10,1956

No. 7 of 1955.

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

BETWEEN

KAI NAM (a firm) . . . . . *Appellants*

AND

MA KAM CHAN . . . . . *Respondent*
PANG CHUEN . . . . . *Appellants*

AND

SAME . . . . . *Respondent*
KAM SHING . . . . . *Appellants*

AND

SAME . . . . . *Respondent*
HOP SHING (a firm) . . . . . *Appellants*

AND

SAME . . . . . *Respondent*
HOP SHING (a firm) . . . . . *Appellants*

AND

SAME . . . . . *Respondent*
HOP SHING (a firm) . . . . . *Appellants*

AND

SAME . . . . . *Respondent*

(Appeal Nos. 7–12 of 1954 Consolidated)

Case for the Respondent

RECORD.

1. These are consolidated appeals from six orders dated 2nd July 1954 of the full Court of Hong Kong (Gould A.C.J. and Gregg J.) by which they allowed six appeals against an order dated 8th April 1954 of the District Court of Hong Kong (Wicks D.J.) rejecting the Respondent's claims for possession of certain premises and dismissing his actions. p. 94. p. 55 *et seq.* p. 16 *et seq.*

p. 1 *et seq.* 2. In six actions each commenced by a writ dated 16th December 1953 the Respondent Ma Kam Chan claims against the six Appellants respectively possession of six premises known respectively as No. 1, No. 5, No. 7, No. 13, No. 15 and No. 17 Landale Street, Victoria in the Colony of Hong Kong and mesne profits from 1st December 1953 and costs.

p. 5 *et seq.* 3. The issues on this appeal are two. First: whether the premises in question are subject to the protection against eviction afforded to tenants by the Landlord and Tenant Ordinance, a question which depends Ex. A, p. 96. on whether they are excluded from its operation by section 3 (1) (*a*) thereof. Second: whether the Respondent is estopped from denying that they are so subject.

4. Section 3 (1) (*a*) is in the following terms:—

"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 16th day of August, 1945; . . . "

5. The facts generally relevant to this appeal are as follows:—

p. 106. (I) A Crown lease dated the 10th January 1918 of the premises being Inland Lot No. 2245 for 999 years was granted to the Hong Kong Land Investment and Agency Company Ltd.

(II) Shortly before the date of such lease, 9 houses being Nos. 1 to 17 (odd numbers) Landale Street were built thereon by the said lessees and the Building Authority's certificate of compliance with the (then relevant) Public Health and Buildings Ordinance No. 1 p. 109. of 1903 was given on 3rd September 1917. These houses were p. 56, l. 2. four storey houses for residential purposes.

p. 56, l. 3. (III) During the second world war these houses were almost completely demolished by enemy action.

p. 123. (IV) Pursuant to an agreement dated the 3rd June 1946 between the lessees and one Li Chok Lai the lease of (*inter alia*) p. 97. Inland Lot No. 2245 was on 29th July 1946 assigned to C.L. Li Investment Company Limited.

(V) The buildings now in question being one storey shop premises of a temporary character were constructed in 1947 on Inland Lot No. 2245. A plan and amending plan for that purpose p. 111. having been approved by the Building Authority being exhibits F p. 113. and G. These appeals relate to six of the nine buildings then constructed.

p. 96, l. 20. (VI) On the 7th October 1947 the Building Authority gave permission for such buildings to be occupied. Such permit was p. 10, l. 35. given under section 116 of the Building Ordinance No. 18 of 1935 which was re-enacted as section 137 of the Buildings Ordinance referred to in section 3 (1) (*a*) of the Landlord and Tenant Ordinance.

(VII) Section 137 (1) of the Building Ordinance is in the following terms :—

" No new building shall be occupied or used in any way, except by caretakers only not exceeding two in number, until an authorised architect shall have certified in writing in the prescribed form to the Building Authority that such building complies in all respects with the provisions of this Ordinance, and is structually safe, nor until the owner shall have received from the Building Authority a written permit to occupy such building."

(VIII) By section 2 of the Buildings Ordinance " new building " is defined as including

" any building begun after the 21st day of February 1903 ; and any then existing building thereafter altered to such an extent as to necessitate the reconstruction of the whole of any two of its main walls or the removal of the roof and the reconstruction of at least one half of each of any two of its main walls, whether at the same time or by instalments at different times ; and any existing building raised to such an extent that its total height exceeds one and a half times the original height of the building. It also includes the conversion into a domestic building of any building not originally constructed for human habitation, and the conversion into more than one domestic building of a building originally constructed as one domestic building only and any existing building altered in such a manner as to form an additional storey, or the conversion into premises, for separate occupation by different tenants, of any building originally constructed for one tenancy."

