

for a term of 75 years with an option to renew for a further 75 years at a premium of KH \$ 415,000,000. Condition 5 of the Special Conditions of Sale obliges the Appellants to erect a building or buildings upon the site which would comply with the relevant laws of Hong Kong.

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Item No. A2

3. The terms of the Contract are contained in the Particulars and Conditions of a sale by public auction. The dispute between the parties is as to the proper construction of the terms of the Contract and the proper interpretation of Regulation 22(1) of the Building (Planning) Regulations. 10

4. The following are the material Contractual terms which are Special Conditions numbered as follows :

(1) The material provisions of the particulars and conditions of sale of the said lease were Special Conditions

(11) (a) The purchaser shall at his own expense and to the satisfaction of the Director of Public Works erect over the areas shown coloured pink cross-hatched black, and purple on the plan annexed hereto at a level of 10.82 metres above the Hong Kong Principal Datum a podium (hereinafter referred to as "the said podium") of such design and standards as the said Director shall approve including the provision and construction of any supports, access steps, stairways and ramps which the said Director in his sole discretion may require. 20

(b) The construction of the said podium together with such necessary supports, access steps and stairways and the footbridges referred to in Special Condition No. (3)(a) hereof shall be carried out in such sequence and in such manner as shall be approved in writing by the said Director. 30

(12) (a) Subject to (b) hereof, no building or buildings or part or parts thereof, other than supports for a building or buildings, shall be erected on or over the area shown coloured pink cross-hatched black on the plan annexed hereto at the deck level of the said podium. The design and disposition of such supports shall be subject to the special approval in writing of the Director of Public Works. 40

(b) A building or buildings or part or parts thereof may be erected over the area shown coloured pink cross-hatched black on the plan annexed hereto provided that there is a clear height extending upwards from the deck level of the said podium to a height of not less than 3.66 metres.

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- (13) (a) No building or structure other than the said podium and such structures including screening walls, foundations, flower beds and seats as may be approved in writing by the Director of Public Works shall be erected or constructed at or above ground level within the area shown coloured purple on the plan annexed hereto (hereinafter referred to as "the said passage area").

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(b) The purchaser shall permit all members of the public at all times and for all lawful purposes freely and without payment of any nature whatsoever to pass and repass -

(i) on foot over and along the said podium (including any access steps and stairways); and

(ii) on foot over and along the said passage area at ground level

as if the said podium (including access steps and stairways), and the said passage area were part or parts of a public street.

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(c) The purchaser shall at his own expense maintain the said podium (including any access steps and stairways) in good order and repair to the satisfaction of the Director of Public Works which may affect the said podium (including any access steps and stairways) on the surface of the passage area except with the prior written consent of the said Director.

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(d) The purchaser shall not place or allow or suffer to be placed on or within the said passage area or the said podium (including any access steps and stairways) any merchandise or goods or stalls or carts or any other article of any nature whatsoever and in the event of any such merchandise or goods or carts or any other articles being

placed on or within the said passage area or the said podium (including any access steps and stairways) without prejudice to any other rights which the Government may have under these Conditions it shall be lawful for the Government by the said Director or other persons deputed to act on his behalf to make arrangements for the immediate removal of such merchandise or goods or stalls or carts or other articles from the said passage area or the said podium (including any access steps and stairways) to such other place and by such means as to the Government or the said Director or such other persons shall seem appropriate and the purchaser shall on demand pay to the Government the cost as certified by the said Director of removing any merchandise goods stalls or carts or other articles in a manner aforesaid.

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(20) The purchaser shall erect, construct and maintain upon the lot to the satisfaction of the Director of Public Works adequate parking spaces for members of the public for the parking of not less than 400 motor vehicles as defined in the Road Traffic Ordinance together with adequate means of access and circulation spaces. The spaces so provided shall be taken into account in the calculation of the gross floor area for the purposes of Regulations 20, 21, 22 or 23(3) of the Building (Planning) Regulations and any amending legislation. Not less than 80% of the total number of parking spaces so provided under this Special Condition shall be available or in use at all times for the parking of private cars or goods vehicles each not exceeding an unladen weight of 40 cwt. as defined by the said Ordinance.

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5. Regulation 22(1) provides as follows :

"Where, between ground level and a height of not less than 5m a building is set back from a boundary of the lot on which it is erected, being a boundary that abuts on a street, and with the consent of the Government, the part of the lot that is thereby not built upon is dedicated to the public for the purposes of passage"

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(then follow the provisions which permit increases in height which allow the 3 extra storeys).

