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INSTITUTE OF ADVANCED
LEGAL STUDIES

No. 7 of 1955.

45966

In the Privy Council.

ON APPEAL

ON APPEAL FROM THE APPEAL COURT OF HONG KONG.

BETWEEN

KAI NAM (a firm)	- - -	<i>Appellants</i>
	— and —	
MA KAM CHAN	- - -	<i>Respondent</i>
PANG CHUEN	- - -	<i>Appellants</i>
	— and —	
SAME	- - -	<i>Respondent</i>
KAM SHING	- - -	<i>Appellants</i>
	— and —	
SAME	- - -	<i>Respondent</i>
HOP SHING (a firm)	- - -	<i>Appellants</i>
	— and —	
SAME	- - -	<i>Respondent</i>
HOP SHING (a firm)	- - -	<i>Appellants</i>
	— and —	
SAME	- - -	<i>Respondent</i>
HOP SHING (a firm)	- - -	<i>Appellants</i>
	— and —	
SAME	- - -	<i>Respondent</i>

(Appeal Nos. 7-12 of 1954 Consolidated).

CASE FOR THE APPELLANTS.

RECORD.

p. 94.

p. 55 et seq.

p. 16 et seq.

1. These are consolidated appeals from the Judgment dated 2nd July 1954 of the Full Court of the Supreme Court of Hong Kong (Appellate Jurisdiction) allowing six appeals against the judgment dated 8th April 1954 of His Honour Judge James Wicks sitting as the Judge of the District Court of Hong Kong (Civil Jurisdiction) holden at Victoria. The Full Court gave judgment in favour of the Respondent herein and made orders for possession of the premises hereinafter described in favour of the Respondent.

p. 1 et seq.

2. The Respondent, Ma Kam Chan, on the 16th December 1953 issued six writs in the said District Court against the respective Appellants herein. By the only material parts of the said writs the Respondent claimed respectively against each of the Appellants an order for possession of temporary shop premises whereof the Respondent was and is the registered owner and whereof the Appellants respectively were monthly tenants until the due determination of their respective tenancies before the issue of the said writs. These premises were situated at and known as Nos. 1, 5, 7, 13, 15, and 17 Landale Street, Victoria in the Colony of Hong Kong and are hereinafter referred to as "the said premises."

Ex. A, p. 96.

3. Section 5 (1) of the Hong Kong Landlord and Tenant Ordinance (Hong Kong No. 25 of 1947) (Chapter 255 of the Revised Edition, 1950) as amended provides *inter alia* that:—

"No order against a tenant for the recovery of possession or for ejectment from any premises to which this Ordinance applies shall be made otherwise than under the provisions of this Ordinance" Section 3 (1) of the said Ordinance provides *inter alia* that:—

p. 57.

"This Ordinance shall not apply to:—

- (a) any entirely new building in respect of which the written permit of the building authority to occupy the same shall have been granted under the provisions of Section 137 of the Building Ordinance after the 16th day of August 1945"

4. The two questions involved in this appeal are first whether the said premises constitute an "entirely new building" within the meaning of Section 3 (1) (a) of the said Landlord and Tenant Ordinance so as to deprive the Appellants of the protection of the said Ordinance or whether the said premises fall within the said protection, and second whether or not the Respondent, having served notices on the Appellants under the said Landlord and Tenant Ordinance which the Appellants acted upon and having demanded and received rent on the basis that the Landlord and Tenant Ordinance applied to the said premises is estopped from denying that the Landlord and Tenant Ordinance applies to the said premises.

p. 10.

Ex. E, p. 110.

Ex. K, 1, p. 119.

p. 10.

5. The facts material to the determination of the first question involved in this appeal were found and stated by His Honour Judge Wicks as follows:— p. 16.

10 “ On 3rd September 1917 an Occupation Certificate was issued by the Building Authority in respect of nine houses on the west side of Landale Street, being Nos. 1 to 17 Landale Street, Hong Kong. After the re-occupation the houses were found to be damaged and on the 28th November 1946 plans were submitted to the Building Authority to build temporary shops mostly on the foundation of the houses. . . . The amended plan was approved by the Building Authority on 5th February 1947 and an Occupation Certificate issued on 7th October 1947. Mr. Tam “ [the architect in charge] ” deposed that in building the temporary shops a large proportion of the old foundations were employed, in fact all the foundations were old except there is some of the kitchen walls and part of the fence walls at the back. The old concrete floors were largely retained, as were most of the old lavatories. The old drainage was retained. By foundations the witness included the foundation, foundation wall plus an average of three bricks above ground level of the old walls. The new walls were built on the old foundations and the ground plan of the temporary shops, apart from thinner walls, is the same as the ground floor plan of the original buildings.” Ex. C.5, p. 109. p. 10 et seq. Exs. F. & G. p. 111 et seq. Ex. J, p. 119. p. 10. Ex. B, p. 96. p. 13.

