

16, 1981

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

HANG WAH CHONG INVESTMENT  
COMPANY LIMITED

Appellants

- and -

THE ATTORNEY GENERAL

Respondent

CASE FOR THE APPELLANTS

Record

10 1. This is an appeal by leave of the Court of Appeal of Hong Kong from an order of that Court (Huggins, J.A., Cons and Zimmern J.J.) made on 31st October 1979 whereby the Court of Appeal dismissed the Appeal of the Appellants from an Order of Yang J. made on 18th August 1978.

20 2. The circumstances giving rise to this appeal are that the Appellants desire to construct blocks of flats on land in Kowloon held by them under an agreement for a Crown Lease, and have applied to the Director of Public Works for his approval of that development. The Director has at all material times made it clear that he has no objection to the proposed development either in principle or in respect of the detailed plans submitted. He in fact approved those plans on 26th October 1976. If this approval is all that is required under the Lease, the Appellants are free to proceed with their development. However the Crown contends that a further expression of the Director's approval is made requisite by the Lease. The Director declines to express such approval for the avowed purpose of compelling the Appellants to apply to the Crown for modification of the terms of the Lease. Such modification is available to the Appellants, but only on terms that they pay to the Crown a very substantial premium, calculated as "the whole amount by which the value of the lot is increased as the result of the modification". The questions raised by the Appeal are :-

p. 90 l. 19.

Record

(1) Whether any approval or further approval of the Director is required; and, if it is

(2) Whether the Director is entitled to withhold his approval for the purpose above stated.

p. 12  
p. 15

The terms on which the land is held are contained in the Conditions of Sale and the Special Conditions of Sale subject to which the whole of the Lot was purchased by the Appellants' ultimate predecessors in title, the Hong Kong Engineering & Construction Co. Ltd. ("H. K. E. C. ") at auction on 16th November 1931. The Appellants are the H. K. E. C. 's successors in title as to part of the entire Lot.

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4. (a) Those terms entitled H. K. E. C. to a Crown Lease for the Lot for 75 years at a rent of \$15,266 p. a. , with an option for renewal for a further term of 75 years at a rent to be fixed by the Crown's Surveyor. The premium bid by H. K. E. C. and paid by them was \$326,000.

p. 13 l. 24  
p. 16 l. 10

(b) By clause 9 of the Conditions of Sale and clause 5 of the Special Conditions, H. K. E. C. were required to spend at least \$500,000 in rateable improvements and to build not less than 35 houses.

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(c) Clauses 6, 7 and 21 of the Special Conditions provide:

p. 16 l. 17

"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.

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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."

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"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."

p. 16 l. 28

"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)."

p. 18 l. 30

10 (d) Numerous other clauses in the Conditions call for approvals consents and directions of the Director of Public Works on a wide range of matters.

5. By letter of 26th October 1976 the Appellants received approval from the Building Authority, Public Works Department, for the construction of the flats in question in accordance with plans previously submitted. The Director of Public Works is the Building Authority, and the Appellants contend that this approval constitutes a sufficient approval of their proposed development under clauses 6 and 7 of the Special Conditions.

pp. 79, 78

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6. Following correspondence between the Appellants and the Public Works Department which related to the Special Conditions, the Director of Public Works did state that he was not prepared to permit pursuant to the Conditions the redevelopment which the Appellants desired (letter of 15th November 1977). However, at the hearing in the Court of Appeal Crown Counsel expressly conceded that the Crown has no objection to the development and that approval was withheld for the sole purpose of compelling the Appellants to pay a premium. It was further accepted on behalf of the Respondent that the Director would be prepared to give such approval if the Appellants would pay the premium: see the judgment of Huggins J. at page 199, line 19 and at page 204, line 35, and of Cons J. at page 206, line 21.

pp. 114-143

p. 144

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p. 199 l. 19  
p. 204 l. 35  
p. 206 l. 21

