the Plaintiff any premium for the purpose of the said redevelopment.
- p. 2 lines  
1 - 4 (4) A Declaration that no further approval of the Director of Public Works is required for the erection on the said premises of :-  
  
(a) the type of building comprised in the said proposed redevelopment; or  
  
(b) buildings of the height of the said proposed redevelopment. 10
- p. 2 lines  
5-8 (4A) A Declaration that the Director of Public Works by approving the plans referred to in Paragraph 1 hereof has approved inter alia the design of the exterior elevations plans height and disposition of the buildings comprised in the said proposed redevelopment.
- p. 2 lines  
9 & 10 (5) A Declaration that no consent of the Governor is required for the purpose of the said redevelopment.
- p. 2 lines  
11-15 (6) A Declaration that upon a true construction of Special Condition 6 incorporated in the Conditions of Sale No. 3121 of 16th November 1931 the expressions "detached or semi-detached residential premises of European type" and "a private dwelling house" include flats or blocks of flats constructed or to be constructed upon the said premises for residential occupation only. 20
- p. 2 lines  
17-25 (7) A Declaration that the Crown has expressly or by conduct  
  
(a) Released the said Special Condition 6 to the extent that the Owners for the time being of KIL 2657 alternatively the Owners for the time being of the said premises may erect blocks of flats thereon and use the same for residential purposes, without obtaining any further consent or approval of the Crown or obtaining any modification of Lease Conditions. 30  
  
(b) Waived the right to object to or acquiesced in the erection on the said lot or premises of blocks of flats for residential use. 40

- (8) A Declaration that the Director of Public Works has expressly or by conduct approved generally of the erection on the said Lot or premises of blocks of flats of European type for residential purposes. p. 2 lines 25-27
- (9) A Declaration that the Crown and/or the Director of Public Works is now estopped by conduct from objecting to the erection on the said Lot or premises of blocks of flats of European type for residential purposes." p. 2 lines 27-30
- 10
3. The following facts in this case were not in dispute :
- (a) On the 16th November 1931 the Hong Kong Government offered for sale by public auction the lessee's title under the Crown Lease for Kowloon Inland Lot No. 2657 which comprised of about 1,330,000 square feet located at the junction of Argyle Street and Waterloo Road, Kowloon. The term of the Crown Lease was 75 years with an option of renewal for a further term of 75 years. The offer was made subject to the Particulars and Conditions of Sale which had been registered at the Land Registry. p. 5 and p. 11
- 20
- (b) Included in the Conditions of Sale was a condition (Condition 9) that the Purchaser should build within five years a building or buildings upon the lot to the minimum value of HK\$500,000 in rateable improvements although the Director of Public Works had a discretion to extend the five year period. Under condition 14 the Crown had the power to (inter alia) resell the property in the event of any failure to comply with the Conditions of Sale. p. 11 lines 25-33 p. 11 lines 14&15 p. 5 pp. 11-18
- 30
- (c) Included in the Conditions of Sale were various conditions referred to as "Special Conditions of Sale". The latter include the following conditions: p. 13 lines 25-40
- "6 Save as provided herein the Purchaser shall not erect on the Lot any buildings other than detached or semi-detached residential premises of European type or such other buildings of European type as the Director of Public Works may approve of with garages and all proper outbuildings thereto. Provided that, subject to the provisions of Special Conditions 7 and 8, the Purchaser shall be at liberty to erect flats, with or without shops or self-contained p. 14 lines 32-44
- 40

RECORD

garages on the ground floor, fronting to Argyle Street and Waterloo Road on that part of the Lot hatched red on the sale plan and having a frontage of approximately 350 feet to Argyle Street and approximately 125 feet to Waterloo Road.

Save as herein provided no buildings erected on that Lot shall be used otherwise than as a private dwelling-house without the written consent of the Governor.

