

**Moon Yik Company Limited and Another**     -     -     -     *Appellants*

v.

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

FROM

**THE COURT OF APPEAL OF HONG KONG**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 18TH MAY 1981**

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*Present at the Hearing:*

LORD DIPLOCK

LORD ELWYN-JONES

LORD FRASER OF TULLYBELTON

LORD ROSKILL

SIR JOHN MEGAW

[*Delivered by* LORD ROSKILL]

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The question for determination in this appeal from the Court of Appeal of Hong Kong (Huggins and McMullin JJ.A. and Yang J.) is whether the appellants as lessees of a valuable site on land reclaimed from the harbour at Wan Chai on Hong Kong Island are entitled to build on that site a 38-storey building or only, as the respondent who represents the Building Authority of Hong Kong contends and the Court of Appeal has held, a 35-storey building. The answer to that question depends upon the true construction of the Building (Planning) Regulations of Hong Kong and in particular of Regulation 22 (1) of those Regulations and of the Special Conditions included in the Particulars and Conditions of Sale and in particular of Special Conditions (5), (11), (12) and (13), upon the terms of which the appellants leased that site which they acquired for a term of 75 years with an option for a further 75 years at an auction held on 13th September 1978 at a price of HK\$415,000,000.

The "particulars of the lot" included in those Particulars and Conditions of Sale described the site "as delineated and shown coloured purple, pink and pink cross-hatched black on the plan annexed hereto". As that plan, a copy of which was before their Lordships and can be treated as incorporated into this opinion, shows, that site was rectangular. The purple area shown in the plan extended 6 metres inwards from the four boundaries of the site. The pink area cross-hatched black extended another 4.50 metres from the inner boundaries of the purple area. The area coloured pink (*simpliciter*) lay within the pink area cross-hatched black and was rectangular. The plan also shows certain areas not forming part of the site respectively coloured green and yellow. The two yellow areas were at either end of the site.

The green area ran the full length of the site on one side. The appellants by the terms of that lease were required to assume certain obligations in relation to those areas coloured yellow and green on the plan. Those areas are mentioned in Condition (3) of the Special Conditions but save in so far as the conditions imposing those obligations were claimed to shed light upon the true construction of the all-important Special Conditions, those areas are not otherwise relevant.

The appellants are presently in the course of erecting a substantial commercial and office building on the site, to be known as the Great Eagle Centre and it is in relation to the height of that building that the present dispute has arisen. Stated briefly, the question at issue is whether the appellants are entitled to "compensation" for the building being, as they claim, but the respondent challenges, "set back" from the boundaries of the site in the form of three additional storeys, thus raising its planned height from the 35, as to which there is no dispute, to the 38 storeys already mentioned. The determination of this question depends upon the answers to two further questions. First, is the building "set back" within the meaning of that phrase in Regulation 22 (1) of the Building (Planning) Regulations? Secondly, if the building be so "set back", do the provisions of Special Condition (11) (a), which require the erection of a podium over the areas coloured pink cross-hatched black, and purple on the plan, and of Special Condition (13) (a) and (b) the latter of which bears the rubric "right of way", have the effect that "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 within the meaning of that last phrase in Regulation 22 (1)?

For the purposes of ensuring prompt determination of this dispute with the Building Authority the appellants on 31st May 1979 issued an originating summons in the High Court of Hong Kong seeking certain declarations as to their rights. On 26th October 1979 Zimmern J. in the High Court granted the two declarations set out at the end of his judgment in the following terms:—

"(1) A declaration that, on the true construction of the said Agreement and Conditions of Grant, compliance with Special Condition 13 thereof will constitute 'dedication with the consent of the Government' for the purposes of Regulation 22 (1) of the Building (Planning) Regulations;

(2) A declaration that the building to be erected on Inland Lot No. 8392 pursuant to and in accordance with the said Agreement and Conditions of Grant is entitled to the increased site coverage and plot ratio provided by Regulation 22 (1) of the Building (Planning) Regulations."