6. The Appellants had submitted plans for approval by the

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Lines 20-30

10 Building Authority for a building 38 storeys high. The plans and accompanying photographs of a model showed concrete pillars or support columns placed at intervals along the harbour-side boundary abutting the public street. The plans were rejected by the Building Authority. It was common ground that plans could only have been approved in respect of a 35 storey building unless the Appellants were to be allowed what was called bonus or compensatory site coverage and plot ratio, pursuant to Regulation 22(1) of the Building (Planning) Regulations.

7. The Appellants contended :

(a) that the planned building would be "set back from" the boundaries and the maxim de minimis non curat lex applies to the column;

20 (b) that in any event the Court should grant a declaration that the building would be within Regulation 22(1) if the columns were omitted from the plans and that they were not prevented by the terms of the Contract from clarifying their plan in this way;

(c) that there had been a dedication to the public use within the meaning of Regulation 22(1) of the lot not built upon;

30 (d) that Special Condition (20) represented that Regulation 22 applies to the building and that they had relied upon this representation by bidding a higher price than they would have done if the Regulation had not applied and that therefore the Respondents were estopped from denying that Regulation 22 applied.

8. The Respondents contended :

(a) that the columns were an essential and substantial part of the building which were on the boundary. In these circumstances the planned building was not "set back from" the boundaries. The de minimis maxim could not apply to such a substantial matter.

40 (b) that the Appellants had no Contractual right to change their plans and in any event bearing in mind the approval required the Court should not grant a declaration;

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(c) that there was no indication of an intention to dedicate to the public use in the Particulars and Conditions of Sale and in fact the wording of the Contract indicated a contrary intention;

(d) that Special Condition (20) contained no representation upon which an estoppel could be based.

9. At the trial Zimmern J. held :

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(1) The question was one of construction of certain of the Special Conditions and reference to extrinsic evidence was unnecessary.

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(2) The Appellants did not have the right under Special Condition 11(a) to build supports for the podium within the passage area, but if the Director was to approve the placement of supports with the passage area that approval would show the Director's intention to secure "the substance of a set back" to create a footpath. If the placement of columns within the passage area did not affect the purpose which the way was intended to serve and was approved by the authorities then a "mere literal construction of the Regulation ought not to prevail against the intention of the Legislature".

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Lines 7-10

(3) If the Appellants carried out their obligations under Special Condition 13 they would have dedicated under Regulation 22(1) otherwise why the words in Special Condition 13(b) "as if the said podium and the said passage area were part or parts of a public street"? The answer to this is in the words of Lord Asquith of Bishopstone in East End Dwelling Co. Ltd. v. Finsbury Borough Council (1952) A.C. 109, at 132 "if you are bidden to treat an imaginary state of affairs as real " etc. Therefore the consequences etc. of the podium and passage area being part or parts of a public street could only have flowed from dedication.

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Lines 20-40

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Lines 1-3

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Lines 4-6

(4) It was unnecessary on these findings to determine the estoppel issue.

10. The Respondents appealed on the grounds that Zimmern J. has erred in fact and law and misdirected himself as follows :

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(1) If the Appellants built a building with columns

supporting the podium spaced at intervals abutting the boundary of the site, the building would be "set back from a boundary of the lot on which it is erected" within Regulation 22(1).

(2) That the Director by approving the placement of support columns on the passage area would show the intention to secure "the substance of a set back".

10 (3) In not finding it would be possible to comply with Special Condition 13 and yet not set the building back from the boundary.

(4) That a literal construction of Regulation 22(1) would oppose the apparent intention of the legislature and that the words "set back from the boundary" are sufficiently flexible to allow more than one meaning.

(5) In finding that the proposed public right of passage over the passage area for the term of the lease showed the intention of the parties that this was to be achieved by an act of dedication and therefore the creation of a public pedestrian highway.

20 11. The Court of Appeal allowed the appeal by the Respondents. The reasons given by the learned Justices of Appeal were as follows :

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(1) He did "confess to considerable hesitation on this aspect of the case" but was not prepared to find Zimmern J. wrong in finding that the substance of a set back had been achieved; or, as it was rephrased, the de minimis non curat lex rule could be applied to the supports abutting the boundary and a set back within the meaning of Regulation 22 would be achieved.

