Judgment (10), 1956

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

BETWEEN

KAI NAM (a firm) AND FIVE OTHERS - - - - - *Appellants (Defendants)*

AND

MA KAM CHAN - - - - - - - - - - - - - - - *Respondent (Plaintiff)*

RECORD OF PROCEEDINGS

LAU, CHAN & KO,
Solicitors for the Appellants (Defendants)

F. ZIMMERN & CO.,
Solicitors for the Respondent (Plaintiff)

No. ..... of 195....

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

BETWEEN

KAI NAM (a firm) AND FIVE OTHERS - - - - - *Appellants (Defendants)*

AND

MA KAM CHAN - - - - - - - - - - - - - - - *Respondent (Plaintiff)*

RECORD OF PROCEEDINGS

REFERENCE OF INDEX

NO.	DESCRIPTION OF DOCUMENT	DATED	PAGE
	IN THE DISTRICT COURT OF HONG KONG CIVIL JURISDICTION ACTIONS Nos. 843, 845, 846, 848, 849 and 850 of 1953.		
1.	Writ of Summons in C.J. Action No. 843/1953	16th Dec. 1953	1
2.	Precis of Writ of Summons in C.J. Action No. 845/1953	16th Dec. 1953	3
3.	Precis of Writ of Summons in C.J. Action No. 846/1953	16th Dec. 1953	3
4.	Precis of Writ of Summons in C.J. Action No. 848/1953	16th Dec. 1953	4
5.	Precis of Writ of Summons in C.J. Action No. 849/1953	16th Dec. 1953	4
6.	Precis of Writ of Summons in C.J. Action No. 850/1953	16th Dec. 1953	5
7.	Copy of the Notes of His Honour Judge James Wicks taken on the hearing of the Actions	28th Jan. 1954	5
8.	Ruling of His Honour Judge James Wicks made on preliminary arguments	17th Feb. 1954	8

NO.	DESCRIPTION OF DOCUMENT	DATED	PAGE
9.	Copy of the notes of His Honour Judge James Wicks taken on the continued hearing of the Actions	17th Feb. 1954 & 16th March 1954	10
10.	Judgment on the hearing before the Court of First Instance ...	8th April 1954	16
	IN THE SUPREME COURT OF HONG KONG APPELLATE JURISDICTION APPEALS Nos. 7 to 12 of 1954		
11.	Notice of Motion on Appeal	29th April 1954	19
12.	Transcript of the Proceedings on Appeal		20
13.	The Judgment on Appeal	2nd July 1954	55
14.	Notice of Change of Solicitors	16th July 1954	60
15.	Petition for leave to Appeal to the Privy Council	16th July 1954	61
16.	Affidavit of Chan Ying Hung in support of Petition	16th July 1954	62
17.	Affirmation of Chan Kai Nam in support of Prayer for a Stay of Execution	16th July 1954	63
18.	Affirmation of Ma Kam Chan in Opposition to Prayer for a Stay of Execution	28th July 1954	64
19.	Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a Stay of Execution	30th July 1954	68
20.	Order of the Full Court giving provisional leave to Appeal to the Privy Council	30th July 1954	94

EXHIBITS

Exhibits produced at the Hearing before the Court of First Instance

EXHIBIT MARKED	DESCRIPTION OF DOCUMENT	DATED	PAGE
A	Notice to Quit	19th Oct. 1953	96
B	Occupation Certificate	7th Oct. 1947	96
C-1	Assignment	29th July 1946	97
C-2	Declaration of Trust	15th Nov. 1947	101
C-3	Assignment	15th Nov. 1947	103
C-4	Lease	10th Jan. 1918	106
C-5	Building Authority Certificate	3rd Sept. 1917	109

EXHIBIT MARKED	DESCRIPTION OF DOCUMENT	DATED	PAGE
D	Notice from New Landlord	1st Oct. 1947	110
E	Notice of Increase of Rent	22nd Oct. 1949	110
F	Plan approved by Building Authority	16th Dec. 1946	111
G	Plan approved by Building Authority	5th Feb. 1947	112
H-1/12	12 Photographs of Landale Street Premises		113
J	Letter from H. S. Tam Architect to B.A. stating to make use of existing foundation	17th Jan. 1947	119
K-1	Nctice of Increase of Rent		119
K-2	Letter from Rating & Valuation Dept.	9th Oct. 1953	121
K-3	Letter from Hastings & Co. to F. Zimmern	23rd Feb. 1954	121
L	Sketch showing old Foundation and Wall		122
M	Sale and Purchase Agreement	3rd June 1946	123

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

APPEALS NOS. 7 TO 12 OF 1954

SUPPLEMENTAL INDEX

NO.	DESCRIPTION OF DOCUMENT	DATED	PAGE
21.	Order of the Full Court giving extension of time for the preparation and despatch of the Record of Proceedings	26th Oct. 1954	125A
22.	Registrar's Certificate as to the compliance by the Petitioners of the provisions of the Order dated 30th July 1954	16th Dec. 1954	125A
23.	Certificate of Registrar and the Acting Chief Justice	16th Dec. 1954	125B
24.	Notice of Motion for final leave to Appeal to the Privy Council ...	16th Dec. 1954	125C
25.	Affidavit of Chan Ying Hung in support	16th Dec. 1954	125D
26.	Order of the Full Court giving final leave to Appeal to the Privy Council	23rd Dec. 1954	125E

No. ..... of 195....

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

BETWEEN

KAI NAM (a firm) AND FIVE OTHERS - - - - *Appellants (Defendants)*

AND

MA KAM CHAN - - - - - - - - - - - *Respondent (Plaintiff)*

10

RECORD OF PROCEEDINGS

No. 1.