p. 16 lines 28-31	7. The design of the exterior elevations plans height and disposition of any buildings to be erected on the Lot shall be subject to the special approval of the Director of Public Works and no building shall be erected on the Lot save in accordance with such approval.	10
p. 16 lines 32 and 33	8. The purchaser shall not without the written consent of the Governor erect any building whatsoever within 20 feet of Argyle Street or Waterloo Road.	
p. 18 lines 30-33	...21. Where under these conditions the consent or approval of the Governor or of the Director of Public Works is required the grant or withholding of such consent shall be in the absolute discretion of the person (Illegible). "	20
	(d) Special Condition 8 has no relevance to the facts of the present case.	
p. 5 lines 34-40 p. 19 lines 13 and 14	(e) The Lot was purchased at auction by the Hong Kong Engineering and Construction Company Limited for a premium of HK\$326,000 and that company entered into a memorandum of agreement with the Crown. Under the memorandum of agreement the purchaser agreed to become the lessee of the Lot for a term of 75 years from the 16th of November 1931, renewable for one further term of 75 years, under and subject to the Conditions of Sale and to perform and abide by those conditions.	30
pp. 20 & 21 p. 15	(f) In 1937 the purchaser and the Crown agreed by memorandum of agreement to vary Special Condition 1 which related to assignment of the Lessee's interest or parts thereof to allow assignment on certain specified conditions.	
pp. 6-9	(g) Kowloon Inland Lot No. 2657 was subsequently sub-divided and further sub-divided with parts of the Lot being assigned and in turn re-assigned to various successors-in-title.	40

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- 10 (h) The Appellant is the successor-in-title in respect of Section D sub-sections 1 and 2 of the original Lot plus the "remaining portion" of that Lot. This parcel (which is now known as "Grand Court") is located at 109 to 135 Kadoorie Avenue, Kowloon. The relationship of this parcel to the original Lot can be seen from an inspection of exhibit "A. L. K. F. -6" to the Affirmation of Andrew Lee King-Fun of the 24th of June 1978. The name "Grand Court" dates from about 1954 when the building presently occupying the site was constructed. pp. 9 lines 1-7 and P. 5 lines 22-25 and pp. 61-64 p. 146
- 20 (i) On or about the 31st December 1953 the Appellant's immediate predecessor-in-title (The Sun Hsing Company Limited) obtained approval from the offices of the Director of Public Works (in a letter signed "pro Building Authority") to the construction on the subject site of buildings "with roofs at a level not higher than the roof level of Hillview Apartments". Hillview Apartments are located near to the subject site and within Kowloon Inland Lot No. 2657. The height of the roof level of Hillview Apartments is 118 feet above the Principal Datum used by the Public Works Department for the Colony, i. e. approximately seven storeys. p. 85 p. 160 lines 1-8
- 30 (j) The Sun Hsing Company Limited constructed in 1954 the building known as Grand Court which is a seven storey structure containing 86 flats. This building does not rise above the roof level of Hillview Apartments. On or about the 23rd of September 1955 the Building Authority granted an occupation permit to the Sun Hsing Company Limited in respect of Grand Court in which the Building Authority stated that the building "complies in all respects with the provisions of the Buildings Ordinance (Chapter 123 of the Revised Edition, 1950) and that it is structurally safe". Provision was given to occupy and use the building for domestic purposes. Grand Court has been used as an apartment block since 1955. The Colonial Treasurer Incorporated, which is part of the Crown, is presently a tenant of several flats in Grand Court. p. 147 (Item "A") p. 88 p. 163 lines 20-27 p. 163 lines 27-33
- 40 (k) By an assignment dated the 30th day of March 1973 the Sun Hsing Company Limited assigned its interest in Section D, subsections 1 and 2 and the remaining portion of Kowloon Inland Lot No. 2657 (i. e. Grand Court) to the Appellant. p. 9 lines 1-7
- (l) On or about the 20th June 1973 a representative of the Appellant informed the Crown Lands and Survey p. 92

