HONG KONG / JUDGMENT

BEST PARTNER LTD v. SECRETARY FOR JUSTICE

COURT
Court of First Instance

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26 July 2007

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bjbj HCMP 1432/2005 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1432 OF 2005

IN THE MATTER of the Government Conditions of Exchange No.3996 and IN THE MATTER of the Remaining Portion of Section D of New Kowloon Inland Lot No.2724 and Subsection 1 of Section D of New Kowloon Inland Lot No.2724 (hereinafter referred to as the Land)

BETWEEN EXPRESSLUCK DEVELOPMENT LIMITED Plaintiff and SECRETARY FOR JUSTICE Defendant

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HCMP 1873/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1873 OF 2006

IN THE MATTER of the Government Conditions of Exchange No.3996 and IN THE MATTER of the Remaining Portion of New Kowloon Inland Lot No.2724 (hereinafter referred to as the Land)

BETWEEN BEST PARTNER LIMITED Plaintiff and SECRETARY FOR JUSTICE Defendant

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(Heard Together) Before: Deputy High Court Judge Gill in Court Dates of Hearing: 10-13 July 2007 Date of Judgment: 26 July 2007

J U D G M E N T

There are two summonses before me. They concern two high-rise developments, one called Oxford Heights, the other Cambridge Heights. They are near neighbours in Fuk Lo Tsun Road, Kowloon City. They were built by two separate companies, the plaintiffs, but these companies have the same owners and directors. What is sought by both are declarations whose effect will give them the right to use the ground floors as shops or for other commercial purposes. This is opposed by the defendant, representing the Director of Lands, upon the grounds that there is a restrictive covenant in the Conditions of Exchange (by which the land is held) that prevents such a course. It is possible, even likely, that the Director will agree to a modification of the Conditions of Exchange (which I shall call hereafter for convenience the Lease) which will permit such course. But that will require the payment of a premium, an expense both companies wish to avoid. The covenant in question, termed Special Condition (c), reads: The lessee will not be allowed to erect any building on the lots except domestic houses. It is the plaintiffs case that as a matter of construction the covenant does not prohibit the use of the ground floors of the buildings for commercial purposes; alternatively, that by conduct and inaction the Government has waived or released the covenant; alternatively, that because it has demanded and collected rent based on a rating valuation whereby the ground floors are taken to be commercial premises, the Government is estopped from enforcing the covenant. The Lease The Lease which, as its heading implies, was an exchange of land made between the Crown and the original lessee, was entered into in July

1939. The land the Crown was giving up comprised three lots designated A, B and C on an attached plan, all within a short distance of each other. They were all undeveloped; indeed it is likely they were farmlands. Block A fronted what was to become Fuk Lo Tsun Road which runs north up to Nga Tsin Wai Road. Block C was on Lion Rock Road which also runs north up to Nga Tsin Wai Road. Block B was on that short stretch of Nga Tsin Wai Road which runs between Fuk Lo Tsun Road and Lion Rock Road. The Lease called for development of the lots in question by the erection of buildings as approved by the Director of Public Works, including the construction of pavements adjacent which were then to be returned to the Government. The nature of the improvements were limited as per Special Condition (c). It was further recorded that upon compliance the lessee would be entitled to a Crown Lease for a period of 75 years as from July 1898 with a right of renewal for a further 24 years. In the event there was no Crown Lease entered into; thus the Lease in its original form remains the core title document. By virtue of the New Territories Leases Extension Ordinance, Cap.150, the Lease now runs until June 2047. I should mention that farmland it may originally have been, but post-war there was rapid development, and the neighbourhood became urban in character and a part of Kowloon City. Fuk Lo Tsun, Nga Tsin Wai and Lion Rock Roads are three sides of a rectangle, the fourth side to the south being the major arterial route Prince Edward Road West. Block A is now best described as