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Lines 1-25

30 (2) The Director of Public Works by virtue of Special Condition 11(a) has an absolute discretion whether or not to require the provision of supports or columns.

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(3) The dictum of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council (supra) did not support the conclusion reached by Zimmern J.

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Lines 17-20

(4) I am content to base my decision on the wording of Special Condition 13(b).

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Lines 33-34

40 (5) There are "obvious difficulties" in the interpretation of Special Condition 20 I am not

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Lines 7 & 8

persuaded that it contains the representation alleged.

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Lines 14 & 15

(6) the appeal must succeed and I would enter judgment for the Defendant in the action.

12. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

(1) The submitted plans and photographs did not show a building set back from a boundary that abuts on a street because of the presence of the columns. The maxim de minimis could not apply to such structures and on this point Higgins J.A. was wrong in law in holding to the contrary. 10

(2) The declaration should not be ordered for the reasons given in paragraph 8(b) above.

(3) There was no indication of an intention to dedicate to the public use in the Particulars and Conditions of Sale and in fact the wording of the Contract indicated a contrary intention. The Respondent relies on the following matters: 20

(a) No ~~express~~ ^{used} words requiring dedication were (as in Item No. D1) and it was unlikely such an important matter would be left for inference.

(b) "Dedication to the public for the purposes of passage" would inevitably result in the creation of a public highway. It was inherently unlikely that this should have been the intention of the Crown where the "highway" would, or could be an integral part of the structure of a building on land held under lease for a term of years which may (as is evident from General Condition (8)) be demolished at any time at the will of the Appellants. In support of this contention it was submitted that it is at least doubtful at law whether, even with the consent of the owner of the fee, a lessee may dedicate a public highway for a term of years. Dawes v. Hawkins (1860) 8 C.B. (N.S.) 858. A.G. v. Biphosphated Guano Co. (1879) 11 Ch. D327. Corsellis v. London Country Council (1907) 1 Ch. D704. 30 40

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(c) The parties expressed intentions in regard to the "passage area" were contrasted with the treatment of the "green and yellow" area as, e.g. in Special Condition 3(b). This indicated that the "passage area" was to remain part of the Appellant's site in a way not, in the circumstances, consistent with the creation of a new highway.

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10 (d) The term "passage area" was unusual if the intention of the parties was to create a public pedestrian highway or street. The side note to Special Condition 13(b) "Right of Way" was not that which would be expected if a public pedestrian highway or street was to be created.

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20 (f) Special Condition 13(b) provided that the purchaser shall permit all members of the public "... freely and without payment of any nature whatsoever to pass and repass". The words "The purchaser shall permit" were indicative of the grant of a licence, and the insistence that passage was to be free and without payment was barely compatible with the intention to form a public street.

30 (g) The words of Special Condition 13(b) "The purchaser shall permit all members of the public to pass and repass - (ii) on foot over and along the said passage area at ground level as if the said podium and the said passage area were part or parts of a public street" made it clear that the passage area was not in fact to be a public street.

40 (h) The effect of Special Condition 11(a) and 13(a) was to allow the Director of Public Works the right to determine whether or not the podium was supported by pillars or other supports which might be placed in abutment to the boundary. It was thus not within the power of the Appellants to determine whether the building was set back from the boundary and thus it could and should not have been in the contemplation of the Appellants that the Respondent at the time the agreement was entered, and before plans had been submitted, was contracting to treat this as a Regulation 22(1) set back case.

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(i) The Appellants had the right under Special

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Condition 11(a) to build supports on the passage area abutting the boundary and thus not set back.

(j) At the highest the Appellants were merely required to grant a licence to the public to allow it a right of passage for the duration of the lease.

(k) There was and had been no dedication in fact or in law.

- (4) Condition (20) contained no representation upon which an estoppel could be based. If the Condition was or included a "representation" which is denied then the same was a representation of law and not sufficient to create an estoppel and in any event the Respondents owed no duty to the Appellants *necessary* to support an estoppel. Further and in any event the representation (if the Condition was or so included) was not intended to be relied upon by the Respondents in the context of a transaction of this Record.

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ANTHONY SCRIVENER Q.C.

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF
HONG KONG

B E T W E E N :

MOON YIK COMPANY
LIMITED
XIPHO DEVELOPMENT Appellants
COMPANY LIMITED (Plaintiffs)

- and -

ATTORNEY GENERAL Respondent
 (Defendant)

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
London, WC2

Ref: R/JA

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