WRIT OF SUMMONS IN C. J. ACTION

No. 843/1953

In the District Court of Hong Kong Civil Jurisdiction.

No. 1
Writ of Summons

IN THE DISTRICT COURT OF HONG KONG
CIVIL JURISDICTION

Holden at Victoria

Action No. 843 of 1953

Between Ma Kam Chan Plaintiff,

20 and

Kai Nam (a firm) Defendants.

ELIZABETH II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

To Kai Nam of No. 1, Landale Street, Victoria in the Colony of Hong Kong.

We command you that you do attend The Victoria District Court, on Friday, the 24th day of December 1953, at Ten o'clock in the forenoon being the day and time appointed for the hearing of an action instituted against you
30 by Ma Kam Chan of No. 50, Bonham Strand West Victoria aforesaid Banker.

In the District Court of Hong Kong Civil Jurisdiction.

No. 1 Writ of Summons —(*Contd.*)

PARTICULARS OF THE PLAINTIFF'S CLAIM

1. The Plaintiff is the registered owner of the premises known as No. 1, Landale Street, Victoria in the Colony of Hong Kong.

2. The said premises is an entirely new building in respect of which the written permit of the Building Authority to occupy the same was granted under the provisions of Section 137 of the Buildings Ordinance after the 16th day of August, 1945.

3. The Defendants were the tenants of the said premises on a monthly tenancy at the rent of $250.00 per month which said tenancy was duly determined on the 30th day of November 1953 by a written notice to quit dated the 19th day of October 1953.

4. The Defendants are wrongfully in possession of the said premises and have refused to quit the same.

The Plaintiff claims:—

1. Possession of the said premises.
2. Mesne profits from the 1st day of December 1953 until date of possession given to the Plaintiff at the rate of $250.00 per month.
3. Costs.

(Signed) F. Zimmern,

Solicitors for the Plaintiff.

WITNESS The Honourable Mr. Justice Trevor Jack Gould, Acting Chief Justice of Our said Court, the 16th day of December 1953.

(L. S.) (Sd.) C. D'Almada e Castro,

Registrar.

EXTRACTS

From "The Supreme Court (Summary Jurisdiction) Ordinance, Cap. 5."

Section 17.—Except by consent or leave of the Court, no cause or matter in the Summary Jurisdiction of the Court shall be set down for trial or hearing before at least three clear days from the service of the Writ of Summons; and except by the consent or leave, it shall not be competent to the Defendant to enter into an Equitable Defence or into any Special Defence, such as Set-off, Illegality, Want of Consideration, or the Statutes of Limitation, unless at least Twenty-four Hours Written Notice thereof has been first given to the Plaintiff or his Solicitor or Counsel.

19. (1) In every Cause or Matter if the Court is satisfied that any party who is not represented by a Solicitor or Counsel is prevented by good cause from attending in person, the Court may permit any Relative, Friend or Agent of such party, who satisfies the Court that he has authority in that behalf, to appear on his behalf.

In the District Court of Hong Kong Civil Jurisdiction.

No. 1
Writ of Summons —(*Contd.*)

(2) If such authority is in writing, it shall not be liable to stamp duty.

No. 2.

No. 2
Precis of Writ of Summons

PRECIS OF WRIT OF SUMMONS IN C. J. ACTION

No. 845/1953

IN THE DISTRICT COURT OF HONG KONG
CIVIL JURISDICTION

Action No. 845/53.

Between Ma Kam Chan Plaintiff,

and

Pang Chuen Defendant.

PRECIS OF WRIT OF SUMMONS.

This Action is exactly the same as that in C. J. Action No. 843/53 except that the premises concerned are No. 5 Landale Street, Victoria in the Colony of Hong Kong. In this case the mesne profits are from the First day of December, 1953 until date of possession given to the Plaintiff at the rate of $234.50 per month.

No. 3.

No. 3
Precis of Writ of Summons

PRECIS OF WRIT OF SUMMONS IN C. J. ACTION

No. 846/1953

IN THE DISTRICT COURT OF HONG KONG
CIVIL JURISDICTION

Action No. 846/53.

Between Ma Kam Chan Plaintiff.

and

Kam Shing Defendant.

PRECIS OF WRIT OF SUMMONS.

This Action is exactly the same as that in C. J. Action No. 843/53 except that the premises concerned are No. 7 Landale Street, Victoria in the Colony of Hong Kong. In this case the mesne profits are from the First day of December, 1953 until date of possession given to the Plaintiff at the rate of $234.50 per month.

In the District Court of Hong Kong Civil Jurisdiction.

No. 4
Precis of Writ of Summons

No. 4.

PRECIS OF WRIT OF SUMMONS IN C. J. ACTION

No. 848/1953

IN THE DISTRICT COURT OF HONG KONG
CIVIL JURISDICTION

Action No. 848/53.

Between Ma Kam Chan Plaintiff,

and

Hop Shing (a firm) Defendant.

PRECIS OF WRIT OF SUMMONS.

This Action is exactly the same as that in C. J. Action No. 843/53 except that the premises concerned are No. 13 Landale Street, Victoria in the Colony of Hong Kong. In this case the mesne profits are from the First day of December, 1953 until date of possession given to the Plaintiff at the rate of $234.50 per month.

No. 5
Precis of Writ of Summons

No. 5

PRECIS OF WRIT OF SUMMONS IN C. J. ACTION

No. 849/1953

IN THE DISTRICT COURT OF HONG KONG
CIVIL JURISDICTION

Action No. 849/53.

Between Ma Kam Chan Plaintiff,

and

Hop Shing (a firm) Defendant.

PRECIS OF WRIT OF SUMMONS.