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- pp. 93 & 94      Office (part of the Public Works Department) that the Appellant intended to redevelop the Grand Court site by demolishing the present building and replacing it with three twelve-storey blocks of flats with three flats per floor. He enquired whether any modification premium would be payable. On or about the 23rd of August 1973 the Director of Crown Lands and Survey replied that he would be prepared to recommend a modification of the Conditions of Sale governing the Grand Court property upon certain specified terms including the payment of a premium to the Government. The Director of Crown Lands and Survey emphasised that he could not bind the Government at that time. 10
- p. 90      (m)      The Hong Kong Government's policy on premium for modification at the time was stated in the "Land Office Circular Memorandum No. 39" which provided that for applications for modification of a Crown Lease of pre-war lots received before the 1st July 1973 the premium exacted by the Government would be 50% of the amount by which the value of the lot is increased as a result of the modification. For applications received after the 1st July 1973 the premium would be the whole amount by which the value of the lot is increased as a result of the modification. This policy was brought to the notice of the Appellant's predecessor-in-title on the 12th April 1973. 20
- p. 91
- p. 92      (n)      The Appellant's real estate representative wrote to the Crown Lands and Survey Office, Modification Section on the 20th of June 1973 stating that the Appellant intended to redevelop the lot in question by building three twelve-storey blocks of flats with three flats per storey. It was contended that no modification premium was payable but that should the Government disagree then that letter was to be treated as an application for the purposes of the "Land Office Circular Memorandum No. 39" 30
- p. 93 & 94      (o)      The Director of Crown Lands and Survey replied by letter of the 23rd of August 1973 that he was "prepared to recommend a modification by way of contemporaneous exchange of the Conditions of Sale governing (the lot)" on certain conditions including "(viii) Payment of a premium". He pointed out that he could not commit the Government at that time. 40
- p. 98 & 99      (p)      By letter dated the 30th of October 1973 to the Director, Crown Lands and Survey Office the Appellant's real estate representative Fleming contended that no modification was required and

only a nominal premium could be charged by way of a nominal administration fee. Amendment to the terms of modification was sought.

pp.99 lines  
10-14

(q) The reply was that modification was granted in 1953 only to the extent of the existing development (i. e. Grand Court) and modification would be granted at a premium calculated on the basis of the difference between the gross domestic floor area to be permitted and that presently existing.

p. 100

10 (r) On the 29th of May 1974 Fleming wrote to the Appellant's architect Ho advising that the Crown had "in our opinion assessed a premium which we consider reasonable".

p. 106

20 (s) On the 26th of July 1974 Ho wrote to the Chief Estate Surveyor of the Crown Lands and Survey Office and contended that "the premium of \$3,216,000 is too high to be realistic" and that he had achieved a lower figure based on a sale price of \$280 per square foot of floor area. He sought an opportunity to discuss the question of premium with the Chief Estate Surveyor. Otherwise he accepted on the Appellant's behalf, the terms of modification.

p. 109

30 (t) By letter of the 28th of October 1974 the Chief Estate Surveyor reduced the premium to \$3,077,000.00 and made the Crown's offer of modification conditional upon acceptance within one month. The offer was not accepted and the Chief Estate Surveyor notified the Appellant's architect Ho that the offer had been withdrawn and that the 50% modification premium concession was no longer available in respect of the lot in question.

p. 111

p. 112  
p. 113

40 (u) On the 25th of August 1976 the Appellant applied for the approval of plans which were submitted with the application to the Building Authority. The application was made under the Buildings Ordinance (Chapter 123 of the Laws of Hong Kong) and the Building (Administration) Regulations made thereunder. In the application the Appellant sought approval of the plans, certified that they had been prepared by Lee King Fun, and gave notice that Lee King Fun had been appointed as the "authorized person". As the "authorized person" Lee King Fun became the person responsible for the co-ordination of the proposed works under Part I of the Buildings Ordinance. Under Section 14(1) of that Ordinance Building works must not be commenced without the builder having first obtained the consent of the Building Authority to the plans for those works. Under

p. 65 lines  
23-36  
pp. 68-75  
p. 76 & 77

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Section 40 of the Buildings Ordinance it is an offence to contravene Section 14(1). Section 2(1) of the Buildings Ordinance provides, inter alia, that in that Ordinance unless the content otherwise requires 'Building Authority' means the Director of Public Works'.

pp.73 & 77 (v) The plans which were submitted provided for the construction on the Grand Court site of four blocks of flats; three of which would be seventeen-storeys in height and one of which would be fourteen-storeys in height - each block being constructed over two storeys of basement car-parks (the final sentence of the third paragraph of the affirmation of Andrew Lee King Fun is incorrect - as can be seen from the exhibit to which he refers therein). 10

p. 65 lines 33-37

p. 73

p. 78 (w) On the 26th of October 1976 the Building Authority approved the plans that had been submitted and drew the Appellant's attention to Section 14(2) of the Buildings Ordinance which provides, inter alia, that the approval of plans by the Building Authority does not exempt the applicant from obtaining the Building Authority's approval to the commencement and carrying out of the building works. The notice of approval of plans was forwarded with a letter dated the 26th of October 1976 from the Building Authority to Lee King Fun, as "authorized person", in which the Building Authority reminded Lee of his duties as "authorized person" and informed him that : 20

