(Privy Council Appeal No. 16 of 1980)

Hang Wah Chong Investment Company Limited – – *Appellant*

v.

The Attorney General – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MARCH 1981

Present at the Hearing:

LORD WILBERFORCE

LORD EDMUND-DAVIES

LORD KEITH OF KINKEL

LORD SCARMAN

SIR JOHN MEGAW

[*Delivered by* LORD EDMUND-DAVIES]

This appeal is from an order of the Court of Appeal of Hong Kong dismissing the appeal of Hang Wah Chong Investment Company Limited (" the appellants ") from a decision of Yang J. in the High Court of the Supreme Court whereby he dismissed the appellants' originating summons seeking declarations concerning their proposed development of a piece of land off Kadoorie Avenue, Kowloon. This was part of a lot sold by the Crown at an auction in 1931 to the Hong Kong Engineering and Construction Company Limited (" Hong Kong Engineering "), and the Conditions of Sale provided for the grant of a Crown lease but none was in fact ever executed.

The following Special Conditions of Sale are of great importance and must be quoted in full:

> " 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 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 the Lot shall be used otherwise than as a private dwelling-house without the written consent of the Governor.

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.

. . . . . .

21. Where under these conditions the consent or approval of the Governor or of the Director of Public Works is required the grant or with-holding of such consent shall be in the absolute discretion of the person named."

In 1953 the appellants' predecessors in title were minded to purchase from Hong Kong Engineering a vacant portion of the lot they had acquired in 1931 for the purpose of erecting a block of flats, and on December 9, 1953, their solicitor sent a letter in the following terms to the Director of Public Works:

". . . . My client desires to purchase these Lots for the purpose of erecting Apartment Buildings of a height levelling to the roof of the Hillview Apartments . . . .

"The said Lots are on the same level as the said Hillview Apartments but there is a clause in the Conditions of Sale . . . . . which says [The wording of Special Condition 7 was then quoted in full].

"Before my client purchases the said Lots he desires to know whether your Department have any objection to the proposed height of the buildings to be erected on the said Lots . . . . "

The Director of Public Works is by definition also the Building Authority, and on December 31 a member of his staff replied:

". . . I am instructed to inform you that the Director of Public Works is prepared to approve the erection of buildings on the sites . . . . at a level not higher than the roof level of Hillview Apartments."

It should be pointed out that the proposed block of flats would not be, in the words of Special Condition 6, "fronting to Argyle Street and Waterloo Road".

On May 26, 1954, the Building Authority sent to the appellants' predecessors in title a formal notice,

"To permit the buildings to be erected to the height shown on the submitted plans."

Thereafter the land was purchased, there was a further approval of plans as required by section 128 of the Buildings Ordinance, a 7-storey block of flats ('Grand Court') was built, and on September 23, 1955, the Building Authority issued a permit "to occupy and use for domestic purposes" the completed building, and Grand Court has been used as an apartment block ever since.

In March 1973 the site was assigned to the appellants, who were minded to demolish Grand Court and replace it by four new blocks of flats, three of them being 17 storeys high and the fourth 14 storeys. As in 1972 the Registrar General had circulated "To All Solicitors" a memorandum

reminding them that a premium was exacted by the Government " for a modification of a Crown lease ", the appellants' real estate representative wrote to the Crown Land and Survey Office on June 20, 1973, indicating the nature of the appellants' project and adding:

> " From the Conditions of Sale . . . . it would appear that no modification premium will be payable in the event of redevelopment of the above lot. However, for the avoidance of doubt .... we .... request you to confirm if our understanding is correct. If, on the other hand, you are of the view that modification of the Conditions of Sale is required, please treat this letter and the enclosed plan as an application of our clients for the purpose of the said circular memorandum."

The material parts of the reply sent on August 23, 1973, by the Director of Lands and Survey was in the following terms:

> " . . . I am prepared to recommend a modification . . . . of the Conditions of Sale . . . . subject to the acceptance of the following provisional basic term:—
>
> (i) Private residential use only.
>
> . . . . .
>
> (iii) No part of any building to exceed 170′ Colony Principal Datum.
>
> . . . .
>
> (viii) Payment of a premium."

A protracted correspondence then ensued, the appellants' representative contending on October 30, 1973, that no modification was called for and that accordingly no premium was exigible, the Chief Estate Surveyor indicating on October 28, 1974, that a reduced premium of $3,077,000·00 was chargeable, conditional upon the appellants' acceptance within one month. Timeous acceptance not being forthcoming, the premium thereafter reverted to $3,216,000·00.