This Action is exactly the same as that in C. J. Action No. 843/53 except that the premises concerned are No. 15 Landale Street, Victoria in the Colony of Hong Kong. In this case the mesne profits are from the First day of December, 1953 until date of possession given to the Plaintiff at the rate of $234.50 per month.

No. 6.

PRECIS OF WRIT OF SUMMONS IN C. J. ACTION

No. 850/1953

In the District Court of Hong Kong Civil Jurisdiction.

No. 6
Precis of Writ of Summons

IN THE DISTRICT COURT OF HONG KONG
CIVIL JURISDICTION

Action No. 850/53.

Between Ma Kam Chan Plaintiff,

and

Hop Shing (a firm) Defendant.

10 PRECIS OF WRIT OF SUMMONS.

This Action is exactly the same as that in C. J. Action No. 843/53 except that the premises concerned are No. 17 Landale Street, Victoria in the Colony of Hong Kong. In this case the mesne profits are from the First day of December, 1953 until date of possession given to the Plaintiff at the rate of $234.50 per month.

No. 7.

COPY OF THE NOTES OF HIS HONOUR JUDGE JAMES WICKS TAKEN ON THE HEARING OF THE ACTIONS

No. 7
Copy of the Notes of His Honour Judge James Wicks

p.160. 24 December 1953 (List) Coram: Reynolds D.J.

20 Zimmern for Plaintiff.
Ying for all Defendants.

p.2. Date fixed 28th January at 9.30 a.m. all day. Coram: Wicks D.J.
28th January 1954 at 10.25 a.m.
Mr. Zimmern for Plaintiff in all cases.
Mr. Bernacchi (instructed by Mr. Hampton) for Defendants in all cases.
By agreement of parties cases to be heard together.

Mr. Zimmern:

Same Plaintiff in all cases. New firms. No. 1, 5, 7, 13, 15 and 17 Landale Street.

Mr. Bernacchi:

30 I accept that Plaintiff is the owner of the property. I accept that Defendants were contractual calendar monthly tenants of the Plaintiff until the contract was terminated by Notice to quit. Notices to quit in each case admitted. Exh. A. as being valid and proper notices. Contractual relationship between parties terminated on 30th November 1953.

In the District Court of Hong Kong Civil Jurisdiction. p.3.

No. 7
Copy of the Notes of His Honour Judge James Wicks
—(*Contd.*)

By agreement of parties issue is as to whether or not premises came within S.3 (1) (a) of Landlord and Tenant Ordinance. If the premises do then Plaintiff succeeds and can go to judgment for possession mesne profits from 1st December 1953 to date of possession given at the rate claimed in respective units and costs. If the premises do not then the actions are dismissed with costs.

Mr. Zimmern:

I will now call evidence that the buildings do come within S.3 (1) (a) of the Ordinance. Calls.

Ma Kam Woon d/d in Punti dialect. I live at No. 15 Zuk Sau Street and I am a banker. The properties in the case are registered in the name of my eldest brother Ma Kam Chan who duly authorises me also I am one of the beneficiaries of the property under a declaration of trust made by the Plaintiff. The properties were purchased by my brother on 15th November 1947. I produce the occupation certificate for all the properties. Exh. B. dated 7th October 1947.

XXD: I know about these houses. The houses were built after the war. I do not know if there were buildings on the sites 1, 5, 7, 13, 15 and 17. I was only told that by the predecessor in title. I knew that the houses were bombed during the war I say they were knocked down to the ground. I did not pay attention to the houses until I bought them.

Q. What was the condition of the buildings immediately before the work, resulting in the grant of the certificate was commenced.
Mr. Zimmern: I object to that question.
Witness leaves the Court.

Mr. Zimmern. Mr. Bernacchi cannot go behind the certificate. What happened before the certificate was issued is quite irrelevant to the issue, that is whether there were stumps of old walls there. The certificate states that the buildings are new buildings and this is binding unless Defendants call the Building authority or such other evidence that the certificate has been improperly issued. Defendants cannot go behind certificate unless can show a forgery, issued improperly. The only way of proving a building comes within S.3 (1) (a) of the Ordinance is by producing the occupation certificate and this is binding.

p.4. Mr. Bernacchi: Mr. Zimmern confuses the Building Ordinance and the Landlord and Tenant Ordinance S.(3) (1) (a) requires two things (a) that the premises are an entirely new building and that the certificate to occupy the same shall be granted after 16th August 1945. Erroneous to my case only have a permit to occupy in the case of an entirely new building. S. 137 of the Building Ordinance does state new Building but that is defined in section 2 of the Ordinance to include buildings which not only are entirely new buildings under

S. 3 (1) (a) of the Landlord and Tenant Ordinance but are re-constructed buildings under S. (3) (1) (b) of that Ordinance. The point is that a re-constructed building coming within S. (3) (1) (b) must have an occupation certificate as a new building under S. 137 of the Building Ordinance. In the Landlord and Tenant Ordinance entirely new building is found in the Building Ordinance 'new building'. So long as anything remains any walls on which the premises were constructed the building is not an entirely new building within the meaning of S. (3) (1) (a) of the L. & T. Ordinance.

Adjourned.

Resumed.

