Privy Council Appeal No. 35 of 1984

Winfat Enterprise (HK) 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 11TH MARCH 1985

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD WILBERFORCE
LORD DIPLOCK
LORD BRIGHTMAN
LORD TEMPLEMAN

*[Delivered by **Lord Diplock**]*

Between 1974 and 1976, the appellants ("the land developers") acquired by assignment under the provisions of the New Territories Ordinance the interests in a number of parcels of land in the New Territories. Those parcels were included in the schedules to Block Crown Leases granted to persons who had originally been Chinese inhabitants of the New Territories at the time of their cession, or who were successors in title to such inhabitants, by a Convention ("the Peking Convention") dated 9th June 1898 between the Emperor of China and the British Crown. By the Peking Convention the New Territories were ceded to the British Crown for a period of ninety-nine years from 1st July 1898. The land developers' claim, in respect of which this appeal is brought, is about their rights in those parcels of land ("the parcels") which they acquired under such assignments.

The facts, the legal history of the land law in the New Territories since the time of the Peking Convention and the fallacies in the various legal [8] arguments which the land developers marshalled in

support of their claims are set out with what their Lordships can only characterise as admirable clarity and adequate detail in the judgments of both Kempster J. in the High Court and of Roberts C.J., who delivered the unanimous judgment of the Court of Appeal (Roberts C.J., Cons and Fuad JJ.A.). This shortens and greatly simplifies their Lordships' task.

The land developers' claim does not lack boldness. At the time of the cession of the New Territories the greater part of the land was occupied by Chinese peasants and used for agricultural purposes: the growing of rice, of vegetables, of fruit and other foodstuffs. Although nominally the property of the Emperor of China, to whom land tax was payable, the land was held by its occupiers upon common or customary Chinese tenure by individuals or families or clans. It suffices for present purposes to note that it was a perpetual interest, heritable and assignable and subject to no restrictions upon building on the land.

When the New Territories were ceded, the land became on 1st July 1898 the property of the British Crown for the ninety-nine year period of the cession. It was declared to be so by the Land Court (New Territories) Ordinance 1900. For the common or customary Chinese tenure under which the inhabitants had previously occupied their land there was substituted by that Ordinance a leasehold interest of ninety-nine years less three days which, for reasons which do not appear in the evidence, took the form of an initial term of seventy-five years from 1st July 1898 which was automatically renewable for a further term of twenty-four years less three days. The leasehold interest in particular parcels of land in the New Territories was granted by incorporating them in the schedules of individual Block Crown Leases which identified their location and area and described the use to which they were put in July 1898. This was generally agricultural or garden ground - and such was the case with all the parcels with which this appeal is concerned. Land so described and scheduled to a Block Crown Lease was subject to an express covenant by the leaseholder not to use the land for building purposes other than for the proper occupation of the land as agricultural or garden ground and no building or structure of any kind could be erected on the land without the approval of the Crown Surveyor.

By the Crown Lands Resumption Ordinance as currently in force in 1981 (the relevant date for the purpose of this appeal) the Crown was entitled to acquire land in the New Territories compulsorily for public purposes. As respects compensation for compulsory acquisition it provided *inter alia*:-

"12(b) No compensation shall be given in respect of any use of the land which is not in accordance with the terms of the Crown lease under which the land is held.

(c) No compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance by the Crown or by any person of any licence, permission, lease or permit whatsoever: provided that this paragraph shall not apply to any case in which the grant or renewal or continuance of any licence, permission, lease or permit could have been enforced as of right if the land in question had not been resumed.

(d) Subject to the provisions of section 11 and to the provisions of paragraphs (a), (b) and (c) of this section, the value of the land resumed shall be taken to be the amount which the land if sold in the open market might be expected to realize."

After their acquisition of the parcels the land developers applied to the Hong Kong Government in 1977 for permission, under the covenants against using any of them for building purposes, to use part of the land for low density housing development. This was refused. Subsequently in 1981 the Government itself compulsorily acquired some of the parcels ("the resumed land") for public purposes viz. temporary housing, leaving unaffected the land-developers' leasehold interest in the remaining parcels ("the retained land") which remained subject to the covenant against use for building purposes, permission for which had been and was still refused.

Put in a nutshell the land developers' claim was that, notwithstanding the ninety-nine year cession under the Peking Convention, they held the retained land, of which they were successors in title to the Chinese inhabitants of the New Territories at the time of the cession, upon the same common or customary Chinese tenure as those Chinese inhabitants had themselves held it, that is to say a perpetual interest, heritable and assignable and free from any restriction upon building on the land. As respects the resumed land they claimed that its purported compulsory acquisition by the Government was void because the above-cited provisions for compensation did not amount to a "fair price" and so resulted in the Crown Lands Resumption Ordinance being *ultra vires*.