(IX) On the 15th November 1947 the said lease of (*inter alia*) Inland Lot No. 2245 was assigned by the C.L. Li Investment Company Limited to the Respondent. p. 103.

(X) On the 19th October 1953 the Respondent duly gave notice to quit to each Appellant thereby determining the contractual monthly tenancies then subsisting of the buildings constructed in 1947. p. 96, l. 1. p. 5, l. 30.

6. The further facts relevant to the first issue of the applicability of section 3 (1) (*a*) of the Landlord and Tenant Ordinance are thus summarised in the judgment on Appeal of Gould C.J. :—

" After the passing of the Landlord and Tenant Ordinance the then owner obtained permission from the Public Works Department to erect temporary one storey premises for use as shops. When building operations commenced debris was piled on the site and only after it was cleared away was the exact position of the existing foundations disclosed. In the new construction, almost the whole of the old foundation was retained, and also the lower part of the old walls to an average height of three bricks above ground level. The old drains were used, the old concrete flooring was largely retained and also most of the old lavatories. The new walls were not as thick as the old, being of the thickness of one p. 56, l. 4.

brick only. The plan of the floor was the same as the old ground floor though there was a slight increase of internal area owing to the thinner walls."

A drawing accepted by the architect who was responsible for the building in 1947 as illustrative of the extent of user of the existing foundations is included in the Record.

p. 122.
p. 13, l. 20.

7. The further facts relevant or alleged by the Appellants to be relevant to the second issue of estoppel are as follows :—

p. 13, l. 44 to p. 14, l. 15.

(I) Li Chok Lai gave evidence (as director of C. L. Li Investment Company Limited) that the lettings in 1947 of the premises then constructed were oral ; that he told the tenants that the buildings and rentals were temporary and that the intention was to build proper buildings in due course ; that (without specific agreement to that effect) the lettings were on the basis that the buildings were not controlled under the Landlord and Tenant Ordinance.

p. 110, l. 25.
p. 119, l. 30.

(II) Notices requiring increased rentals were given by the Respondent on the 22nd October 1949 and 1st August 1953 purporting to be notices of increases authorised by the Landlord and Tenant Ordinance. Such increased rentals were paid.

p. 5, l. 30.

(III) At all material times the Appellants were on any footing contractual monthly tenants.

p. 121, l. 25.

(IV) The estoppel point was taken during an adjournment of the hearing before Wicks D.J. by letter dated 23rd February 1954 in the following form :—

> " The Plaintiff by his conduct and by the conduct of his predecessors in title in letting the premises to the Defendants herein as premises controlled under the Landlord and Tenant Ordinance is estopped from now alleging that the premises are exempted from such ordinance."

p. 16.

8. On the 8th April 1954 the District Court dismissed all the actions. Wicks D.J. in a reserved judgment said that there were only two issues before the Court. The first was whether the Respondent having served notices on the Appellants under the Landlord and Tenant Ordinance which the Appellants acted upon, the Respondent was estopped from denying that the Ordinance applied to the premises. This issue he decided in favour of the Respondent, considering that the point was covered by *Langford Property Co. Ltd.* v. *Goldrich* [1948] 2 A.E.R. 439. The second issue was whether the buildings were entirely new buildings under section 3 (1) (*a*) of the Landlord and Tenant Ordinance. He accepted that the mere use in the construction of a later and different sort of building of materials which were not themselves new (having been previously used in an earlier and different building or buildings on the same site) could not prevent the later building from being an entirely new building : but he based that view (A) on the fact that the definition of " building " in the Building Ordinance section 2, while including any part of a building, did not embrace e.g. bricks *per se* and (B) on the fact that the later building would be different in area or character from the earlier. He pointed out the conformity in floor area and floor shape in the present case between the earlier and later buildings, asserting that it would be reasonable to

say that the standard rents would be the same as those of the previous ground floors. He said that " consequently " in the present case section 3 (1) (*a*) of the Landlord and Tenant Ordinance did not apply since (A) the foundations, stump of walls (i.e. the three brick depth), floors, lavatories, and drains formed an integral part of the buildings and were not entirely new, and (B) the present shops conformed in ground plan with the ground floor of the old buildings. He concluded by saying that the result was not unreasonable since the landlord could have previously or might yet be able to take steps under the Ordinance which might result in his being able or authorised to carry out his proposed permanent building plan.