pp. 79 & 80

"Form 12 indicating approval of your proposals, and one set of plans are enclosed herewith. Will you please draw the contents of this letter to the attention of your client? This approval is given subject to Section 14(2) of Buildings Ordinance. It is noted that a modification of the Lease Conditions is required in order to permit the development you propose and you should therefore advise your client to apply for such modification before proceedings further." 30

p. 201 lines 32-35 (x) Section 14(2) of the Buildings Ordinance provides : 40

"Neither the approval of any plans nor the consent to the commencement of any building works or street works shall be deemed . . . . . (b) to act as a waiver of any term in any lease or licence . . . . ."



(y) Between the 2nd of December 1976 and the 21st of November 1977 there was a series of correspondence between the Appellant's Solicitors and the Registrar General (whose duties include advising the Public Works Department on land matters). The correspondence contains an exchange of arguments on the law and merits of this case. On the 13th of July 1977 the Registrar General wrote :

pp. 122-145

pp. 140 & 141

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"In fact even at this stage, I can only deal with what Government believes to be the legal position under the lease conditions, which is as follows :

p. 140 lines  
16 & 17

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....(5) There has been no waiver of any of the restrictions in the Conditions of Sale in favour of your client. This is because the present block of flats on the above site was specifically approved by the Director of Public Works under Special Condition 6 of the Conditions of Sale by his letter of the 31st December 1953 addressed to the Solicitors then acting i. e. the present block of flats, having been specifically approved by the Director under the provisions of Special Condition 6, is not now, and was never, in breach of the Conditions of Sale. There can therefore be no question of any waiver."

p. 140 line 36  
to p. 141  
line 5

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4. It has not been contended at any time in the Court of Appeal or in the High Court that the Conditions of Sale of 1931 do not run with the land and bind the successors-in-title to the Hong Kong Engineering and Construction Company Limited in the same way as they bound that company.

5. The questions raised by this appeal are :-

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(a) does Special Condition 6 prohibit the Appellant from building blocks of flats without the approval of the Director of Public Works?

(b) if the answer to (a) is "yes", has the Director of Public Works in fact approved of the building of blocks of flats as a class so that the Special Condition 6 prohibition is now spent?

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- (c) has the Director of Public Works in fact or in law given his "special approval" to the design of the exterior elevations plans height and disposition for the purposes of Special Condition 7 for the redevelopment of Grand Court by the Appellant in the way proposed in the Appellant's application to the Building Authority of the 25th August 1976?
- pp. 192-194 6. In his judgment on the 18th August 1978 Yang J. held that :-
- p. 193 lines 12-19 (a) buildings of flats fall within the prohibition in Special Condition 6 : Wong Bei-nei v. The Attorney General [1973] H.K.L.R. 582; 10
- p. 193 lines 20-30 (b) the Crown has either expressly or impliedly given permission to the Plaintiff to construct flats up to seven storeys; the permission was not a blanket permission for all times but was restricted to the construction of Grand Court; subsequent redevelopments were not exempted by the letter of the Building Authority dated the 31st of December 1953 : Wong Bei-nei v. The Attorney General (page 597); 20
- p. 193 lines 31 & 32 (c) because there has been no breach of Special Condition 6 no question arose concerning waiver by the Crown of that condition or acquiescence by the Crown in the breach of that condition;
- p. 193 lines 32-40 (d) on the facts of the case the decision in Chatsworth Estates v. Fewell [1931] 1 Ch. 224 did not apply;
- p. 194 (e) the Director of Public Works has neither in fact nor in law approved the height of the proposed buildings for the purposes of Special Condition 7. Because of Section 14(2)(b) of the Buildings Ordinance and the requirement in Special Condition 7 that the "special approval" of the Director of Public Works be obtained: the Building Authority's approval of the plans for the redevelopment was not approved under Special Condition 7. 30
- p. 2 lines 8-10 7. (a) In paragraph 5 of the Plaintiff's Amended Originating Summons the Plaintiff claimed : "A Declaration that no consent of the Governor is required for the purpose of the said redevelopment." The claim relates to the final two lines of Special Condition 6 which provide "Save as herein provided no buildings erected on the Lot shall be used otherwise than as a 40
- p. 16 lines 26 & 27

private dwelling-house without the written consent of the Governor". Special Condition 21 provides that the Governor's consent may be withheld in his absolute discretion. Yang J. made no finding on this claim. The Appellant did not include in the grounds of its Notice of Appeal any complaint in respect of this issue and no argument was addressed to the Court of Appeal in respect of it.