The respondent appealed to the Court of Appeal who on 14th March 1980 allowed the appeal and entered judgment for the respondent. There was no difference of opinion between the Court of Appeal and the learned trial judge on the question of "set back". Huggins J.A. however expressed considerable hesitation on this question but was not prepared to hold that the learned trial judge was wrong. The difference of opinion arose on the question whether the area not built upon had been "dedicated to the public" within the meaning of that phrase in Regulation 22 (1). The Court of Appeal unanimously held that it had not. On 15th April 1980 the Court of Appeal gave the appellants leave to appeal to this Board. In order that the rival submissions may be properly understood it is necessary to set out in full certain of the Special Conditions to which their Lordships have already referred and also certain of the General Conditions and of the Building (Planning) Regulations of Hong Kong.

### General Conditions

“ 8. . . . . In the event of the demolition at any time during the tenancy of any building then standing on the lot or any part thereof the purchaser shall replace the same either by sound and substantial buildings of the same type and of no less volume or by buildings of such type and value as shall be approved by the Director of Public Works. . . . .

10. Any private streets, roads and lanes which are required to be formed shall be sited to the satisfaction of the Director of Public Works and included in or excluded from the area to be leased as may be determined by him and in either case shall be handed over to the Government free of cost if so required . . . . .”

### Special Conditions

“(5) The purchaser shall develop that portion of the lot shown coloured pink and pink cross-hatched black on the plan annexed hereto by the erection thereon of a building or buildings complying with these Conditions and in all respects in accordance with the provisions of all Ordinances, By-laws and Regulations relating to building and sanitation which are or may at any time be in force in Hong Kong, such building or buildings to be completed and fit for occupation on or before the thirtieth day of September 1982 and shall expend thereon a sum of not less than \$25,000,000 (such sum to exclude moneys spent on site formation, foundations, access roads and other ancillary works).

(8) (a) Subject to these Conditions, upon development or redevelopment of the lot or any part thereof, the building or buildings erected or to be erected thereon shall in all respects comply with the Buildings Ordinance, any regulations made thereunder and any amending legislation.

(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.

(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.

(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.

### Purple Area

(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 ”).

*Right of Way*

(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.

*Podium (maintenance)*

(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 and shall not carry out any 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.

(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 . . . .

(18) Space for the parking of private motor vehicles may be provided within the lot below ground level to the satisfaction of the Director of Public Works. Such space (if provided) shall not be used for any purpose other than for the parking of private motor vehicles belonging to the occupiers of the building or buildings erected on the lot. Space for the parking of such private motor vehicles shall not be provided at or above ground level.

(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 . . . .”

**Building (Planning) Regulations**

“ 20 . . . .

(2) Subject to regulations 19A and 22 and paragraph (3) and depending on the height of the building . . . .

(c) the site coverage for a non-domestic building, or for the non-domestic part of a composite building, on a class C site shall not exceed that percentage of the area of the site specified in the tenth column of the First Schedule.

21 (1) Subject to regulations 19A and 22 and depending on the height of the building— . . . .

(f) the plot ratio for a non-domestic building on a class C site shall not exceed the plot ratio specified in the thirteenth column of the First Schedule.

. . . .

(3) For the purposes of this regulation and regulations 19, 20 and 22, the plot ratio of a building shall be obtained by dividing the gross floor area of the building by the area of the site on which the building is erected.

22 (1) Where, between ground level and a height of not less than 5 metres, . . . a building on a class . . . C site 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—

(a) the site coverage for the building or for any one part of the building may exceed the permitted percentage site coverage, so, however, that the site coverage therefor does not exceed that percentage of the area of the site equal to the sum of the permitted percentage site coverage for the building or for that part of the building, as the case may be, and the figure obtained by dividing the product of 1 500 and the area of the lot so dedicated to the public by the product of the area of the site and the height of the building; and

(b) . . . .”

Their Lordships have set out those Regulations which bear upon the method of calculation of any compensation which may become due if the conditions in Regulation 22 (1) are satisfied for the sake of completeness though nothing turns upon the complex mathematics to which the various formulae give rise.