being 10, 12 to 16, 18, 20 and 22 Fuk Lo Tsun Road. Oxford Heights is at 12 to 16 Fuk Lo Tsun Road. It was developed by Best Partner Limited. Cambridge Heights was built on 20 and 22 by Expressluck Development Limited. Block B has become 124 and 126 Nga Tsin Wai Road, and Block C is now 6 and 8, 10 to 16, 18, 20, 22, 24 and 26 Lion Rock Road. The Kwong Family Kwong Ming Kong (Mr Kwong Senior) bought from the original lessee the as yet still undeveloped Lots A and B and that part of C which became 26 Lion Rock Road, shortly after the cessation of hostilities in December 1945. So began a history of ownership, management and development of the lands in question by the Kwong family, which subsists to this day. By the early 1950 s Mr Kwong Senior had built four-storey buildings (in one case a five-storey building) at the following addresses, namely, 12 Fuk Lo Tsun Road; 14 to 16 Fuk Lo Tsun Road; 20 and 22 Fuk Lo Tsun Road; 26 Lion Rock Road; and 124 and 126 Nga Tsin Wai Road. In addition he built a cinema on 18 Fuk Lo Tsun Road. He sold 10 and the recently developed 12 Fuk Lo Tsun Road. Subsequently he vested 26 Lion Rock Road in his wife Bertha Kwong. In 1970 Mr Kwong died. He was survived by his wife and three sons Alfonso, Carlos and Louis. There followed the vesting of various of the properties to his widow and the next generation. Carlos has since died. In 1973 the family repurchased 12 Fuk Lo Tsun Road. The cinema at 18 Fuk Lo Tsun Road was sold in 1996. It has since been redeveloped as I shall come to. In 1999, 20 and 22 Fuk Lo Tsun Road came to be vested in Expressluck Limited. Expressluck is owned and controlled by Alfonso and his son Antonio. In 2001, 12, 14 and 16 Fuk Lo Tsun Road became vested in Best Partner Limited. Best Partner is also owned and controlled by Alfonso and Antonio. I believe Mrs Kwong Senior continues to own 124 to 126 Nga Tsin Wai Road and 26 Lion Rock Road. What is material to the plaintiffs case is that, in respect of all of the houses that Mr Kwong Senior built in the 1940 s, their occupation permits were entitled Domestic Permit, and they were described as Chinese Houses. As such they were occupied as dwellings, but only from the 1st floor up. The ground floors were run as shops or restaurants or similar; at any rate, as commercial enterprises. Indeed, until he died, Mr Kwong Senior himself ran a department store at 124 and 126 Nga Tsin Wai Road. Thereafter it became a supermarket. It has only just been vacated because it, too, is scheduled for redevelopment. Similarly, the ground floors of the houses which until recently stood on the lots that have become Oxford Heights and Cambridge Heights were throughout run as commercial enterprises. But whilst from time to time, as I shall come to, there were rumblings of discontent about this apparent breach of the covenant at Special Condition (c), at no stage has the Director of Lands or his predecessor the Land Agent taken steps to enforce a correction and, in extremis, take back the lands. Modification Applications by the Kwongs It is appropriate to note that on several occasions through the history of these Kwong-owned properties applications have been made to develop or redevelop various of the properties, to incorporate into the proposed new buildings commercial premises. The paper work that has survived reveals that this required the modification of the Lease as it related to the site in question by the removal or amendment of Special Condition (c). First in 1958 there was modification applied for and granted in respect of the cinema complex built 10 years earlier at 18 Fuk Lo Tsun Road. One can draw the inference that the Authorities required this of Mr Kwong because of the

drastic departure from the provisions of Special Condition (c). Secondly, some time after the death in 1970 of Mr Kwong Senior, an application was made on behalf of the executors of his estate to have built a commercial building of seven storeys to span 12 to 22 Fuk Lo Tsun Road. This produced a preliminary response from the office of the District Lands Officer of January 1984 which recorded the need for a modification application. It stated in part: You may wish to draw your client s attention to the fact that under the existing Conditions of Exchange governing the captioned lot, portions of the site are restricted to domestic use only. A commercial development extending over the entire site would therefore contravene such restrictions. In this respect, the registered owner(s) should submit an application for modification, together with sketch plans showing the proposed redevelopment, to this office for consideration. If a representative is to be appointed, a written authorization signed by the registered owner(s) should also be forwarded. I must point out that I am not in a position to commit Government in this matter at the present stage and it should not be construed that a modification will be granted. In the event prospective plans to redevelop in this manner were abandoned and no modification was applied for. Thirdly in 1983 Louis and Carlos Kwong, the then owners of 124 and 126 Nga Tsin Wai Road, applied for a modification of the Lease in light of a proposed redevelopment of the site. This resulted in a provisional offer and assessment of the premium to be paid. In the event this development did not proceed either. Fourthly in 1993 an application for modification was made on behalf of Mrs Bertha Kwong in respect of 20 Fuk Lo Tsun Road. It seems this was not because of a prospective redevelopment of the lot, but to regularize the situation; the ground floor had all along been used commercially. In 1993 it housed a congee and noodle eating place. In fact in the ensuing correspondence the delegated officer of the Lands Department proposed resolution by Mrs Kwong applying for a temporary waiver of Special Condition (c) for a period of three years. The correspondence included a veiled threat that failure to apply would result in enforcement action without further notice. In the event it was not pursued either; but nor was any enforcement action taken. Other Modification Applications of the Lease There were several of these made by those who at some stage came to own parts of the land covered by the Lease. The owner of 10 and 12 Fuk Lo Tsun Road in 1966 applied for and was granted a modification which permitted a redevelopment of the lots. Although that redevelopment did not proceed, the Lease was modified in anticipation. In 1975 the owners of 6 to 16 Lion Rock Road obtained modifications to permit buildings with ground floors for commercial use and proceeded to redevelop these sites. The buildings thereon came to be called Sun On House and Mai Hing Mansion. 18 Fuk Lo Tsun Road having been sold in 1996, the purchaser wanted to redevelop into a composite building comprising commercial and residential premises and carparking. But it wanted to do so in reliance on the deed of modification which Mr Kwong Senior had secured in 1958. When this was declined it filed in court an application by summons for a declaration to that effect. The matter did not proceed to a hearing, because it was resolved when the developer capitulated and agreed to apply for a further modification. That was granted, requiring payment of a further premium. The composite building is complete and bears the name Genius Court. Oxford Heights and Cambridge