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6. The facts material to the second question involved in this appeal were that on the 22nd October 1949 the duly authorised agent for the Respondent gave Notice in writing to the Appellants of a 55% increase of rent authorised by Section 4 of the Landlord and Tenant (Amendment) Ordinance, 1949, and that on the 1st August 1953 the Respondent served upon the Appellants a Notice of Increase of Rent in statutory form pursuant to the provisions of Section 28 of the Landlord and Tenant (Amendment) Ordinance 1953 stating that the Standard Rent of the said premises was 117.25 dollars and that as from the 1st September 1953 an increase of 25% would be payable. It was also proved that the parties at all material times demanded and paid rent on the basis that the said premises came within the provisions of the said Landlord and Tenant Ordinance. p. 10, Ex. E, p. 110. p. 10, Ex. K1, p. 119. p. 10.

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7. Upon these facts His Honour Judge Wicks held as to the first question that as the foundations, stumps of walls, floors, lavatories and drains formed an integral part of the said premises and were not new and as the present shops conformed in floor plan to and were substantially the same as the ground floors of the old buildings, the said premises were not entirely new buildings within the meaning of Section 3 (1) (a) of the said Landlord and Tenant Ordinance. p. 18.

40 8. As to the second question His Honour Judge Wicks directed himself that the case of *Langford Property Co. Ltd. v. Goldrich* (1948) 2 All E.R. 439 was clear authority that there could be no estoppel against a landlord on the question of whether or not Rent Restriction legislation applied to property and he therefore held that no estoppel arose in the present cases. p. 17.

p. 19 et seq.
p. 59.

9. The Respondent appealed to the Full Court. After hearing argument on behalf of the Respondent and the Appellants the Full Court allowed the Respondent's appeal on the ground that the said premises constituted entirely new buildings within the meaning of Section 3 (1) (a) of the said Landlord and Tenant Ordinance and were therefore not subject to the provisions of the said Ordinance.

p. 57 et seq.

10. The reasons upon which the Full Court concluded as aforesaid were that:—

(i) They held that it is necessary to distinguish between a building and the materials of which it is composed and that the parts of the old building incorporated in the present case into the said premises were merely old materials utilized in the making of a building entirely new in its nature; 10

p. 59.

(ii) That the similarity of ground plan was immaterial; and

p. 59.

(iii) That the material test for the purpose of deciding whether or not a building is entirely new is the difference between "repair" and "renewal" and that in the present case the old buildings were so far beyond repair that they could no longer be said to exist as buildings and that therefore what was done on their site could not properly be described as repairs but was in the words of Buckley L.J. in *Lurcott v. Wakely and Wheeler* (1911) 1 K.B. 919 at 923-4 the "reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion." 20

p. 41.

11. The Full Court did not separately deal with the question of estoppel though it was argued by Counsel for the present Appellants.

p. 57.

12. The Appellants respectfully submit that the judgment of the Full Court cannot be sustained. In the first place the exempting wording of Section 3 (1) (a) of the said Landlord and Tenant Ordinance is clear and unambiguous and ought therefore to be given its literal and precise meaning. It requires a building to be entirely new if it is to come within the exemption provided by it. Since it provides exemption it must be construed strictly. The word 'entirely' means what it says and had the Hong Kong legislature meant to prescribe a test of substantiality only it could easily have so provided by the use of that word. The present premises were not entirely new buildings. 30

p. 57.

13. In the second place the analogy of incorporating already existing old foundations, drains, floors, lavatories and parts of walls, all of which were fixed in place, into a building in the course of erection with the incorporation of loose second-hand bricks and calling both 'materials' is false. No doubt a building can be entirely new as a building though built of old materials, but it is not entirely new when it incorporates parts of old buildings previously in situ. To hold otherwise is to deprive the word 'entirely' of meaning and is to confuse materials and the result of the use of such materials. 40

14. Further the fact that a building operation amounts virtually or even p. 58.
substantially to a renewal does not make the result an entirely new building if
parts of it were there before and have never ceased to be there. In any event
the two expressions "renewal" and "entirely new" are not correlative to one
another in meaning

15. The judgment of the Full Court suggested that to interpret the word- p. 57.
ing of Section 3 (1) (a) in the way submitted by the Appellants might lead to
strange results. The Appellants respectfully submit that this is not so, but that
in any event in construing enacted words effect must be given to the language
10 used and that the Courts are not concerned with either questions of policy or
results.