In this state of affairs, on August 25, 1976, the appellants submitted to the Building Authority plans of the proposed redevelopment, and on October 26 a formal notice of approval was issued, but " subject to Section 14(2) of Buildings Ordinance ", which provides that:

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

The Building Authority also pointed out 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 a modification before proceeding further."

On the foregoing facts the primary issue relates to what happened in 1953, and turns on the construction of the Special Conditions of Sale already cited in this judgment. On the threshold is the question whether the appellants' predecessor in title had needed approval to erect the 7-storey Grand Court. For the appellant the contention is that the building came within the words " detached or semi-detached residential premises of European type " in Special Condition 6, and that the approval of the Director of Public Works under that Condition was, therefore, not necessary and was in fact never sought or granted. For the respondent,

on the other hand, it is contended that a block of flats is not " a detached or semi-detached " dwelling, but that it comes within the following words, " . . . . such other buildings of European type as the Director of Public Works may approve of with garages and all proper outbuildings thereto ", and that this view is supported by the presence of the immediately succeeding provision in Special Condition 6 that " the Purchaser shall be at liberty to erect flats " on a site *other than* what for brevity may be called the Grand Court site.

These conflicting views have now been presented at length before three courts and were carefully and expansively considered by the Court of Appeal. No useful purpose would be served by traversing yet again what has become familiar ground, and it should suffice to say that in the unanimous opinion of their Lordships the submission of the respondent is clearly correct. In the result, they hold that in 1953 the approval of the Director of Works was required under Special Condition 6, just as his special approval was required in relation to the matters specified in Special Condition 7.

The Director's approval thus being required, was it ever granted? For the appellant it is submitted that it was never even sought, that Grand Court was nevertheless erected and occupied for over 20 years without protest from the responsible authorities and therefore with their implied acquiescence, and that in consequence they cannot now object to the proposed extensive redevelopment of the Grand Court site. It is common ground that the special approval required under Special Condition 7 was both sought and granted, but it is objected that the 1953–55 correspondence makes no express mention of Special Condition 6. That is true, but it in no way concludes the matter. For as the Director's approval was required, even without invoking any presumption of regularity it requires only slight evidence to lead to the conclusion that, the development having in fact taken place, the necessary approval had in fact been obtained. In this context, it is noteworthy that by their letter of December 9, 1953, the appellants had informed the Director not simply of the height of the proposed building but also that it was an " Apartment Building ", a term which it is unchallenged clearly meant a block of flats. The Building Authority approval signified on December 31 therefore related not only to a building " with roofs at a level not higher than the roof level of Hillview Apartments " but to an " Apartment Building ". Their Lordships are thus led to the conclusion that the Director's approval was obtained both under Special Condition 6 and under Special Condition 7.

But was such approval given in relation to the erection of an apartment building unrestricted as to height, or one not exceeding 7 storeys in height, or (as the appellants contend) has the Director's approval given in December 1953 to be regarded as consenting to the construction on the Grand Court site of flats *as a class* and of unlimited height? If the last of these is the right view to adopt, it follows that, provided only that plans are submitted and special approval obtained under Special Condition 7, the appellants are free to proceed with their extensive redevelopment and there can be no question of any premium being exigible. But in their Lordships' opinion it is a mistake to sever Special Conditions 6 and 7, just as it is a mistake to regard Condition 7 as relating solely to height. And their Lordships respectfully adopt the observations of Huggins J.A., who said in the Court of Appeal:

> " I do not think it follows from the fact that Special Condition 7 refers expressly to the height of buildings for which special approval is required that a consent under Special Condition 6 may not also include a limitation as to height."

It accordingly appears that the proper construction of the appellants' solicitors' letter of December 9, 1953, is that they were there at least impliedly seeking the Director's approval under both Special Conditions and that the approval granted on December 31 was in truth restricted to the erection on the site of a block of flats not exceeding 7 storeys in height.

It follows from the foregoing that the extensive redevelopment now contemplated by the appellants cannot proceed without the consent of the Director of Public Works, and that, by virtue of Special Condition 21, the grant or withholding of that consent is in his absolute discretion. Even so, as he indicated on October 26, 1976, approval of the building plans (albeit " subject to Section 14(2) of Buildings Ordinance "), can payment of a premium of *any* amount be exacted as the condition of granting final permission to proceed? As the hearing of the appeal progressed, this proved the most troublesome of all the points raised. The appellants submitted that, were some modification of the terms of a lease involved, a landlord could legitimately extort a premium. But no lease was ever granted and, the appeal turning on the contract of sale and the necessity of obtaining thereunder merely the Director's *approval* and no modification of a lease, it was submitted that no premiums may be demanded. In their Lordships' opinion, however, this question cannot so simply be answered. It is necessary to consider carefully the terms of the contract of sale.