Heights The decision having been made to redevelop the two sites in Fuk Lo Tsun Road, plans were in turn drawn up for consideration. Those for Cambridge Heights to be developed by Expressluck were submitted first, followed in time by those for Oxford Heights, to be constructed by Best Partner. Both followed more or less the same history. I shall deal in detail with that pertaining to Cambridge Heights. Early on the plans showed an intention to have shops with cocklofts on the ground floor, and residential units on the remaining floors to the 20th storey. This brought a response from the Lands Department which was not favourable, by letter of January 2002. It read in part: Your submission is considered not acceptable as it is in breach of the type of building restriction under the lease conditions and is therefore disapproved. As your submission constitutes fundamental breaches of the existing lease conditions, the plans have not been checked in details against other lease conditions. I take this opportunity to remind you that failure to comply with any lease conditions may result in lease enforcement action being taken and the lots being re-entered by Government. It is apparent that the delegated department officer regarded the proposals as being in breach of Special Condition (c). Further attempts were made culminating in plans which showed that it was then proposed that the ground floor be utilized as a children s playground and gymnasium. This also was rejected. A letter of November 2002 stated in part: Your submission has been check and is considered not acceptable under lease and rejected on the following ground: The two G/F units for children playground and gymnasium room/billiard room should be counted as separate houses under the Practice Notes No.3/2000. As these units contain no domestic elements when regarded as separate houses, they are in breach of the domestic houses permitted under lease. Only when these proposed ground floor areas were recorded as being part of the common areas of the building, for use by the occupiers of the residential units, was there a favourable response. The letter of February 2003 stated in part: Your submission has been checked and is considered acceptable under the lease. The building was completed and an occupation permit was issued in February 2003. But the ground floor premises, designated a play area and gymnasium, is not occupied or otherwise in use. The directors of Expressluck have made no secret of their intention which is to reserve to the company the ground floor premises for use as originally applied for; namely, for shops or a restaurant or similar. In fact prospective purchasers of residential units on the floors above are alerted to this in sales brochures, and the DMC to be entered into is framed in this way. But as things stand this would result in enforcement by the Director of Lands of Special Condition (c) in the absence of an application for modification. The same situation pertains to Oxford Heights. The impasse has led to the issue of both sets of summonses. The Applications The relief sought by Expressluck is as follows:

(1) A declaration that the Government of the Hong Kong Special Administrative Region (the Government) as lessor has no right to impose on the Plaintiff a condition that the recreational facilities on the two Ground Floor units of the building hereinafter described shall be used as common area for the building.

(2) A declaration that Special Condition (c) of the Conditions of Exchange No.3996 (the Government Lease) does not prevent the Plaintiff or its successors in title from using the Ground Floor of the building now known as Cambridge Heights, Nos.20 & 22 Fuk Lo Tsun Road, Kowloon (the building) for commercial purposes.

(3) Alternatively, a declaration that the Government as lessor in respect of the Government Lease has abandoned, waived and/or released Special Condition (c) of the Government Lease insofar as the same relates to the Land and has no right to enforce the same against the Plaintiff or its successors in title, and/or alternatively is estopped from enforcing the same against the Plaintiff or its successors in title.