Mr. Zimmern: Defendants proposition appears to me that if there were any remnants of the old building so that the new buildings consist partly of the old structures and part additions which are new then the premises are not entirely new buildings. Refers to S.131 of Building Ord. shows a complete difference between a new building and the shell of a house. Shell of a house comes under S.131 and the certificate issued would be as in Sch. D. not an occupation certificate under S.137. S.2 definition of 'new building' gives instances (a) any new building commenced after 21.2.1903 (b) the existing building thereafter 'altered to such an extent ..... at different times' (c) any existing building ..... height of the building'. (d) conversion into a ..... human habitation (e) conversion into ..... building only (f) any existing building ..... additional storey (g) 'conversion into ..... are tenancy'. Cases where certificate under S.137 is necessary and required. In all other cases repairs etc. a certificate of occupation is not required. What is required is a certificate under Sch. D. Entirely an architecture problem for the Building authority when plans are produced for approval as to whether work proposed amounts to alterations etc. under S.131 or new building under S.137—in this case has decided that these buildings are new buildings and not repairs etc. under S. 131. Defendants in effect ask Court to be the Building Authority and that is not the function of the Court. The Court is bound by the certificate. This proposition is supported by S.3 (1) (b) of L. & T. Ordinance which refers to "extensive repairs" that is repairs under S. 131 of Building Ordinance —it follows that a certificate under S.137 of the Building Ordinance is conclusive evidence that the building comes within S.3 (1) (a) of the L. & T. Ordinance and can only be an entirely new building and cannot be a repaired building under S.3 (1) (b) of the L. & T. Ordinance. By producing the certificate Exh. B. Plaintiff has discharged the burden placed on the Plaintiff under S.3 (1) (a) and that the defendant cannot be heard to say what the state of the land was before the "new buildings" were erected.

p.5.

C. A. V.

(Sd.) James Wicks
28.1.54.

In the District Court of Hong Kong Civil Jurisdiction.

No. 7
Copy of the Notes of His Honour Judge James Wicks
—(*Contd.*)

p.20.

9.50 a.m.
8th February 1954.

Zimmern for Plaintiff in all cases.
Bernacchi (Instructed by Hampton) for Defendants in all cases.
Considered decision delivered.
Adjourned to 2.30 p.m.

(sd.) James Wicks
17th February 1954.

(sd.) James Wicks
8th February 1954. 10

No. 8
Ruling of His Honour Judge James Wicks

No. 8.

RULING OF HIS HONOUR JUDGE JAMES WICKS MADE ON PRELIMINARY ARGUMENTS

Coram: Wicks D.J. in Court

The Plaintiff by his witness having put in evidence an Occupation Certificate in respect of the premises, the subject matter of these actions Mr. Bernacchi, who appeared for the Defendants, sought to cross-examine the witness on the state of the buildings before the Certificate was granted. Mr. Zimmern, who appeared for the Plaintiff, objected to the question, contending that the Certificate, having been issued by the Building Authority under Section 137 of the Building Ordinance, and stating on the face of it that the buildings 20 were new buildings, the Defendants could not go behind it except for such purposes as to show that it was a forgery or it has been improperly issued.

Mr. Zimmern further contends that repairs, demolitions, alterations and additions to an existing building, being dealt with under Section 131 of the Ordinance, where a special certificate is provided for, Section 137 of the Ordinance, and the Occupation Certificate issued thereunder are restricted to new buildings, which buildings ipso facto are entirely new buildings under Section 3(1)(a) of the Landlord and Tenant Ordinance.

Mr. Bernacchi argues that the term new building having been defined in Section 2 of the Building Ordinance to include existing buildings which 30 have been reconstructed, and the word entirely qualifying the term new building in Section 3(1)(a) of the Landlord and Tenant Ordinance, it necessary that two requirements be fulfilled before a building can be brought within the description entirely new building, first all new materials must have been used and secondly the building must have been newly constructed from the foundations up.

The effect of Section 131 and 137 of the Building Ordinance is to make authorised architects responsible for the proper carrying out of all building work, Section 131 relating to repairs, demolition, alterations or additions to existing buildings, and Section 137 to any new building or part of a building and any other building works included in the definition of new building found in Section 2 of the Ordinance. I agree with Mr. Zimmern that it is a matter for the Building Authority to decide in each case whether building work comes within Section 131 or Section 137.

The word entirely, employed in Section 3(1)(a) of the Landlord and Tenant Ordinance, restricts the application of the words which follow, that is new building, and reading the Building Ordinance as a whole, it is clear that an entirely new building under the Landlord and Tenant Ordinance might well be an addition within Section 131 of the Building Ordinance or a new building within Section 137 of that Ordinance, but, and this is the crucial point, the definition of new buildings includes not only new buildings as the contractor understands them, that is newly constructed from the foundations up, but all the instances of work on old buildings set out in Section 2 of the Ordinance, the word entirely excluding the latter from the application of Section 3(1)(b) of the Landlord and Tenant Ordinance.

The result is that an Occupation Certificate is not conclusive evidence that a building is an entirely new building under Section 3(1)(a) of the Landlord and Tenant Ordinance; on the one hand, it may be found that some part of the walls are part of an old building, and as a result the building is not an entirely new building or, on the other, that in the absence of an Occupation Certificate, a building is an entirely new building for the purposes of the Landlord and Tenant Ordinance, although being an addition under Section 131 of this Building Ordinance, an Occupation Certificate was not issued.

Mr. Bernacchi's contention that the use of old materials in constructing a building, or any part thereof, precludes the building from being an entirely new building is erroneous. Materials do not come within the definition of building, the parts of buildings which are in themselves buildings are such as a "chimney, arch, bridge, stair" etc. and not the materials with which such buildings are constructed. Any other interpretation would lead to an absurdity, for instance should one second hand water tap be used in the construction of a house that house cannot be an entirely new building and is an old building controlled by the Landlord and Tenant Ordinance.

An Occupation Certificate not being conclusive evidence that a building is an entirely new building it follows, first that by the mere putting in evidence of an Occupation Certificate the Plaintiff has not discharged the onus resting on him of establishing that the buildings are entirely new buildings, and secondly that Mr. Bernacchi's question is in order and allowed; though why the Defendant should assist the Plaintiff in filling a lacuna in his case is best known to Mr. Bernacchi.

(sd.) J.W.
District Judge.