Their Lordships will deal first with the question of “ set back ” upon which the appellants succeeded in both courts below. The respondent submitted that there was no relevant “ set back ” and that the courts below had been in error in reaching their conclusion to the contrary. Both sides referred in support of their respective submissions to photographs of a model of a building, said to represent the building now under construction when complete which was put in evidence in the courts below. Since the model did not appear to conform to the plan to which reference has already been made in relation to the yellow and green areas, their Lordships have derived little or no help from those photographs. The crucial question is whether the fact that the podium, supported by the columns which bear its weight and which extend to the boundaries of the site, is part of the building, so that the entirety of the site can in one sense be said to be built upon, prevents the building being “ set back ” within Regulation 22 (1). The appellants contended that the presence of the supporting columns did not prevent the building being “ set back ” since those columns were not necessary for the support of the podium, that support being equally obtainable by cantilevers. The columns were, they said, included by their own architect as an architectural feature and did not occupy any or any substantial part of the passage area upon which they stood. As already stated the learned trial judge decided this question in favour of the appellants. In effect he held that “ the substance of a set back ” had been achieved and that was sufficient for the purposes of Regulation 22 (1) on a proper construction of that Regulation. This was also the view of McMullin J.A. As already pointed out, Huggins J.A. felt doubt upon the point and appears to have rested his conclusion upon the *de minimis* principle, thereby meaning, as their Lordships think, that the columns occupied so small a part of the passage area that they could be ignored for present purposes. Yang J. contented himself with expressing his agreement with the decision of the other members of the court.

Their Lordships find the reasoning of Zimmern J., with which McMullin J.A. agreed, convincing and would respectfully adopt their reasoning and the conclusion which both courts below reached on this question. On any view on a matter of this kind their Lordships would have long hesitated before differing from the unanimous decision of both courts below.

Their Lordships turn to deal with the second question, that of "dedication" which they have found more difficult than the first. Their Lordships begin their consideration by reference to the language of Regulation 22 (1). It is plain that the other pre-conditions to the "compensation" provided for in this Regulation are fulfilled. Thus, it being common ground that the building is on a class C site and the relevant height of the podium is more than 5 metres, namely 10.8 metres, the first condition is satisfied. On the view which their Lordships have already expressed on the first question, that relating to "set back", the second condition is also satisfied. The provision requiring "the consent of the Government" is clearly satisfied since the relevant obligations imposed on the appellants by the Special Conditions are imposed by the Government as freeholders and in that capacity the Government was plainly consenting to those obligations thus imposed. The only remaining question is whether the "part of the lot that is thereby not built upon is dedicated to the public for the purposes of passage". To answer this, it is necessary to see what upon their true construction is the effect of the relevant Special Conditions. Do they amount to "dedication"? Mr. Scrivener Q.C., for the respondent, rightly pointed out that in most cases where questions of "dedication" or "non-dedication" arise, they have to be resolved by reference to the proper inferences to be drawn by user by members of the public over a period of time. In the present case there has been no such user and there can be no such user until the passage area and the podium are complete and user by the public begins. The answer in the instant case, most unusually he submitted, has to be found not by determining the correct inference from past user but by reference to the language of the Special Conditions on the terms of which the appellants acquired their 75 year lease. "Dedication", Mr. Scrivener argued, had to be in perpetuity. Once land was "dedicated" as a public highway it so remained for ever subject in English law (but, their Lordships were told, not in Hong Kong), to special statutory procedures for closing or diverting such highways. The public thus acquired an enforceable right which, though not normally enforceable by an aggrieved person individually, might be and in England often is enforced by the Attorney General in a relator action. The word "dedicated" in Regulation 22 (1) was used in its technical sense with all that it implied in the complex field of highway law. Mr. Scrivener pressed upon their Lordships the submission that that word was used in the Regulation but was not used in the Special Conditions. The true interpretation of the Special Conditions was, in his submission, that they showed an intention not to confer upon the public any enforceable right in perpetuity but only a limited right of passing and re-passing during the currency of the lease or of any extension of the lease. Just as public user was not conclusive of the existence of a public right but could be more consistent with a limited right deriving from a licence of perhaps a limited duration, so the rights accorded by the Special Conditions were more consistent with a licence than with a right in perpetuity. Mr. Scrivener enquired what the position would be in the event of demolition and reconstruction, such as Clause 8 of the General Conditions envisaged, or if the appellants sought to alter the line of the podium or of the passageway area, whether in connection with any such reconstruction or otherwise. Special Condition 13 (c), he submitted, was inconsistent with the existence of an intention by the parties to dedicate to the public for the purposes of passage. Whether or not the word "on" in the phrase "on the surface of the passage" is a misprint for "or", the implication that the lessees might, with the consent of the lessors, carry out any works on, or any works which might affect, the surface of the passage was difficult to reconcile with the concept of the passage area being a highway duly dedicated for public use.