(4) An Order that the Government do pay the costs of these proceedings. It is the same as that sought by Best Partner in respect of Oxford Heights. The Construction Point This is the first ground submitted by Mr Harry representing both plaintiffs; that Special Condition (c) does not deal with the issue of user, only the type of building that was permitted to be built. If it were intended to be otherwise, the Lease could, and should have incorporated that as an express term. Special Condition (c) was complied with when the primary nature of the building, looked at as a whole, was that it comprised domestic habitations which did not exclude a relatively small percentage of space reserved for commercial activity. Thus the original buildings of four or five storeys as built by Mr Kwong Senior comprising one floor for commerce and the rest for living in passed the test. And so must the high-rises now in place comprising as they do a much higher percentage of residential accommodation. The fact that the ground floors might be intended for commercial purposes does not detract from, or undermine, that primary or general nature. Mr Harry also submitted that the primary purpose of the Lease being in fact an exchange of land, was that this was designed to regulate the manner in which the land was to be developed from unimproved land, including the laying out of pavements. Thus it was intended to regulate the original constructions and go no further. In support of this contention is that it was intended that it be replaced by a Crown Lease which would become the core title document for the future. The fact that that did not eventuate did not alter the contractual intent when the Lease (headed Exchange of Land) came to be executed in July 1939. Discussion Does a covenant restricting the type of construction also limit the use to which it is put? The editors of Hill and Redmond s Law of Landlord and Tenant state that it does. At paragraph 7066: A covenant to build a house as a private dwelling house requires also that it shall be kept as such , the addition of the conversion of the premises into flats, their use as a school, or as a charitable institution, the subletting of part whether as apartments or otherwise, even if the subtenant is bound to use the part sublet as a private residence, the carrying on of a guest house, and the taking of lodgers or paying guests, and the grant of occupational licences in return for payments will in general constitute breaches of the covenant. The authority in support of the primary proposition is the case of Bray v Fogarty [1870] 4 IR Eq 544. That case concerned a lease which contained a covenant that the lessee was required to build a house fit for a private family on the land which was immediately alongside the house where the lessor, John Bray, lived. The lessee duly built the house but then converted it into a public

house. His lessor sued, and won. The case was tried by the Vice Chancellor who opened his judgment with these words: I am of opinion, upon the construction of the covenant, that it extends to the keeping the tenement intended to be built adjoining John Bray s house, as a private dwelling-house, and is not confined to the building of it as such. The restriction appears to have been intended for the protection of the privacy of the lessor s own dwelling-house; and the covenant would be nugatory for that purpose, if, as soon as the tenement was erected by the lessee, he was to be at liberty to change its character into that of which he was prohibited from erecting it. The proposition is further supported by another case of the 19th century: Webb v Fagotti Brothers [1898] 79 LT 589. A covenant in a conveyance of unimproved land prevented the construction of a tavern (or the like). The purchaser s lessees built a restaurant and began running it as such. The vendor sought an injunction to restrain such use. North J granted the injunction. He said at p.590: I think the true construction of the covenant is that no house is to be built for the purpose of being used or to be used as a public-house, &c. It is plain that the covenant would be of no advantage to the lessor or to the lessees of other lots unless no building on the lot could be used for this purpose, and I think that the getting a licence to sell liquor amounts to a use of the premises for that purpose. The injunction asked for must be granted. The matter was taken to the Court of Appeal reported at [1898] 79 LT 683. North J was upheld, unanimously. Lindley M R said at page 684: The true meaning is that no hotel, tavern public-house, beerhouse, shop, or other building, for the sale of wines, spirits, ale, or stout, or any spirituous malt, or excisable liquor of any kind, shall on any lot except on the lots marked tavern lots. I do not throw over altogether the language of the covenant. To put a building on the land which is used for the sale of wines and spirits absolutely defeats the covenant. It is not what was meant should be done. I feel no doubt that North, J was right in his decision; and the appeal must therefore be dismissed, with costs. And Chitty LJ followed on the same page with this: I am of the same opinion. The various stipulations contained in the second schedule to the covenant must be read as forming part of the covenant itself. The appellants lay too great a stress on the word built , having regard to that stipulation and the other stipulations. It is wider than the word built will truly bear. The stipulation is that no hotel, tavern, public-house, beerhouse, shop, or other building, for the sale of wines, spirits, ale, or stout, or any spirituous, malt, or excisable liquor of any kind, shall be built upon any lot offered for sale, except on the lots marked tavern lots. I read that as meaning that there shall be no building on the land for the sale of wines, spirits, ale, or stout, or any spirituous, malt, or excisable liquor of any kind, except on the lots marked. I think that North, J. was right in saying that you cannot tell as to many of the things mentioned, whether or not a house, when it is in course of building, is intended for a hotel, tavern, public-house, &c. You must look to the user of the house before you can say that it is or is not a beerhouse, and before declaring that the covenant has been infringed. I agree that the words hotel and tavern are undergoing a change in their meaning, there being temperance hotels and temperance taverns as well as houses for the sale of excisable liquors. But all the words here are directed to avoiding having too many beerhouses and taverns on the land in question, the object being to restrict the number of places where excisable liquors are sold. In the present case when the