In the District Court of Hong Kong Civil Jurisdiction.

No. 9
Copy of the Notes of His Honour Judge James Wicks taken on the continued hearing

No. 9.

COPY OF THE NOTES OF HIS HONOUR JUDGE JAMES WICKS TAKEN ON THE CONTINUED HEARING OF THE ACTIONS

p.34. 3.10 p.m.
17th February 1954.
Appearances as before.

Mr. Zimmern:

In view of ruling will call Plaintiff's predecessor in title Mr. Li Chok Li. Also will put in all documents of title and three subpoena witnesses will be called.

Documents of title put in by agreement of parties Exh. C. (including one Building Authority Certificate d/d 3rd September 1917. Agreed fact that the land was developed by buildings before the war.

Ma Kam Woon reminded of his former declaration for further xxd. The property is family property. I know my elder brother's writing. Shown a document. I agree this is a circular letter in my brother's. Ma Kam Chan Exh. D. The document Exh. D. is addressed to Kai Nam defendant in /843. Shown another document states I agree
p.35. this is another similar document Exh. E. I am a beneficiary in the property and I enjoy an income from it. Exh. E. is a notice of increase of rent but the rent collector sent it without reference to us and the family has received this increased rent. Parties agree that rent was paid as if the premises came under the Landlord & Tenant Ordinance. Witness continues. I agree that when our family took over the premises we continued the rents as fixed by our predecessors in title.

re XXD. None.

Mr. Zimmern calls.

John Hubert Bottomley S/S in English. I appear here on subpoena. I am Chief Building Surveyor and I act on behalf of the Building Authority and the Building Ordinance. I know I.L.2245 together with the building there as numbered 1 to 17 Landale Street Hong Kong. Shown Exh. B. states I issued that certificate in 1947. It was issued under S.116 of the Building Ordinance No. 18 of 1935 which is re-erected as S.137 of the existing Buildings Ordinance. I produce two plans dated 28th November 1946 and 30th January 1947 which were approved by the Building Authority on 16th December 1946 and 5th February 1947 respectively. The buildings were erected in accordance with these plans and Exh. B. was issued subsequent to an application dated 2nd September 1947 by Mr. H. S. Tam an Authorised architect plans Exh. F. and G. respectively. Exh. G. is Exh. F. with minor amendments. Referred to S.2 of Building Ordinance.

Q. The interpretation of "new building" is not a comprehensive one.

Mr. Bernacchi objects—the construction of any ordinance is a matter for the Court.

Mr. Zimmern: I withdraw the question.

Referred to F. I would say this is a plan of a new building. I would say it is the plan of an entirely new building. The plan indicates
p.36. it is but from my knowledge of the times, it was just after the war, it is probable that some of the old foundations were utilised. Accord-
10 ing to the plan Exh. F. one old foundation that of the front wall are not new the foundation of the rear walls are shown to be new. My information is that that building work was carried out in accordance with the plans. I was satisfied of that otherwise I would not have issued the permit.

Q. If there were old walls and it was the intention to rehabilitate them or use them would this be shown.

A. Yes.

These plans show that only the foundation of the old front wall.

Witness. I have been looking at Exh. F. Exh. G. is the relevant
20 one it is later and indicates use of the old foundations and I see that the foundations of the middle wall was retained. I think that the cement floors road, wall and foundation were new. I say this because I can only judge from the plan I have never inspected the buildings. My records show that 6 tons of cement were used in the construction of the buildings the estimated cost of which was $22,500. By looking at the plans I find that the buildings are constructed with brick walls 3″ cement concrete floor and asphalt roofing on china fir boarding and joints.

XXD: I agree I have never inspected the premises personally.
30 Shown a photograph told this is a photo of the corner of No. 17 Exhs. H-1-12 provisionally.

Q. Can you say that the foundations are old.

A. I cannot say they are hidden—underground. I cannot draw any conclusions from this photograph. If any old walls were used this would be apparent because they would be found to be much thicker than shown on the plans Exhs. F. and G.

Shown Exh. H.2 told this shows the entrance to the shop, states I have already said the front foundation was used and in this there would be a granite threshold this in my opinion is it and it is part
40 of the old building. Shown Exh. H.3 states I cannot form any
p.37. conclusion from the photograph it is not sufficiently clear. Shown Exh. H.4 states this sill might I say probably is new I say this as

In the District Court of Hong Kong Civil Jurisdiction.

No. 9
Copy of the Notes of His Honour Judge James Wicks taken on the continued hearing —(*Contd.*)

the edge is not rounded. Shown Exh. H.5 I would say 12 to 15 inches of the side wall shown is part of the old building. Shown Exh. H.6 states I would say this shows about 9 inches to 1 ft. of the old wall in the background it is indicated by an arrow. Shown Exh. H.7 states I would say the threshold is part of the old building—as the agent there is evidence that part of the old wall was left, four bricks are showing. Shown Exh. H.8 states it is difficult to draw any conclusion from this one. Referred to H.9 states part of the old foundations are shown on the left, probably up to the old ground level of the buildings. I think the entrance is new. Shown Exh. H.11 I would say that the step to the latrine is new, though it might in fact be old. Shown Exh. H.12 states I can see here part of the foundations of the old buildings. It appears to be a threshold though it may be rendered bricks and in fact a few courses of the old wall rendered over. As a fact at the time bricks were so valuable that no unnecessary bricks would be left. I would say I am 90% certain that old bricks were used in the new structure I say this because at the time of building 1947 new bricks were difficult to obtain. I cannot say that any old bricks used came from the old buildings on this site. If evidence is called that all the floors are old I could not contradict it. The buildings are described as temporary in Exh. F. this is in accordance with the architect's application. The application is "Application to carry out building repairs and/or alterations." I have a letter on the file from the architect stating that he intended
p.38. to make use of existing foundations, letter Exh. J. Exh. J. referred is a plan which was not approved. It was a matter of roofing over part of the yard. I do not know how much of the yard was roofed over by the old buildings.

re XXD: The application was for carrying out building repairs and/or alterations. In 1946 such applications were accepted. All applications are made under Section 128 whether the work is under S.131 or 137—In 1946 the heading of the application was irrelevant in any case the architect's certificate was under Schedule K which only relates to Section 137 (then Section 116).