7. The existing buildings on the land in question, erected in about 1955, are known as Grand Court and consist of 3 blocks of flats, each of 12 storeys. The Appellants wish to replace these with 4 blocks of flats of up to 17 storeys. Prior to the construction of Grand Court by predecessors in title to the Appellants a letter dated 9th December 1953 was written on behalf of such predecessors to the Director of Public Works quoting clause 7 of the Special Conditions, stating their intention to build flats to a particular height, and asking whether the Director had any objection to the proposed

p. 83

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Record

p. 85

height. By letter of 31st December 1953 it was stated that the Director would have no objection to buildings of the proposed height. No other communication took place with the Director of Public Works concerning Grand Court, which was duly erected. Some 33 of the 86 flats are let to the 'Colonial Treasurer Incorporated', which represents the Crown for the purpose of obtaining accommodation for Crown employees.

p. 16 l. 17

8. The Appellants contend that the requirement referred to in the first sentence of clause 6 of the Special Conditions (of approval for buildings of European type other than detached or semi-detached residential premises) is directed to the control by the Director, in the exercise of his public functions, of the type of building to be erected. They contend that it is not open to the Crown through the Director to use the threat of withholding of approval under the clause as a means of raising revenue for the Colony of Hong Kong, as that is wholly outside the purpose and intent of the clause, and is not a matter which it is proper for the Director to consider.

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9. Nonetheless, if it was open to the Director to use the withholding of permission in that manner, the Appellants would contend that in the present instance no approval under clause 6 was required:

(a) The proposed blocks of flats are "detached residential premises of European type", so that no approval under clause 6 of the Special Conditions is necessary.

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(b) Alternatively, the correspondence referred to in paragraph 7 above amounted to an express or implied approval of the construction of flats on the site pursuant to clause 6.

(c) In the further alternative, the existence of Grand Court on the site and the lack of any objection to it over some 25 years during which the Crown itself has enjoyed the benefit of flats within the building amounts to a waiver by the Crown of the benefit of clause 6 insofar as it inhibited the construction of flats on the site.

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p. 16 l. 17

10. Whereas clause 6 of the Special Conditions enables the Director of Public Works to control the type of building to be erected on the Lot subject to the authorisations contained in the clause itself,

in the Appellants' contention clause 7 is directed to the control by the Director of the design of the exterior elevations of a building, its plans, height and disposition. A fortiori from the position under clause 6, the Appellants contend that if the Director is otherwise prepared to approve these matters, he is not entitled to withhold his approval for the purpose of raising money.

p. 16 l. 28

10 11. The leading judgment in the Court of Appeal was given by Huggins J.A., with which Cons and Zimmern J.J. concurred. The Court held that the proposed buildings were not detached residential premises of European type, that the Director had not approved the proposed development either under clause 6 or under clause 7, and that the Director was entitled to withhold his approval in order to obtain premiums. The Court appears to have held that the Director was entitled to take into account any matter in deciding whether or not to withhold his approval, and found support for this in clause 21. The Appellants contend that the Director is not entitled to take into  
20 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. The Appellants contend that the effect of clause 21 is to make it clear that, in reaching  
30 his decision on the matters which are properly to be considered by him, the exercise of the Director's discretion is a matter for him alone and is not subject to review.

p. 199

p. 18 l. 30

p. 18 l. 30

12. The Court of Appeal further held in effect that any consent or waiver in connection with the construction of Grand Court was a consent or waiver of consent for flats to the height of Grand Court. The Appellants contend that any consent under clause 6 and any waiver of consent could not be so limited, but must relate to flats, being the type of dwelling, generally.

p. 202 l. 30  
to  
p. 204 l. 3

40 13. The Appellants submit that their appeal should be allowed for the following among other

R E A S O N S

1. BECAUSE it is not within the powers of the Director of Public Works to exercise his discretion to grant or withhold his approval under clause 6 or clause 7 of the Special Conditions of Sale, for the purpose of raising revenue.

Record

2. BECAUSE in any event in the circumstances of the case no approval or no further approval of the Director of Public Works is required by the Appellants under clause 6 of the Special Conditions of Sale.
3. BECAUSE the judgments of the Court of Appeal and the learned trial Judge were wrong.

MARK LITTMAN

MICHAEL MILLER

RAYMOND JACK

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IN THE PRIVY COUNCIL

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Linklaters & Paines (SJMM)  
Barrington House,  
59-67 Gresham Street,  
London EC2V 7JA.

Solicitors for the Appellants