defendants showed their plans they called their building a restaurant, and no one could have told that the building was to be used for the sale of excisable liquors. On the whole I think that North, J. s conclusion was the right one. Chitty LJ, as can be seen, made the point that sometimes one may have to look at the user to determine the kind of place that has been built. And this must be so in many situations. The layout and manner of construction of a house built as a dwelling and one that is to be used as a hotel or boarding house might be close to being identical. Where, as here, the clear intent was that all buildings built on the lots to be carved out of the Lease were to be residential it follows that the conversion to a hotel or boarding house could have been in breach. Mr Harry submitted that the covenants in the lease and conveyance being the subject of the two cases above are different in form from that of Special Condition (c). Perhaps so; but the same principle applies. The restriction was imposed for a purpose; no commerce to be conducted from the buildings to be built. The Government was laying out a district from the beginning. I am satisfied that implicit in the meaning of the word erect in Special Condition (c) are the words and keep . I am not satisfied that the restriction was limited to the construction phase and no more. First it does not state that. But further; the Government was imposing restrictions in the type of building intended for given areas. The words will not be allowed were by their ordinary meaning intended to be lasting, and for as long as the Lease in its present form was extant. For these reasons I find that Special Condition (c) does prevent the use of the ground floors at Oxford Heights and Cambridge Heights for commercial purposes and decline to make the declaration asked for at (2). With regard to the declaration sought at (1), the Government as I find is entitled to impose a restriction that requires the recreational facilities to be part and parcel of the residential units above, achieved by making them part of the common areas. This was of course a proposal initiated by the developers. To treat them as separate, self-contained units would be to remove them from the ambit of residential dwelling houses and would invite commercial use. And this is forbidden, at least without modification. There shall be no declaration asked for at (1). Has There Been Abandonment or Waiver of Special Condition (c)? Both plaintiff companies rely heavily on the historical fact that for the life-span of all the buildings put up by Mr Kwong Senior by about 1950, some of which remain standing, in no case has the Government taken any action, whether by proceedings in court, or entry in the Land Registry or by re-entry of the lands. Thus as Mr Harry submits the lessees in each case are entitled to assume that the Government has abandoned or released the lessees in each case from the covenant at Special Condition (c). I was referred to a local case, Fairfax Limited v Attorney General [1995] 2 HKC 617. The facts reveal that the plaintiff had bought a property which it proposed to redevelop into a high-rise building. But there was a covenant common to the neighbourhood that restricted development to the construction of villas. The plaintiff sought relief on the basis that the lot in question was full of high-rise developments, with no modification of the lease or payment of a premium called for. At first instance the claim was dismissed, but that decision was overturned on appeal. Godfrey JA reviewed the extent of redevelopment of the lot as a whole and stated at p.622: For myself, I find a clearer case of notorious and avowed acquiescence on the part of a landlord difficult to imagine. It may be open to question whether the terraced houses