Date fixed 16th March 1954, 9.30 a.m. all day.

(Sd.) James Wicks
17.2.54.

p.98. 16th March 1954
9.40 a.m.

Zimmern for Plaintiff.
Bernacchi (Hastings) for Defendants.
Parties put in further documents by agreement: Exh. K, Exh. K1 contains new defence. Exh. K.2 is a notice similar to that served on all Defendants. Exh. K.3 letter from Rating and Valuation Dept.

In the District Court of Hong Kong Civil Jurisdiction.

No. 9
Copy of the Notes of His Honour Judge James Wicks taken on the continued hearing —(*Contd.*)

Mr. Zimmern calls.

Tam ~~Hoare~~ Heung Shing d/d in English. I am an Authorised Architect. I have practiced in Hong Kong since 1938. I was the architect employed by Mr. Li to prepare plans of propound buildings at 1 to 17 (old) Landale Street. Shown Exhs. F. and G. states I prepared these plans F. was the first plan Exh. G. is the amended plan that was approved by the building authority. The Sang Hop Construction Co. were employed to carry out the work. The buildings were temporary shops. At the time there were no existing structures. The upper structures were new built on a portion of the old foundations. A large proportion of the old foundations were employed, in fact, all except some of the kitchen walls had new foundations and part of the foundation of the fence wall at the rear was renewed. The structures built on the old foundations were new; they were built of bricks, mostly old ones, china fir poles I cannot say whether they were new or not, and wooden boarded roof. I cannot remember the exact date when the buildings were completed but I applied for the certificate of occupation it is Exh. B.

p.99.

XXD: When I say old foundations I mean the foundations, foundation wall plus an average of about three bricks high above ground level of the old wall with the new above it. Shown a sketch states I agree that this is the position. Exh. L. The old concrete flooring was largely left. At the time the building was done builders used mostly old bricks. I cannot say whether or not the bricks came from the old four storey building that was on the site before. Mostly the old lavatories were retained and the drainage is old.

re XX. None.

Mr. Zimmern: I have one more witness I did not expect to have reached this stage. Request to call witness later. His name is Mr. Li.

Mr. Bernacchi: No objection to Mr. Li being called later. I had witnesses but as the facts on the building are now clear I am not calling any evidence.

Document put in by agreement of parties. Exh. M.

Mr. Zimmern. Mr. Li has now arrived.

Li Chok Lai d/d in English. I live at No. 111 Robinson Road and on 3rd June 1946 I entered into an agreement with the Hong Kong Land Investment Co. to buy certain property it is Exh. M. The agreement was completed in Exh. C1. I took the ~~account~~ assignment of the property in dispute and the agreement under which I took 1-17 Landale Street was that these premises had been demolished. After I purchased the properties I instructed Mr. Tam the architect to prepare plans to build temporary structures, when they were completed I let them out to tenants. This was in 1947. At the time a Landlord and Tenant Ordinance was in force. The lettings were verbally and

p.100.

In the District Court of Hong Kong Civil Jurisdiction.

No. 9
Copy of the Notes of His Honour Judge James Wicks taken on the continued hearing —(*Contd.*)

I told the tenants the buildings were temporary and the rentals were temporary and I intended to build proper buildings in due course. No specific agreement was made. The lettings were on the basis that the buildings were not controlled under the Landlord and Tenant Ordinance.

XXD: I deny that I let the premises at the controlled rents. At first the rents were $100 something. At the time things had not improved and that was the market value of the premises at the time. I agree that at the time the business boom was on but it was a short let and I intended to build very soon the tenants had no security. I intended to pull down within a matter of months it was a matter of obtaining possession of adjoining houses. I did not know the standard rent at the time so there was no question of fixing rents or standard rents. I owned adjoining premises and the rents of shops in these buildings are higher but they are on Hennessy Road.

re XXD. None.

Plaintiff closes case.

Mr. Bernacchi: I call no evidence and close my case.

Adjourned.

Resumed.

Mr. Zimmern:

Main issue is whether or not buildings are entirely new buildings under S.3(1)(a) of the Landlord and Tenant Ordinance Onus of proving this is on the Plaintiff. In discharge of onus Plaintiff p.101. has produced Occupation Certificate Exh. B. Court having held this was not conclusive evidence was brought to support contention that in fact apart from Exh. B. the buildings were entirely new buildings —evidence of Mr. Bottomley and Mr. Tam. Agreed that Mr. Tam was a very fair witness and does not propose to analyse this evidence. As far as Mr. Bottomley is concerned he gives opinion that buildings are entirely new buildings. Definition of buildings in Building Ordinance. Cause of all the trouble is the word entirely used in S.3(1)(a) of Landlord and Tenant Ordinance. What entirely means not subject of decision in any court in this Colony. Use of word 'entirely' what does it mean refers to objects—Restriction of rents is principal object of Ordinance. Matter of Judicial knowledge that after war prices of building materials and labour had increased many-fold over pre war prices. Legislators had to draw distinction between buildings built before the war and buildings built after the war or partly built after the war. Properties built before the war and habitable after the war subject of rent control. Properties built or partly built after the war—Legislator sought to do this in S.3 (1) (a) and 3 (1) (b) of Ordinance, no control of these two clauses. S.3 (1) (b) applies to buildings which have been partly demolished and can be 'repaired'. As to what 'repairs' means depends on decision

of the Building Authority. Entirely new—even though old foundations and part of the old walls used to an average of three bricks above the ground all this is in fact only the foundations on which the new buildings were placed. Farcical that a Plaintiff should have to prove every brick in the building was new this was not the intention of the legislature. Submit buildings are entirely new buildings.