16. Moreover the Landlord and Tenant Ordinance itself contains provi-
sions which enable landlords to protect themselves adequately against any
results which might at first sight seem strange. These provisions are:—

(i) Section 3 (1) (b) which exempts from the provisions of the
Landlord and Tenant Ordinance premises continuously untenanted
since the 16th August 1945 which have been rendered habitable at the
expense of the landlord since the 23rd May 1947 by repairs "wholly
necessary for rendering the premises reasonably habitable" and at a
20 cost of not less than seven times the standard rent for one year. The
expression standard rent is defined by Section 2 of the Landlord and
Tenant Ordinance and it is governed by pre-war rental values. Due
to the general rise in prices including building costs since the war, Sec-
tion 3 (1) (b) will therefore, in the humble submission of the Appel-
lants cover almost all cases of extensive re-building which neverthe-
less do not result in an entirely new building.

(ii) Section 13 which expressly enables landlords and tenants to
contract out of the provisions of the Landlord and Tenant Ordinance
and which when read with Section 18 (1) (e) enables a landlord who
30 wishes to let only for a limited period pending re-development to eject
his tenant provided he has taken the necessary steps at the time of first
letting the premises. In the humble submission of the Appellants if
a landlord does not take these steps and does not otherwise clearly
bring himself within one of the exemptions provided by the Landlord
and Tenant Ordinance he is likely to lead tenants and prospective
tenants to believe that they will be protected and there is therefore
nothing strange in construing the Ordinance so as to justify such belief.

(iii) Section 18 (1) (j) which expressly enables the Courts to make
an order for possession or ejectment of "a tenant of land which has
40 not been developed by the erection of buildings of a permanent charac-
ter, which is required by a landlord for his own use or for the erec-
tion of buildings of a permanent character."

(iv) Section 31 which enables the Governor in Council upon the recommendation of a tenancy tribunal by order to exclude from the further application of the Landlord and Tenant Ordinance any premises or class of premises at the instigation of either a landlord or a tenant.

17. The Appellants further humbly submit that the Respondent is by reason of the facts set out in Paragraph 6 hereof estopped from denying that the Landlord and Tenant Ordinance applies to the said premises.

18. The Appellants will submit that the case of *Langford Property Co. Ltd. v. Goldrich* (1948) 2 All E.R. 439 is distinguishable or alternatively ought not to be followed. In that case a landlord's agents had written a series of letters and had given a notice of increase of rent in which they had assumed the applicability of the Rent Acts. But there is nothing to indicate that the tenants paid such increase and the judgment shows that the matter was put right in correspondence. Indeed the tenants appear always to have paid rent in excess of the standard rent. Furthermore Birkett J. appears not to have laid down any general proposition of law that a landlord can never be estopped from denying that the Rent Acts apply, but held only that on the facts of the case no estoppel arose. This is supported by the fact that when the case came before the Court of Appeal ((1949) 1 K.B. 511) the question of estoppel was not argued. The Appellants will contend that while no doubt it is correct that the doctrine of estoppel cannot apply where the result would be to compel the Court to give a judgment which it is by statute prohibited from giving, this principle when applied to Rent Restriction legislation can only prevent tenants from depriving themselves or being deprived of the protection of such legislation, but cannot prevent tenants from being protected by such legislation due to an estoppel on the part of a landlord. The result of such an estoppel would not, in the submission of the Appellants, be the giving of a judgment which the statute prohibits. 10 20

19. The Appellants therefore humbly submit that the judgment appealed from is wrong and should be set aside for the following among other 30

REASONS.

1. Because the said premises do not constitute an entirely new building within the meaning of Section 3 (1) (a) of the Landlord and Tenant Ordinance.

2. Because the Respondent is estopped from denying that the Appellants are protected by the provisions of the Landlord and Tenant Ordinance.

3. Because the judgment of the Trial Judge was correct and the judgment of the Full Court was wrong. 40

JOHN WILMERS.

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG.

BETWEEN

KAI NAM (a firm) and FIVE OTHERS *Appellants*

AND

MA KAM CHAN - - - - *Respondent.*

Case for the Appellants.

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