erected before 1939 on Inland Lot 757 satisfied the description of villa residences contained in the covenant. If they did not, then, on the landlord s own case, there have been open and notorious breaches of the covenant, insofar as it affects the site with which we are concerned, for well over 50 years; but even if it is assumed that the terraced houses did satisfy the provisions of the building covenant, the six-storey building erected on the site in 1958 manifestly did not, so that the period of notorious and avowed acquiescence still falls not far short of 40 years. In these circumstances, I have no doubt the proper conclusion is that the landlord has long since abandoned any legitimate interest in the enforcement of this covenant. If you find a long course of user, such as in the present case for twenty-four years, which is wholly inconsistent with the continuance of the covenant relied upon, the court infers some legal proceeding which has put an end to that covenant, in order to show that the usage has been and is now lawful and not wrongful. (see Hepworth v Pickles, supra, per Farwell J at p.110). And Leonard J said at p.625: The judge declined to make the declaration sought, but he did not say why. He did not point to any particular fact or any circumstances in Hong Kong which might justify a refusal to draw what must otherwise be a plain and obvious inference from the facts. There are no such circumstances. The evidence is overwhelmingly in favour of the presumption of a release. For many years past, the Crown has been aware of some 18 developments between 1957 and 1992 in clear contravention of the covenant in question upon the land the subject of the lease. It has done absolutely nothing to prevent it: nor has it sought to profit from the development by charging a premium. It was charging premia for developments on other land and there is no evidence to suggest that it could not have exacted a premium had it chosen so to do when the various buildings were built in breach of covenant upon the land the subject of the lease with which this court is concerned. He went on to say: I find that the evidence permits only one conclusion that the covenant has been released . The case was taken to the Privy Council and reported as Attorney General of Hong Kong v Fairfax Limited [1997] 1 WLR 149. The appeal was dismissed. The judgment was delivered by Lord Browne-Wilkinson who said at page 152: the Crown contended that the plaintiff had to prove that the Crown had knowledge of the developments in breach of covenant before any question of abandonment by the Crown can be presumed. A man cannot acquiesce in conduct of which he is ignorant. Whilst their Lordships accept that proof of such knowledge is essential, there is here overwhelming proof. It is true that the plaintiff was unable to lead evidence showing specifically that any relevant servant or department of the Crown was aware of what was going on. But it must be borne in mind that this case is not concerned simply with what has been going on on the property belonging to the plaintiff, Nos 9 and 10, Hing Hon Road. The Crown is relying on a single covenant which applies to the whole of Inland Lot 757. Therefore conduct by the Crown inconsistent with the continuing reliance upon the covenant by the Crown in relation to all parts of Inland Lot 757 is relevant to the question whether the Crown has abandoned the covenant. Accordingly the question is whether the Crown was aware of the wholesale development of the whole of Lot 757 which has taken place over the years. In the absence of any explanation the only possible inference from the fact that over a period of 40 years multi-storey blocks have been built over virtually the whole of Lot 757 is that everyone,

including the Crown, must have been aware of those facts. An area of 2 acres has been transformed into an area of high-density high-rise buildings. It would take compelling evidence, which is lacking, to rebut the inference that everyone concerned with that land was well aware that it was not being used for villas. As Leonard J said in the Court of Appeal [1995] 2 H.K.C.617, 626: the suggestion that the Crown as landlord did not know of the development is unrealistic. Mr Harry referred to evidence from Alfonso Kwong who said that the existence of the shops on the ground floor level of the land facing the street had always been open, obvious and notorious . He submitted that with such wholesale breaches of Special Condition (c) the Government could not say that it was unaware of such breaches and by its inaction must now be said to have abandoned, released or waived the covenant. I was also taken to Chinachem Investment Co. Ltd v Chung Wah Weaving and Dyeing Factory Ltd [1978] HKLR 83. This was an appeal from a judgment at first instance where a landlord had sued its tenant for breach of a covenant. The tenant had, it was alleged, wrongfully built a permanent structure on that part of the leased property reserved for parking, loading and unloading. The judge found that the landlord through a representative knew of and acquiesced in the breach; indeed, in one respect gave active assistance. On appeal it was held on the facts that there had indeed been avowed acquiescence on the part of the landlord and its appeal was dismissed. The case is particularly useful because Huggins JA who gave the lead judgment cited from a number of cases to show that a distinction could be drawn between conduct amounting to a waiver of a breach of a covenant and a waiver of the covenant itself. At page 85 he quoted from a judgment of Denning LJ in the case Wolfe v Hogan (1949) 2 KB 194 where he said at p.205: A house or a part of a house originally let for business purposes does not become let for dwelling purposes, unless it can be inferred from the acceptance of rent that the landlord has affirmatively consented to the change of user. Let me illustrate that from the common law doctrine as to waiver of forfeiture. A breach of covenant not to use premises in a particular way is a continuing breach. Any acceptance of rent by the landlord, after knowledge, only waives the breaches up to the time of the acceptance of rent. It does not waive the continuance of the breach thereafter and, notwithstanding his previous acceptance of rent, the landlord can still proceed for forfeiture on that account. Indeed in the case of a continuing breach, the acceptance of rent, after knowledge, is only a bar to a claim for forfeiture if it goes on for so long, or is accepted in such circumstances, that it can be inferred that the landlord has not merely waived the breach, but has affirmatively consented to the tenant continuing to use the premises as he has done. (See notes to Dumpor s case in the Smith s Leading Cases (13th ed.), vol.I, at pp.48 and 49). At the same page he referred to an extract from the case Lloyds Bank Limited v James (1955) 2 QB 298 in the judgment of Morris LJ at p.326: The judge in his judgment held that the conduct of the landlords in standing by from May 23, 1934, until January 31, 1951, without protest at the respondent s non-residence on the holding constituted waiver, or release of, or acquiescence in, the respondent s breach of clause 15, and that the landlords were now estopped from alleging that the respondent had committed a breach of clause 15. On the admitted facts I cannot see that any implication arises that the landlords agreed that they would never again insist on full performance of clause 15. It may well be that if they