These are in their Lordships' view powerful arguments which were powerfully advanced. They found favour with all members of the Court of

Appeal. But it is plain that it was the intention of the Government as freeholder as part of the terms upon which the appellants were to be allowed to acquire their lease and build upon the site that the public should have clear and specific rights without conceding which the appellants would not have obtained their lease. Thus, there is the provision in Special Condition (3), in relation to the green and yellow areas, designed to ensure that public vehicular and pedestrian access was secured. There is also Special Condition (20) which insisted upon adequate parking spaces for members of the public for no less than 400 cars. Special Condition (20) refers not only to Regulations 20, 21 and 23 of the Building (Planning) Regulations but also to Regulation 22. Though both learned counsel found it difficult to give any sensible meaning to the reference to those several Regulations in this Condition, nonetheless, the presence of these references in Special Condition (20) does suggest that the construction of the Special Condition ought not to be wholly divorced from those regulations, and, in particular, from Regulation 22 (1).

Their Lordships have given full weight to the considerations which led the Court of Appeal to their conclusions and also to the difficulties which can in theory at least arise in the event of demolition or reconstruction. But there are a number of powerful considerations which seem to their Lordships to point the other way. First, there is the rubric to Special Condition (13) (b) "Right of Way". This rubric must be construed together with the ensuing Special Condition (13) (b). It is not a phrase their Lordships would expect to be used if the purpose were only to grant a licence of limited duration. Secondly, where a licence is granted it is granted by a licensor to a licensee or to a group of licensees. Their Lordships find it difficult to see how in this context the licensee or group of licensees can properly be described as "all members of the public". Thirdly what is granted is granted in extremely wide terms for it is "at all times and for all lawful purposes freely . . .". Fourthly, what is granted in relation to both the podium and the passage area is to be granted "as if the said podium (including access steps and stairways) and the said passage area were a part or parts of a public street". Their Lordships appreciate the force of the opinion expressed by Huggins J.A. as to the effect of those words. He said: ". . . the fact that the words of the contract require us to treat as real an imaginary state of affairs, namely that the podium and passage area are part or parts of a public street, is a clear indication of the very opposite intention" (*videlicet*, opposite to the intention which the appellants seek to derive from the "as if" clause). "If the state of affairs predicated were in fact real—as it would be if there were a dedication—there would be no need for it to be treated as if it were real." What is there being suggested—and it is the effect of the respondent's submissions—is that the lessees are as a matter of contract accepting obligations towards the lessors to allow the public to pass and repass in the same manner as if they, the public, themselves had rights of a nature which, because there has been no dedication, they do not in fact have, and cannot acquire as being rights enforceable by them from a mere contractual stipulation in a contract to which they are not parties.