p. 18 lines  
30-33

10 (b) No argument based on the decision of Farwell J. in Chatsworth Estates Company v. Fewell [1931] 1 Ch. 224 was advanced in the Court of Appeal despite paragraph ten of the Notice of Appeal.

p. 197

8. By a notice of appeal dated the 26th of September 1978 the Appellant appealed to the Court of Appeal of Hong Kong.

pp. 196-198

9. The appeal came before Huggins, J.A., Cons and Zimmern JJ.

10. In outline, the submissions made on behalf of the respective parties were :-

20 (A) The Appellant

(i) The blocks of flats proposed for construction came within the phrase "detached or semi-detached residential premises of European type" found in Special Condition 6 so that the approval of the Director of Public Works under that condition is not required. A block of flats can be "detached or semi-detached residential premises of European type". The proviso to Special Condition 6 relates to "flats with or without shops or self-contained garages on the ground floor" and not to "flats" alone so that the maxim expressio unius est exclusio alterius is inapplicable.

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The case of Wong Bei-nei v. The Attorney General [1973] H.K.L.R. 582 was wrongly decided and is distinguishable in any event.

(ii) Alternatively, if the approval of the Director of Public Works to the erection of the blocks of flats is required then that approval was given by his letter of the 31st of December 1953 when he consented to the erection of Grand Court because he thereby consented to the construction on the site of flats as a class.

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- (iii) Alternatively, if the Director of Public Works did not give his approval under Special Condition 6 to the erection of Grand Court then by allowing the building to be erected on the property in breach of Special Condition 6 and by allowing the building to remain on the property for well over twenty years the Crown has waived the requirements of Special Condition 6.

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Hepworth v. Pickles [1900] 1 Ch. 108;

Gibson v. Doeg (1857) 2 H. & N. 615;

Chinachem Investment Co. Ltd. v. Chung Wah

Weaving and Dyeing Factory Ltd. [1978] H. K. L. R. 83.

- (iv) The Director of Public Works has given his "special approval" to the height of the proposed buildings for the purposes of Special Condition 7 by the approval to the building plans given by the Building Authority on the 26th of October 1976 because of Section 2 of the Buildings Ordinance whereby the Building Authority is the Director of Public Works. By his letter of the 26th of October 1976 the Building Authority showed that he in fact approved of the height of the proposed buildings. No particular formalities of approval are required.

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"Hudson's Building Contracts"  
(10th ed.) 478.

- (v) (a) Alternatively, if the Director of Public Works has not given his "special approval" to the proposed buildings then he is wrongfully withholding his approval for the purpose of extracting premium from the Appellant. The Director of Public Works is not entitled to withhold approval to a lawful project of which he in fact approves.

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(b) The legal consequence of the actions of the Director of Public Works is that the Appellant should be placed in the position he would have been in had the approval been given. The Court can dispense with his approval.

Dallman v. King (1835-42) All E. R. 411

English and Empire Digest, Vol. 31,  
para. 6588

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Panamena Europea Navigacion (Compania Limitada) v. Frederick Leyland and Company Ltd. [1947] A. C. 428

(c) The withholding of approval under Special Condition 7 for the purpose of extracting premium is an unreasonable exercise of the power of the Director of Public Works. He has acted upon a consideration which is wholly irrelevant to his responsibilities under Special Condition 7. He is not a revenue collector. His powers under Special Condition 7 are not unlimited.

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Padfield v. Minister of Agriculture, Fisheries and Food [1968] A. C. 997;

Chan Yat-san and others v. The Attorney General [1975] H. K. L. R. 503.

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(d) The case of Crozet Ltd. and others v. The Attorney General (unreported Decision of Briggs, C. J. dated the 8th of April 1974) was wrongly decided. It is distinguishable in any case because of the decision in Chan Yat-san v. The Attorney General [1975] H. K. L. R. 503.

(e) The Public Health and Buildings Ordinance of 1908 was in force in 1931 and it contained provisions substantially the same as those provisions now contained in Section 16 and Section 2 (definition of "Building Authority") of the Buildings Ordinance.