accepted rent with knowledge they waived breaches of covenant from time to time, but I can see no reason why they should be prevented from demanding proper compliance as from the date they required it. There may be conduct from which can be implied the waiver or abandonment of a right. I do not think that the landlords so conducted themselves that they could not assert that clause 15 should be honoured. Huggins JA went on to say: That such an inference will not be lightly drawn appears from the words of Buckley L.J. in Shaw v. Applegate [1977] 1 WLR 970 at 977H when he was reviewing the well-known passage in the judgment of Fry J. in Willmott v. Barber As I understand that passage, what the judge is there saying is that where a man has got a legal right as the plaintiffs have in the present case, being legal assignees of the benefit of the covenant binding the defendant acquiescence on their part will not deprive them of that legal right unless it is of such a nature and in such circumstances that it would really be dishonest or unconscionable of the plaintiffs to set up that right after what has occurred. Finally I come to the case of Real Honest Investment Limited v Attorney General[1997] 2 HKC 437. The facts of that case reveal that the Crown had leased land to a lessee which included a covenant that the building to be erected thereon could not exceed 35 feet in height. Subsequently a redevelopment was proposed of a high-rise called Interocean Court to a height of over 80 feet. Correspondence between the lessee and lessor ensued following which Interocean Court was built. Then more recently a further redevelopment was proposed. It was contended for the lessee that the Crown had waived the original height restriction. The Crown s case was that it had not. At first instance a judge contended that there had been a general waiver, but this was overturned on appeal. The matter came before the Privy Council who dismissed the appeal. The case turned on the correspondence that preceded the building of Interocean Court. Their Lordships formed the view that the waiver allowing the building of Interocean Court was restricted to that building. It did not amount to a waiver of the restriction for all time. Lord Clyde said at p.440: If it had been the intention to grant a waiver of the restriction on height for any future building at any time during the future currency of the lease and its renewal that could have been done, but it would require clear language to express that intention. Having considered the correspondence which passed in 1948 their Lordships have not been persuaded that was the intention and as a matter of construction of the letters they are satisfied that the decision of the Court of Appeal was correct. What I glean from the authorities is that waiver of a covenant cannot be lightly inferred. It can be, but only where acquiescence by the grantor is sufficiently clear and unambiguous that it would be inherently unfair for him to be permitted to go back on his word, either actually spoken or derived from his conduct. Further, it is important to distinguish between waiver of a breach of a covenant and the covenant itself. Acquiescence will not amount to a waiver of the covenant unless in the particular circumstances, there was a clear intention to do so for all time. The facts of Fairfax reveal that to be a clear and obvious example of such a situation. With these principles in mind I turn to the particular circumstances in this case. Discussion I believe I can take it as read that the Director of Lands and his predecessor the Land Agent would have been aware of the breach of Special Condition (c) by virtue of Mr Kwong s four and five storey houses having commercial interests operating from the ground floor. This knowledge