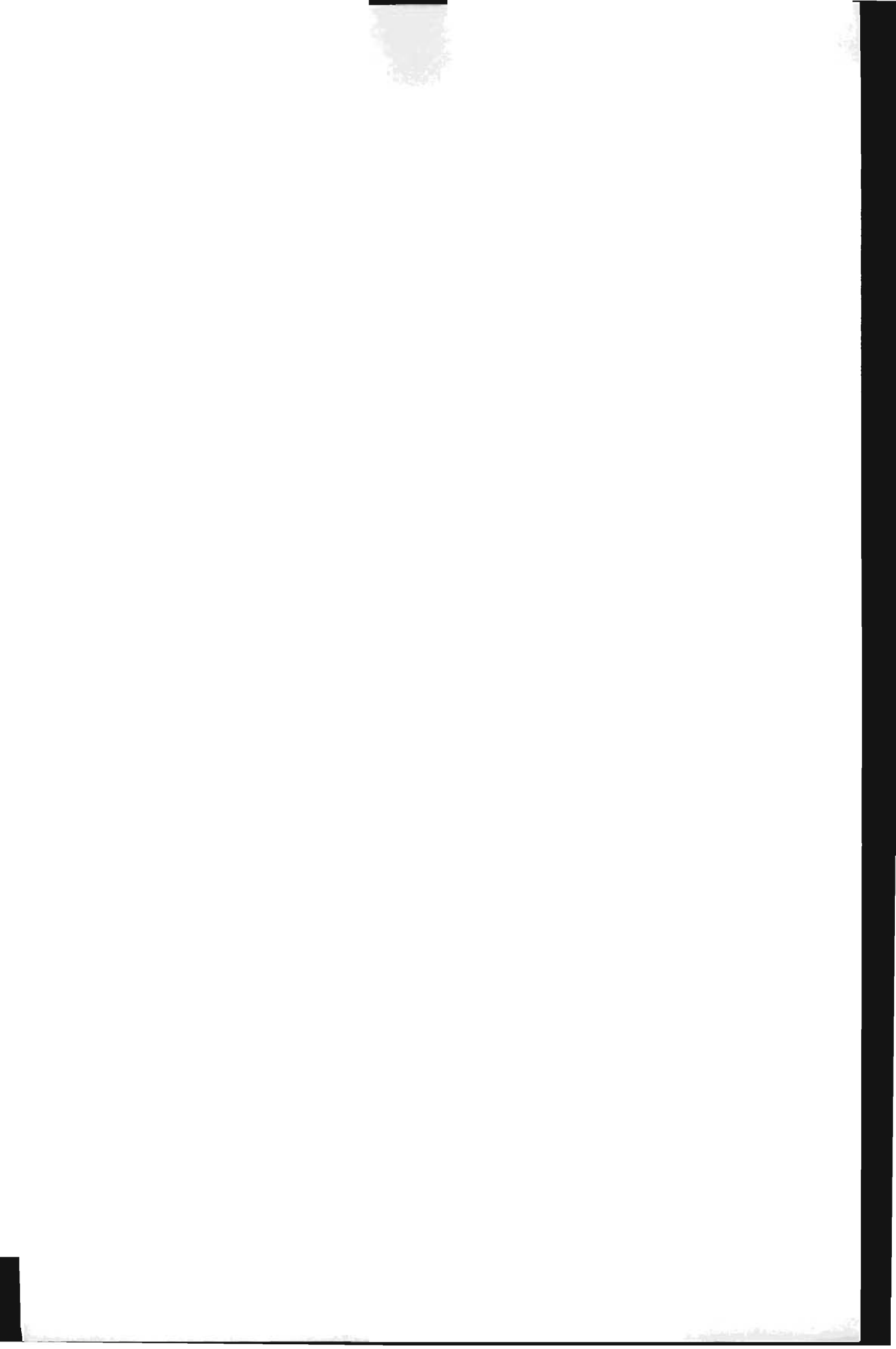
In their Lordships' view, however, the indication from the "as if" provision is otherwise. It is that the members of the public are to have the same rights under Special Condition (13) (b) as if the podium and passage area were a public street. That aim could, in their Lordships' view, only be achieved if rights were granted in perpetuity by the dedication of those parts of the site not built upon to the public for the purposes of passage and re-passage.

The conclusion with which their Lordships have arrived in respectful disagreement with that reached by the Court of Appeal, but in agreement with that reached by Zimmern J., may or may not accord with what was the actual intention of either or both the appellants and the Building

Authority when the lease was entered into. But in their Lordships' view this conclusion flows inexorably from the language which was used in the Special Conditions, a printed document prepared by the Building Authority whose Special Conditions they were. There was some discussion whether a lessor for a term of years could "dedicate" land, the argument being that since dedication must be in perpetuity a lessor for a term of years could not do so. Like the Court of Appeal their Lordships do not pronounce upon that question which does not arise since as already stated the Government as freeholder not only authorised what their Lordships have held to be dedication but insisted upon it. Their Lordships would only add that it is from the moment that public user starts that, pursuant to the contractual obligations already discussed, the podium and the passage area will each become a public highway in perpetuity.

In the result their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of Zimmern J. should be restored, and the two declarations which that learned judge granted should stand. The respondent must pay the appellants' costs before this Board and in the courts below.





**In the Privy Council**

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**MOON YIK COMPANY LIMITED  
AND ANOTHER**

**v.**

**ATTORNEY GENERAL**

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**DELIVERED BY  
LORD ROSKILL**