The foundation of both these claims was a paragraph in the Peking Convention which reads:-

"It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension '[sc. the New Territories]', and that if land is required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price."

The elementary fallacy of British constitutional law which vitiates the land developers' claim is the contention that this vaguely expressed understanding, stated in the Peking Convention that there shall not be expropriation or expulsion, is capable of giving rise to rights enforceable in the municipal courts of Hong Kong or by this Board acting in its judicial capacity. Although there are certain *obiter dicta* to be found in cases which suggest the propriety of the British Government giving effect as an act of state to promises of continued recognition of existing private titles of inhabitants of territory obtained by cession, there is clear long-standing authority by decision of this Board that no municipal court has authority to enforce such an obligation. This was laid down by Lord Halsbury L.C. in *Cook v. Sprigg* [1899] A.C. 572 and by Lord Dunedin in *Vajesingji Joravarsingji v. Secretary of State for India* [1924] L.R. 51 I.A. 357.

What the High Court and Court of Appeal of Hong Kong are bound to enforce in the New Territories is the municipal law of Hong Kong made in the manner authorised by the Constitution as a British colony that has been granted to Hong Kong by the British Crown as sovereign of those territories for the duration of the cession. So far as is relevant for present purposes the Constitution applicable in the New Territories is to be found in the New Territories Order in Council 1898, the Royal Instructions to the Governor and the Colonial Laws Validity Act 1865.

The Order in Council is in the following terms:-

"

At the Court at Balmoral,
the 20th day of October, 1898

PRESENT:

The Queen's Most Excellent
Majesty in Council.

Whereas by a convention dated the 9th day of June 1898 between Her Majesty and his Imperial Majesty the Emperor of China, it is provided that the limits of British territory in the regions adjacent to the Colony of Hong Kong, shall be enlarged under lease to Her Majesty in the manner described in the said convention.

And whereas it is expedient to make provision for the Government of the territories acquired by Her Majesty under the said Convention, during the continuance of the said lease.

It is hereby ordered by the Queen's most Excellent Majesty, by and with the advice of Her Majesty's Privy Council, as follows:-

1. The territories within the limits and for the term described in the said Convention shall be and the same are hereby declared to be part and parcel of Her Majesty's Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of the said Colony.

2. It shall be competent for the Governor of Hong Kong, by and with the advice and consent of the Legislative Council of the said Colony to make laws for the peace order and good government of the said territories as part of the Colony.

3. From a date to be fixed by proclamation of the Governor of Hong Kong, all laws and ordinances which shall at such date be in force in the Colony of Hong Kong, shall take effect in the said territories and shall remain in force therein until the same shall have been altered or repealed by Her Majesty or by the Governor of Hong Kong, by and with the advice or consent of the Legislative Council.

4. Notwithstanding anything herein contained the Chinese officials now stationed within the city of Kowloon shall continue to exercise jurisdiction therein except in so far as may be inconsistent with the military requirements for the defence of Hong Kong.

And the Right Honourable Joseph Chamberlain, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.

A.W. FITZROY."

Paragraph 2 of the Order in Council grants to the Governor with the assent of the Legislative Council power to make laws for "the peace, order and good government" of the New Territories as part of the colony. The words "peace, order and good government", it has repeatedly been stated by this Board, "connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign". Lord Radcliffe so put it in *Ibralebbe v. The Queen* [1964] A.C. 900, 923. That was said in relation to the independent state of Ceylon; in the case of Hong Kong, which remains a Crown colony, it is subject to

such limitations upon the subject-matter of legislative power as are imposed by the Colonial Laws Validity Act 1865; but such limitations are not relevant to the land developers' claim.

It was under Ordinances made pursuant to this legislative power, the relevant terms of which are set out in the judgments below, that the land developers acquired their leasehold interest in the parcels which constitute the retained land and the resumed land. The only reference to the Peking Convention in the Order in Council is for the purpose of identifying the area of land and the period of time to which the Order in Council relates. The relevant Ordinances are unambiguous and their Lordships agree with the courts below that there is no ground for recourse to the principle of *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116 in an attempt to construe their unambiguous words so as to give effect to some guess, for it can be no more, as to what was intended by the respective sovereigns to be meant by the paragraph in the Convention which their Lordships have already cited.