The appellants' next submission was that any discretion as to the granting of approval under Special Condition 6 possessed by the Director must relate to matters relevant to the contract and particularly to his control over the *type* of buildings, whereas in the present case the demand for a premium is wholly unconnected with any such consideration. The argument presented in the appellants' printed Case was that, " . . . . the Director is not entitled to take into account matters which are wholly extraneous to the purpose of Conditions 6 and 7, such as the raising of revenue (any more than he could do so in the exercise of any of his other functions under the Conditions) and that if he does so and such a matter is the sole reason for the withholding of approval, the Appellants are entitled to act as if his approval had been granted ". This submission is in substance similar to that upheld by the Court of Appeal in *Viscount Tredegar v. Harwood* [1928] Ch.59, but rejected by the House of Lords [1929] A.C.72. There Lord Shaw of Dunfermline rejected the Court of Appeal's implication of a new clause in a lease to the effect that the lessor's consent to insurance of the leased property with any responsible insurance company was not to be withheld unreasonably, and added (at page 80):

> " The Court [of Appeal] then proceeds to attach to these terms and to this contract . . . . that the lessor must furnish a justification for his refusal, and further that such a justification must be something incidental to the individual contract itself and also to the financial standing or responsibility of the alternative insurance company. I am humbly of opinion that this process of piling implication upon implication is not a legitimate mode of construing a very simple and plain condition. It is clogged neither by the one implication nor the other."

In the same way and for a like reason, their Lordships reject the objection taken in the present appeal that a premium is not exigible because it is " wholly extraneous to the purpose of Conditions 6 and 7 ".

Somewhat more formidable than the foregoing is the point (scarcely hinted at in the appellants' printed Case, but nevertheless spaciously developed by their learned counsel) relating to the role assigned to the

Director of Public Works under the contract and particularly in relation to Special Conditions 6 and 7. It has already been observed that he is by definition also the Building Authority, and he is charged with many duties falling within the public domain, in relation to which it might well amount to an abuse of power were he to demand a premium as a condition precedent to acceding to a suppliant's request. Was the Director, ask the appellants, not operating in the public domain when saddling his approval of the appellants' building plans in 1976 with a demand for an extremely high premium which bore no apparent relation to the terms of the appellants' application? And, in consequence, was he not therefore imposing an insupportable condition on his compliance amounting to an abuse of power?

It has to be observed in the first place that it is common ground that the Conditions of Sale operate in lieu of the terms of the contemplated Crown lease which was never granted. Secondly, no difference relevant to the present appeal can be drawn between a lease granted by a public body, or indeed the Crown, and a private lease (*Wade,* ' Administrative Law,' 4th Edn. p.644). Thirdly, the view expressed by Huggins J.A. in the Supreme Court that " The Director of Public Works has many responsibilities besides those imposed by the Buildings Ordinance " appears well established, one of those responsibilities being that of acting as the Crown's land agent. And appellants' counsel did not challenge the conclusion of Huggins J.A. that " . . . . the Director of Public Works can bind himself in his capacity as the Building Authority without binding himself in his capacity as land agent and vice versa ".

The various Conditions of Sale well illustrate the wide range of roles played by the Director in exercising his discretion. As regards some of the Conditions, the Director's role may, almost certainly, be that of protector of the public interest. The vital question is whether for the purposes of Special Conditions 6 and 7 he can properly be regarded as being entitled to act in his capacity of land agent for the Crown. It is not open to serious doubt that those Conditions relate directly to the landlord's interests, economic and otherwise, and their Lordships conclude that the Director was entitled to act, and did act, in that role when granting his qualified approval to the appellants' plans in 1976.

On that view, can it properly be said that it is for the respondent to establish the reasonableness of the demand for a premium? In the light of *Viscount Tredegar v. Harwood* (ante), their Lordships are of the opinion that the question requires a negative answer. But they must not thereby be taken as holding that the requirement was capriciously advanced (and, indeed, appellants' counsel expressly disclaimed any such suggestion) or that, were it incumbent upon the respondent to justify the requirement, he would be unable to adduce good reasons for demanding a premium. It is sufficient, for present purposes, simply to say that, the appellants seeking a concession from their landlords in relation to the development of land leased, the landlords were entitled to make the granting of that concession conditional upon the payment of a premium.

It follows that in their Lordships' opinion the unanimous decision of the Court of Appeal to uphold Yang J's dismissal of the appellants' originating summons should in its turn be upheld. They will therefore humbly advise Her Majesty The Queen that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

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In the Privy Council

HANG WAH CHONG INVESTMENT COMPANY LIMITED

v.

THE ATTORNEY GENERAL

DELIVERED BY
LORD EDMUND-DAVIES

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