As regards estoppel. Mr. Li said never let premises as controlled premises. As regards the notices such as Exh. K.1 and Exh. D. and Exh. B. No doubt that Plaintiff has thought for some time that premises were controlled—it was a unilateral mistake. Refers Exh. K.2 Carr v. L.N.W. Rly's L.R. 10 CP. p.316 must be element of wilfulness—persons not estopped by making a genuine mistake. No question that Defendants have suffered from mistake in fact they have benefitted from it and still wish to do so—that is their case Maritime Elec. Co. Ltd. v. General Dairies (1937) 1 A.E.R. p.748. No mention in defence of estoppel.

Mr. Bernacchi:

Clearly not an entirely new building old foundations old floors old lavatories old drainage and old walls average of three bricks above ground level. On evidence structures were temporary never any intention to build an entirely new building. Extent of repairs. Ward must be interpreted in relation to ordinance as a whole "entirely"—S.3(1)(b)3.31. Bullock v. Dommitt 6 D. & E. p.650. In re Gray (1927) 1 Ch. 242 p.250. Jacob v. Dunn (1900) 2 Ch.161.

Object of Ordinance. Entirely new building S.3 (1) (a) repaired building S.3 (1) (b) other cases of inadequate building S.31. If Plaintiff wants to rebuild his procedure is under S.31.

On Estoppel. Defendant having repeatedly served notices under Ordinance estopped from saying and does not apply. Tchitatchef v. Salerni (1932) 1 Ch. 330. Defendants acted on notices and paid increased rents on basis that they had controlled premises.

Mr. Zimmern. No reply.

C.A.V.

(Sd.) James Wicks,
16.3.54.

p.157. 2.35 p.m.
8th April, 1954.
Zimmern for Plaintiffs.
Hampton for Defendants.
Judgment delivered.

(Sd.) James Wicks.
8.4.54.

In the District Court of Hong Kong Civil Jurisdiction.

No. 10
Judgment on the hearing before the Court of First Instance

No. 10.

JUDGMENT ON THE HEARING BEFORE THE COURT OF FIRST INSTANCE

Coram: Wicks D.J. in Court.

In this case six actions are before the Court which, for convenience and by agreement between the parties, were heard together. To preserve the jurisdiction of the Court, each action is considered a separate action.

The facts proved not to be in dispute. 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 No. 1 to 17 Landale Street, Hong Kong. After the re-occupation the houses were found to be damaged and on 28th November 1946 plans were submitted to the Building Authority to build temporary shops mostly on the foundations of the houses. On 17th January 1947 Mr. H. S. Tam an Authorised Architect wrote the Building Authority submitting an amended plan:

> " I beg to re-submit herewith amended plan showing apparent enlargement to the kitchens of the shops, proposed to be built on the above premises, and to inform you that the approved plans were prepared while debris were still piling on the site, it was only when these were cleared away that the exact positions of the existing foundations were exposed. On account of the fact that these single-storey shops are of a temporary nature and which will be entirely demolished to make room for a proper re-development of the site in about six months' or one year's time, when building materials are easier to obtain and less expensive, my client intends to build all the rear walls on the existing foundations, and request me, on his behalf, to beseech you to give the matter your kind re-consideration and approval."

The amended plan was approved by the Building Authority on 5th February 1947 and an Occupation Certificate issued on 7th October 1947. Mr. Tam, who gave evidence, 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 it follows from Mr. Tam's letter, set out above, and the amended plan, that the ground plan of the temporary shops, apart from thinner walls, is the same as the ground floor plan of the original buildings. Certain notices were served on the Defendants by the Plaintiff under the Landlord and Tenant Ordinance and as a result two issues are before the Court:

1. The Plaintiff having served notices on the Defendants under the Landlord and Tenant Ordinance, which the Defendants acted upon, is the Plaintiff estopped from denying that the Ordinance applies to the premises.

2. Are the buildings entirely new buildings under s.3(1)(a) of the Landlord and Tenant Ordinance.

" The first issue is a simple one and is covered by clear authority. In Langford Property Co. Ltd. v. Goldrich (1948) 2 A.E.R. p.439 a landlord had assumed that the Rent Acts applied to a property, stated so in letters to the tenants, and served notices of increase of rent purported to be made under the Acts. It was held that the landlords were not estopped by such letters or notices from pleading that the Acts did not apply and judgment was given in favour of the landlord. This conclusion is logical and follows from the operation of the Rent Acts, and similarly the Landlord and Tenant Ordinance, being in rem."

On the second issue I refer to the ruling in this case made on 8th February 1954. That ruling was made on a point of law and is to be applied in relation to the facts which have been established.

The buildings in this case comprise the foundations most of which are old, old walls to an average of three bricks above ground level, concrete floors and lavatories, most of which are old, the original drainage, new walls built on to the old, and new roofs. There is expressed reference to the Buildings Ordinance in section 3(1) (a) of the Landlord and Tenant Ordinance and under section 2 of the Buildings Ordinance "building" is defined to include:

> " any part of a domestic building, house, school, shop, factory, workshop, bakery, brewery, distillery, pawnshop, warehouse, godown, place of secure stowage, verandah, balcony, kitchen, latrine, gallery, chimney, arch, bridge, stair, column, floor, out-house, stable, shed, pier, wharf, fence, wall, roof, covered way, canopy, kiosk, sunshade, garage, well, piling, septic tank, cow-shed, lift and hoarding".