Substantial extracts from the relevant Ordinances are cited in the judgments below. Their Lordships, in addition to the extract from the Crown Lands Resumption Ordinance which they have already cited, will only find it necessary to reproduce sections 14, 15 and 17 of the New Territories Land Court Ordinance 1900.

In view of the adequate manner in which the judgments below expose the fallacy of the land developers' claim to rely upon the legislative effect of two proclamations made by the Governor of Hong Kong on 9th April and 12th July 1899, their Lordships can restrict themselves to saying that the Crown had not delegated any power to the Governor to legislate by proclamation. The Hong Kong Letters Patent did reserve a power to Her Majesty to legislate by proclamation but only with the advice of the Privy Council. The Governor's proclamations were no more than reassuring statements addressed to the Chinese inhabitants of the New Territories. In any event being earlier in date than the New Territories Land Court Ordinance 1900 if the proclamations were capable of having any legislative effect they would, to the extent of any inconsistency, have been repealed by that Ordinance which substituted leasehold tenure for any previous tenure that the Chinese inhabitants enjoyed before the cession while they were still subjects of the Emperor of China.

Again, because the matter is dealt with so adequately in the judgments below, their Lordships can deal equally briefly with the Royal Instructions. Clause XXVI provides that the Governor shall not

consent in the name of Her Majesty to certain classes of bills including, "6. Any bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty", unless certain conditions are fulfilled, one of which is instructions to assent obtained from a Principal Secretary of State. The Ordinances under which the land developers acquired their leasehold title to the retained and the resumed land and those under which the resumed land was compulsorily acquired were in fact assented to on the instructions of the Secretary of State; but it would not have mattered if they had not been since, as the Governor himself had assented to them, they would have been validated by section 4 of the Colonial Laws Validity Act 1865 which is cited in the judgments both of the High Court and the Court of Appeal.

Sections 1 to 13 of the New Territories Land Court Ordinance 1900 are directed to setting up a special Land Court to hear and determine claims in relation to land in the New Territories with a right of appeal to the Full Court conferred by section 16. Neither the Land Court itself nor the Full Court on appeal however had any power to grant titles to land in respect of which it allowed a claim. Sections 14, 15 and 17 deserve to be cited in full:-

> "14. In cases where the Court allows the claim or part of the claim, such claim and its allowance shall be reported by the Registrar to the Governor in due course in order that a title appropriate to the case may be granted. If, however, in any particular instance, the Governor deems it inexpedient, having regard to the public interests of the Colony, that such title should be granted, the matter shall be referred back to the Court to decide what compensation shall be paid to the claimant or claimants, and the amount awarded by the Court shall be paid by the Government to such person or persons as the Court may direct. The decision of the Court as to the amount of compensation shall be final.
>
> 15. All land in the New Territories is hereby declared to be the property of the Crown, during the term specified in the Convention of the 9th day of June, 1898, hereinbefore referred to, and all persons in occupation of any such land, after such date as may be fixed by the Governor by notification in the Gazette, either generally or in respect to any specified place, village, or district, shall be deemed trespassers as against the Crown, unless such occupation is authorized by grant from the Crown or by other title allowed by the Court under this Ordinance, or by license from the Governor or from some Government officer having authority to grant such license, or unless a claim to be entitled to such occupation has been duly

presented to the Court and has not been withdrawn or heard and disallowed.

16. ...

17. Titles to be granted under this Ordinance shall be in such form or forms as may, from time to time, be directed by the Governor."

Their Lordships agree with the judgments in the courts below that sections 14 and 17 make it plain that it is for the Governor to determine what form of title is appropriate; while section 15 with its express reference not only to the land in the New Territories being the property of the Crown for the ninety-nine year term of the Peking Convention, but also to all persons in occupation of any land being deemed trespassers as against the Crown unless their occupation is authorised by grant from the Crown, reinforces the provisions of sections 14 and 17 that the only form of title to land in the New Territories that will exist in the New Territories after the Land Court has completed its work, is in such form as is directed by the Governor.

It would appear that the work of the Land Court was virtually completed by 1905. The title which the Governor directed should be granted was leasehold tenure for the term of ninety-nine years less three days from 1st July 1898. The form of grant adopted was that of Block Crown Leases with their accompanying schedules. As to the legal nature and effect of these Block Crown Leases their Lordships have already expressed their agreement with what has been said upon this matter in the admirable judgments of Kempster J. and the Court of Appeal.

As they have already stated in their Lordships' view the land developers' claim is based upon obvious misunderstandings of British constitutional law relating to Crown colonies. They will humbly advise Her Majesty that this appeal should be dismissed with costs.