9. The Respondent appealed to the Supreme Court of Hong Kong and in his notice of appeal dated 29th April 1954 gave as the ground thereof (1) that upon the facts as found by the learned Judge he the Respondent was entitled to a judgment (2) that the learned Judge was wrong and mis-directed himself in holding that the premises the subject matter of the above mentioned action were not excluded from the provisions of the Landlord and Tenant Ordinance and (3) that the learned Judge was wrong in holding that the said premises were not an entirely new building within the meaning of these words within section 3 (1) (*a*) of the Landlord and Tenant Ordinance. p. 19.

10. On the 8th June 1954 the Full Court of Hong Kong heard the arguments on the appeal and reserved judgment. p. 20 *et seq.*

11. On the 2nd July 1954 the Full Court allowed the appeal and ordered that the Respondent do recover possession of the premises together with mesne profits from the 1st December 1953 at the rate claimed in each of the said writs and with costs. Gould A.C.J. gave his reasons for the decision in a judgment in which Gregg J. concurred. He said that the definitions of the words " building " and " new building " in the Building Ordinance did not appear to assist in the problem of determining the meaning of the words " entirely new building " in section 3 (1) (*a*) of the Landlord and Tenant Ordinance: the meaning of which phrase must he thought be determined having regard to the provisions and objects of that Ordinance itself. In this connection he pointed out that the definition " building " included matters such as an arch, a lift, a septic tank and a hoarding. As to the definition of " new building " in the Building Ordinance he said that it must include every " entirely new building " but that obviously it also included matters which could not be " entirely new buildings ": he added that it was not impossible that the word " entirely " in the Landlord and Tenant Ordinance was inserted to make it quite clear that the full definition of " new building " in the Building Ordinance did not apply. He said that judicial notice could be taken of general building and housing conditions in the colony since 1945 and that in view of those conditions it was quite plain that such provisions as section 3 (1) (*a*) of the Landlord and Tenant Ordinance were designed to encourage new building: with building costs at an extremely high figure owners of land would be much less likely to build if their rents were to be subjected to immediate control. He also referred to section 3 (1) (*b*) of the Ordinance (which exempted from the Ordinance other cases) as holding out encouragement to carry out extensive repairs p. 55 *et seq.*

to untenanted premises to render them habitable. He held that the legislature did not in the phrase " entirely new building " intend to use the word " new " in relation to the materials of which the building was constructed but in relation to the building *qua* building. When some portion of the original building had survived and was built into or utilized in the building without having broken up into its component bricks or blocks of granite, it was wrong, he thought, to say that such a building could not be entirely new because it comprised parts of a new building: that in his opinion was to confuse " materials " with " building." With regard to the argument that the exemption in section 3 (1) (*b*) (and therefore not that in section 3 (1) (*a*)) would (if the expense were sufficient to meet the sub-section) apply when a five storied building was erected on part of old foundations he was of the opinion that this could only be the case if the word " repairs " in section 3 (1) (*b*) was given a strained meaning and held, referring to *Lurcott* v. *Wakely and Wheeler* [1911] 1 K.B. at 919 that the word " repair " did not include replacement of the whole entity when it has been destroyed to a point at which it was in the common phrase beyond repair. In support of this view he assumed by way of example that by a freak of bomb damage, one of two adjoining houses was completely demolished except for a party wall: a newly built house which utilized the party wall could not be described as " repairs " for there was no answer to the question " repairs to what ? " : but if in such case it were held that the incorporation of the party wall prevented it from being an entirely new building it would be subject to the Ordinance. He held that where as a result of damage there is nothing left which could possibly be called a building, then the existence of such building as such was terminated: it was he thought no longer an entity: in any such case the building replacing it would be an entirely new building even although it was built on the same foundation and had the same floor. In discussing the views expressed by the District Judge he rejected the suggestion that the incorporation of any part of the former building however small necessarily prevented the new building from being an " entirely new building " and rejected the second element in the reasoning of Wicks D.J. (based on similarity of conformation) on the ground that a perfect replica which incorporated no part of the former building would obviously be an entirely new building. He concluded by stating in summary his view that in the present case it was impossible to say that any building within the purview of the Landlord and Tenant Ordinance continued to exist and that its successor must therefore be regarded as an entirely new building.

12. The Full Court did not deal with the question whether the Respondent was estopped from saying that the Landlord and Tenant Ordinance did not apply. Counsel for the present Appellants had in argument substantially accepted the case of *Langford* v. *Goldrich* (*supra*) as one which the Full Court would normally follow, though suggesting that that decision involved a *non sequitur* and therefore did not require to be followed. Counsel for the present Respondent did not reply on this point.

p. 94. 13. On the 30th July 1954 the Full Court of Hong Kong ordered that the Appellants subject to the performance by them of certain conditions therein mentioned should have leave to appeal to Her Majesty

The Queen in her Privy Council against the judgments of the Full Court of the 2nd July 1954 and ordered (among other things) that the six appeals should be consolidated.