(B) The Respondent

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(i) Blocks of flats cannot come within the phrase "detached or semi-detached residential premises of European type" found in Special Condition 6

because : (1) the words "detached or semi-detached" when found in a 1931 document indicate that buildings of flats are excluded, and (2) the proviso to Special Condition 6 expressly provides for the construction of flats : expressio unius est exclusio alterius.

Rogers v. Hosegood (1900) 2 Ch. 388 (C.A.)

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Wong Bei-nei v. The Attorney General [1973] H.K.L.R. 582.

"Woodfall's Law of Landlord and Tenant" (28th ed.) Vol. I, 510.

Re Enderick's Conveyance, Porter and anor v. Fletcher [1973] 1 All E.R. 843.

P. 83 lines  
15-20

(ii) (a) The letter of the Director of Public Works of the 31st of December 1953 was a "special approval" given under Special Condition 7 to the erection of Grand Court which approval was sought by the letter sent on behalf of the Appellant's predecessor-in-title dated the 9th of December 1953. There is no evidence to show whether or not any application was made to the Director of Public Works for approval under Special Condition 6 of the Grand Court construction.

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(b) Alternatively, if the letter of the 31st of December 1953 was an approval of Grand Court for the purposes of Special Condition 6 that approval was limited to either the Grand Court Building alone or to the construction of blocks of flats to the height of the roof level of the Hillview Apartments. It was not an approval of buildings of flats in specie.

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(iii) (a) Although there is no evidence that the Director of Public Works approved the erection of Grand Court for the purposes of Special Condition 6

the Court should not thereby conclude that no application was made and subsequently granted (or refused). In any case the evidence adduced by the Plaintiff was insufficient to give rise to any finding of waiver by the Crown of its rights under Special Condition 6.

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(b) Alternatively, if there was a waiver by the Crown of its rights under Special Condition 6 that waiver was only in respect of a building containing flats to the extent of a seven-storey building of the type (and, in particular, to the same height) of the Grand Court Building.

Darnley v. London, Chatham and Dover Railway (1867) E & I App. 43

Watson v. Healy Lands Ltd. [1965] N. Z. L. R. 511

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(iv) Because of Section 14(2)(b) of the Buildings Ordinance and the terms of the Building Authority's letter of the 26th of October 1976 that letter was not a "special approval" by the Director of Public Works under Special Condition 7. The one person occupying the offices of Director of Public Works and (thereby) Building Authority can act and thereby bind the Crown in one capacity or the other without binding the Crown in both. Here the one capacity is contractual and the other statutory. A "special approval" under Special Condition 7 must be communicated to the applicant to be effective.

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(v) (a) (Sub-paragraph (A)(v) of this paragraph) is a point which was not raised in the Notice of Appeal (or the Amended Originating Summons) and as no leave to introduce new grounds of appeal has been sought or granted the Court of Appeal should not hear the Appellant's Counsel on it.

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(b) Also, authorities on the subject of statutory discretions or duties or powers are irrelevant in cases, like this, where the powers concerned are created by contract. The Director of Public Works has a complete discretion to refuse his "special approval" under Special Condition 7 whether for the

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purpose of requiring premium or otherwise.  
Special Condition 21 underlines this.

Crozet Ltd. and others. v. The Attorney  
General (unreported decision of Briggs, C.J.  
dated the 8th of April 1974).

Viscount Tredegar v. Harwood [1929] A.C. 72;

Pearce v. Maryon-Wilson (1935) Ch. 188.

11. Judgments in the Court of Appeal were delivered on the 31st of October 1979. The appeal was unanimously dismissed with costs. 10
- pp. 199-205
12. The first judgment was delivered by Huggins, J.A. who held that :-
- p. 202 lines 1-30
- (a) The words "residential premises" were clearly intended to mean "dwellings". A block of flats is not a detached or semi-detached dwelling. The maxim expressio unius est exclusio alterius applies to the proviso to Special Condition 6 and Wong Bei-nei v. The Attorney General [1973] H.K.L.R. 582 was correctly decided and Yang J. was correct to follow it. 20
- pp. 202 & 203  
p. 203 lines 17 & 18  
p. 203 lines 3-18
- (b) There was at least an implied consent given under Special Condition 6 to the erection of Grand Court. That consent is to be found in his letter of the 31st December 1953. The consent was only to the erection of blocks of flats not exceeding a specified height and not to the erection of blocks of flats as a class.
- p. 203 lines 19-29
- pp. 203-204  
p. 203 lines 30-42
- (c) If he is wrong as to the question of whether consent was given under Special Condition 6 to the erection of Grand Court and if the absence of consent amounted to a waiver by the Crown then that waiver was only a waiver in respect of a breach of Special Condition 6 and not a waiver of the condition itself. The waiver extended only to buildings of flats to the height of Grand Court and not to flats as a class. 30
- p. 203 line 43-  
p. 204 line 3
- (d) The Director of Public Works has many responsibilities besides those 40
- p. 204 lines 24 & 25