is to my mind established or inferred by the open, obvious and notorious manner in which the commercial activities have been conducted over a period of 50 years and more and, as well, from correspondence between the owners and representatives of the Government throughout this period. From the history of events that have taken place in the neighbourhood as it evolved from farmland to a bustling, inner city enclave, two factors emerge. The first is that with this knowledge notwithstanding, the Director of Lands and his predecessor had consistently turned a blind eye, or at least taken a benevolent view, of the breaches of Special Condition (c) in the use of the small houses that originally were built, of the sort that Mr Kwong Senior constructed. Throughout the period there has been no remedial action taken to make good these breaches; at least none have been presented in evidence. The closest that I have been shown to this having been threatened is the letter sent to Mrs Kwong s AP when she for some reason chose to consider seeking a modification of the lease in respect of 20 Fuk Lo Tsun Road in 1993, prior to its vesting to Expressluck. In this letter written in November 1993 she was told that if she did not at least apply promptly for a temporary waiver lease enforcement would be recommended . But when she did nothing no steps were taken. Through the history, the only time a modification was required to an existing building was when 10 years after its construction Mr Kwong Senior was required to seek a modification of the cinema at 18 Fuk Lo Tsun Road. I am sure this would have been because the cinema bore no resemblance whatsoever, in design or user, to a domestic house. But all the other dwellings, with their highly visible commercial ground floors, have not been interfered with. The second factor is in marked contrast; every time a redevelopment has been proposed with a commercial element, there has been the need to apply for a modification of the Lease, and with the granting of that the payment of the appropriate premium. Mr Kwong Senior s executors would have had to commit to that, if they had proceeded to redevelop 12 to 22 Fuk Lo Tsun Road in 1984. So would have Louis and Carlos Kwong, had they gone ahead with a proposal to redevelop 124 and 126 Nga Tsin Wai Road. And the same goes for the redevelopments which became Sun On House and Mai Hing Mansion in Lion Rock Road. The developer of Genius Court, formerly the cinema at 18 Fuk Lo Tsun Road, chanced his arm and applied in proceedings similar to these, looking to seize the right to incorporate commercial floors without a remodification of the Lease. But those in control capitulated and dropped their claim when instead they applied for a modification, got that and paid the premium. What Alfonso and Antonio Kwong must accept is that the Director of Lands has not voluntarily conceded or by court declaration been required to accept that by inaction he has waived the covenant when it comes to new development. What thus emerges is clear; there has over the period of the life-span of the four-storey houses erected on the various lots since 1950 been a waiver of the breaches of Special Condition (c), but not of Special Condition (c) itself, as it relates to redevelopment. That covenant remains extant, and the Director of Lands is entitled to invoke it. There shall be no declaration of abandonment, waiver or release as asked for at (3). The Estoppel Point This came into being when, following completion of Cambridge Heights and then Oxford Heights, the Commissioner of Rating and Valuation came to value the various premises in the buildings for assessment and payment of rent. Since the completion of both buildings

both ground floors have been completed but left undecorated and vacant, presumably awaiting the outcome of these summonses. When it came to establishing the worth of the ground floors the Commissioner calculated the same on the basis that the intended user was for shops and the like. Of course the occupation permits had issued on the basis that these floors were to house recreational equipment for shared use by the occupants of the apartments in the floors above. Expressluck and in time Best Partner objected. But notwithstanding that, the assessments stood and both companies have had rent demands based on commercial user which they have had to pay. Both now contend that the Government, in its Department of Lands guise, cannot on the one hand claim that a commercial user of the ground floors would amount to a breach of Special Condition (c), and yet on the other hand through its Rating and Valuation wing demand rent based upon such user. By doing so it is, in effect, representing that such user is not a breach after all. Thus it is estopped by its demand for commercially assessed rent from continuing to forbid use of the premises for such purposes. Discussion The point taken against this proposition is that the Rating and Valuation and Lands Departments are different arms of the Government with different duties and obligations statutorily spelt out. The Commissioner in assessing values is obliged to ignore any restrictions on user which binds the lessor and lessee, such as the covenant which is Special Condition (c). In that regard I quote direct from Cruden s Land Compensation and Valuation Law in Hong Kong, 2nd edition, at page 342: Restrictions in Government grants In Hong Kong, any restrictions in Government grants are also ignored. After earlier conflicting views, the law was settled by the Court of Appeal in Commissioner of Rating and Valuation v Lai Kit Lau Mutual Aid Committee (1986) HKLR 93. It held that for rating valuations, any restrictions in a Government grant are to be ignored. If a Government lease, licence or other grant, contains a restrictive covenant or condition, it is to be ignored on the same basis that a restrictive covenant in a tenancy between private parties must be disregarded. The law therefore is that while statutory restrictions are to be taken into account in rating valuations, restrictive covenants, whether in a Government grant or in a private lease or tenancy agreement, are not to be taken into account. One assumes that faced with ground floor premises devoid of fixtures and fittings and occupant, the Commissioner chose to regard them as suitable for shops and proceeded to value them on that basis. I should have thought that in those circumstances it would have been appropriate to go to the plans and occupation permits and establish what was the proposed user upon which basis the green light to proceed has been given. That s as may be. Perhaps the plaintiffs should appeal that decision. But in any event I accept the proposition put forward against the estoppel point that the Commissioner s role does not include getting involved in Government land grants, and control and management and enforcement. That of course falls within the purview of the Director of Lands. The Commissioner s decision on the rentable value does not give rise to estoppel binding the Government as lessor not to enforce the covenant at Special Condition (c). There shall be no declaration of estoppel as asked for at (3).

Determination

In respect of both summonses they stand dismissed, with costs to the defendant; the costs orders are nisi. (D M B Gill) Deputy High Court Judge Mr T Harry, instructed by Messrs Kwong & Lam, for the Plaintiff (in both proceedings) Mr Y C Mok, instructed by the Secretary for Justice, for the Defendant (in both proceedings) PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L 1udk 1udk i$&`G Gill-HCMP.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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