14. The Respondent submits that the orders made by the Full Court on the 2nd July 1954 should stand.

15. In the first place the premises are within the exemption contained in section 3 (1) (*a*) of the Landlord and Tenant Ordinance.

(I) The existing temporary shops are " an entirely new building " for the reasons, among others, given in the judgment of Gould A.C.J. and summarised above. It is respectfully submitted that the contrary view expressed by Wicks D.J. is incorrect for the reasons among others given in the said judgment of Gould A.C.J.

(II) It is additionally submitted that the explanation of the word " entirely " is in fact that which was regarded by the Full Court as " not impossible "—namely to avoid the inference that the words " new building " by themselves would include everything contained in the definition in section 2 of the Buildings Ordinance of " new building."

(III) Further there is no justification for referring to the definition of " building " in the Buildings Ordinance as being material.

(IV) Further it is not correct that the incorporation in a building of any part however small of the earlier building without first moving that part renders the later building something which is not an entirely new building within the Ordinance.

(V) Further a test cannot be whether the shape and dimensions of the later building are the same or substantially the same as the earlier building: and in any event the only resemblance in the present case lies in the ground floor plan.

(VI) Further a test under section 3 (1) (*a*) of the Ordinance is whether the condition of the site is such (as here) that it cannot be said that there is any longer a building there: in which case the later building must be an entirely new building.

(VII) Further another and similar test is whether in any given case the conditions on the site are such that it is possible to speak of rendering premises habitable by " repairs "; if not any later building constructed on the site must be an entirely new building.

(VIII) Further the other parts of the Landlord and Tenant Ordinance to which Wicks D.J. referred as making his construction reasonable do not make it so and cannot affect the true construction of section 3 (1) (*a*).

16. Secondly the Respondent is not estopped from alleging that the Appellants are protected by the provisions of the Landlord and Tenant Ordinance.

(I) The relevant pleading on this point (letter 23rd February 1954) asserts (A) conduct unspecified by the Respondent: (B) conduct of the Respondent's predecessor in title in letting the premises to the Appellants as premises controlled under the Ordinance. p. 121, l. 25.

p. 14, l. 44 to p. 15, l. 16.

(II) The only evidence on (B) is that they were not so let.

(III) For the respondent to be estopped it must be established that the Respondent or his predecessors in title made a representation of fact upon which the Appellants not only acted but acted to their detriment.

Exh. E, p. 110. Exh. K1, p. 119.

(IV) No such representation of fact was made or can be inferred from the notices dated 22nd October 1949 and 1st August 1953 requiring the Respondents to pay an increased rent.

(V) There was no evidence that the Appellants acted on any representation by the Respondent as to the applicability of the Landlord and Tenant Ordinance or at any rate acted to their prejudice. The payment of increased rent was not prejudicial to them because if the Landlord and Tenant Ordinance had no application the Respondent was entitled to compel payment of the increased rent by recovering possession if it was not paid.

(VI) The case of *Langford Property Co. Ltd.* v. *Goldrich* [1948] 2 A.E.R. 439 so far as it decides there can be no estoppel against the landlord on a question whether or not the rent restriction legislation applies was rightly decided.

(VII) Even if the case last mentioned was wrongly decided, in this case any representation made by the Appellants as to the applicability of such Ordinance was a representation of law and not of fact concerning which no estoppel can arise.

17. The Respondent therefore humbly submits that the order made by the Full Court of Hong Kong on 2nd July 1954 was right and should be upheld for the following among other

REASONS

(1) BECAUSE the premises constitute an entirely new building within the meaning of section 3 (1) (*a*) of the Landlord and Tenant Ordinance which Ordinance accordingly affords no defence to the Respondent's actions.

(2) BECAUSE the Respondent is not estopped from denying that the Ordinance applied to the premises.

(3) BECAUSE the judgment of the Full Court was right.

(4) BECAUSE the judgment of the District Court was wrong.

CHARLES RUSSELL.

A. A. BADEN FULLER.

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AND

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Case for the Respondent

GIBSON & WELDON,
27 Chancery Lane,
London, W.C.2,

Agents for:—

E. ZIMMERN & CO.,
Hong Kong.

The Solicitors' Law Stationery Society, Limited, Law and Company Printers,
22 Chancery Lane, W.C.2. N4904-5283