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imposed by the Buildings Ordinance. Inter alia he is in effect the Crown's land agent. The Director of Public Works can bind himself as the Building Authority without binding himself in his capacity as land agent and vice versa. He could not see why the Crown should be in any worse position than a private vendor.

p. 204 lines  
25-28  
p. 204 lines  
28-30

p. 204 lines  
34-35

10 (e) The Director of Public Works is not required to act as an arbitrator for the purposes of Special Condition 7 and is entitled to act as the alter ego of the landlord (the Crown). The House of Lords has decided in Viscount Tredegar v. Harwood [1929] A.C. 72 that a landlord whose approval is required for some act by the tenant has an absolute right to withhold his approval without giving reasons. If reasons are given it is not open to the tenant to argue that the reasons are insufficient. Even if a term was implied in the 1931 agreement for sale that the approval of the Director of Public Works under Special Condition 7 would not be capriciously withheld he had not capriciously withheld it here. In any case Special Condition 21 makes it unlikely that any such term was implied.

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p. 204 line  
44 - p. 205  
line 2

p. 205 lines  
8-12

p. 205 lines  
14-33

13. Cons, J. also rejected the contentions of the Appellant. He adopted the reasons of Huggins, J.A. and added the following reasons for dismissing the appeal :-

pp. 205 &  
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30 (a) If the Court of Appeal was wrong in holding that consent to the redevelopment was given under Special Condition 6 in 1953 then (applying the judgment of Farwell, J. in Hepworth v. Pickles [1900] 1 Ch. 108, at 110) the inferred legal proceeding between the parties (or their predecessors-in-title) limited the Appellant to building blocks of flats to the height of Grand Court and that limitation binds the Appellant today.

p. 205 line  
38 - p. 206  
line 14

40 (b) While there may be some force in the argument that it would be improper for the Director of Public Works to demand a premium for giving his approval under Special Condition 7 to works with which he is otherwise satisfied; Special Condition 6 deliberately restricts the intensity of development and in turn that directly affects the value of the land and would have been taken into account in 1931. There is nothing improper in demanding a premium if the Appellant wishes to have those restrictions lifted.

p. 206 lines  
15-22

RECORD

p. 206 line  
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14. Zimmern, J. also rejected the contentions of the Appellant and stated that the appeal should be dismissed.

15. The Respondent will submit that the judgment at first instance and the judgments of the Court of Appeal are correct and that this appeal should be dismissed with costs for the following amongst other:

R E A S O N S

- (1) The Appellant is required by Special Condition 6 of the 1931 Agreement for Sale to obtain the approval of the Director of Public Works to the erection of the proposed buildings containing flats and this approval has never been obtained. 10
- (2) The said Special Condition 6 has not been waived by the Crown or alternatively, if it has been waived, the waiver is only in respect of a building of the same type and height as the Grand Court building.
- (3) The Appellant is further required by Special Condition 7 of the 1931 Agreement for Sale to obtain the "special approval" of the Director of Public Works to the height of the proposed buildings containing flats and this approval has never been obtained. 20
- (4) The Appellant is not entitled to argue in this appeal that the Director of Public Works has wrongfully withheld his "special approval" under the said Special Condition 7; but in any case the Director of Public Works is entitled to withhold his "special approval" for the purpose of demanding premium from the Appellant or otherwise and the withholding of his "special approval" in this case was neither wrongful nor capricious in any event. 30

G. GODFREY

B. G. J. Barlow  
(Counsel for the Respondent)

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE COURT OF APPEAL OF  
HONG KONG

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B E T W E E N :

HANG WAH CHONG INVESTMENT  
COMPANY LIMITED Appellant

and

THE ATTORNEY GENERAL  
OF HONG KONG Respondent

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CASE FOR THE RESPONDENT

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