The scope of exemption being restricted in s.3(1)(a) of the Landlord and Tenant Ordinance to entirely new building, the word entirely would seem to exclude the buildings in this case from the exemption. The word entirely is not defined and great care must be exercised in assessing its meaning. The first principle of interpretation is admirably set out in Megarry on the Rent Acts 7th Edition at p.6:

> " the court must endeavour to place a reasonable interpretation upon the statute if the language used admits of such an interpretation. A certain amount of common sense has to be brought to the consideration of these Acts, and it is essential that, wherever possible, (the Acts) should be construed in a broad, practical, common-sense manner so as to effect the intention of the Legislature."

On these principles it is interesting to examine hypothetical cases, some of which were advanced in argument in this case. If old bricks are used in building a block of flats on land where cottages once stood it would seem the block of flats could be an entirely new building because bricks are not included in the definition of building referred to above and the flats have no physical

In the District Court of Hong Kong Civil Jurisdiction.

No. 10
Judgment on the hearing before the Court of First Instance —(*Contd.*)

resemblance in area or character to the cottages. If an antique staircase taken out of a mansion is built into an expensive house built on land where a cottage once stood the new house could be an entirely new building because the staircase never formed part of a building coming under the Landlord and Tenant Ordinance, the new house bears no physical resemblance to the old cottage and the standard rent ceased to exist with the demolition of the old cottage.

In the case before the Court the shops conform in floor area to that of the former shops, in fact so much so that it was necessary to submit amended plans when the exact position of the old foundation became known, the result is that the shops as such are substantially the same as the ground floors of the old buildings, the floor area is the same, except for a slight increase due to thinner walls, the floor plan is the same, the floors and lavatories are in most cases the original, and it would be reasonable to say that the standard rent of the ground floor of the old buildings is the standard rent of the present shops. Consequently in this case the foundations, stumps of walls, floors, lavatories and drains forming an integral part of the buildings and not being entirely new, and the present shops conforming in floor plan to the ground floors of the old buildings, section 3 (1)(a) of the Landlord and Tenant Ordinance does not apply.

A landlord builds temporary shops on the foundations of four storey buildings, the temporary shops are uneconomic and the landlord wishes to demolish them and put up permanent buildings. The result of the judgment in this case is that the Defendants are protected under the Landlord and Tenant Ordinance and the Plaintiff cannot evict them, and as a result cannot build. Is this reasonable in view of the principles I have referred to above? The Ordinance must be construed as a whole—it may be that the Plaintiff would have succeeded had he proceeded under section 3(1)(b) of the Ordinance (premises vacant on 16th August 1945 and made habitable at a cost of not less than seven years standard rent), or he could have protected his position in the beginning by granting five year leases under section 3(1)(c) of the Ordinance or contracted out under section 13 and 18(e) of the Ordinance. Should all these fail the Plaintiff may still apply for exemption under s.31 of the Ordinance, and if successful re-build. This being so, construing the Landlord and Tenant Ordinance as a whole the result is seen to be reasonable and each action is dismissed with costs.

(James Wicks)
District Judge.

8th April, 1954.

No. 11

NOTICE OF MOTION ON APPEAL

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 11
Notice of Motion on Appeal

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

Appeal No. 7 of 1954

(On Appeal from Victoria District Court Civil Action No. 843 of 1953)

Between Ma Kam Chan — Appellant (Plaintiff)

and

Kai Nam (a firm) — Respondents (Defendants)

TAKE NOTICE that pursuant to the leave of His Honour Judge James Wicks the Judge of the Victoria District Court granted on the 14th day of April 1954 the Full Court will be moved on Tuesday the 8th day of June 1954 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard, by Counsel for the above named Plaintiff that the Judgment delivered by the learned Judge on the 8th day of April 1954 may be set aside and that judgment may be entered for the Plaintiff and that it may be ordered that the costs of this Appeal and of the hearing before the learned Judge be paid by the Defendants to the Plaintiff.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are:

1. That upon the facts as found by the learned Judge the Plaintiff is entitled to judgment.

2. That the learned Judge was wrong and misdirected 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, Cap. 255.

3. That the learned Judge was wrong in holding that the said premises were not an entirely new building within the meaning of the words "entirely new building" under Section 3 (1) (a) of the Landlord and Tenant Ordinance, Cap. 255.

Dated the 29th day of April 1954.

Zimmern,
Solicitors for the above named Plaintiff.

To the above named Defendants,
and to Messrs. Hasting & Co., their Solicitors,
and to the Registrar of the Supreme Court.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal

No. 12.

TRANSCRIPT OF THE PROCEEDINGS ON APPEAL

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
APPEALS NOS. 7-12 OF 1954.

(On Appeal from Victoria Dist. Court Civil Action Nos. 843, 845, 846, 848, 849, 850 of 1953.)

BETWEEN :	MA KAM CHAN	Appellant. (Plaintiff)
	— and —	
	Kai Nam (a firm)—App. 7/54	Respondent. (Defendant)
	Pang Chuen—App. 8/54	Respondent. (Defendant)
	Kam Shing—App. 9/54	Respondent. (Defendant)
	Hop Shing (a firm)—App. 10/54	Respondent. (Defendant)
	Hop Shing (a firm)—App. 11/54	Respondent. (Defendant)
	Hop Shing (a firm)—App. 12/54	Respondent. (Defendant)

Coram : Gould, Actg. C.J.
& Gregg, J.

Transcript of the shorthand notes taken by the Court Reporters, taken on the hearing of the above appeals.

Date : 8th June, 1954, @ 10.06 a.m.

Present : Mr. Patrick Yu (Zimmern) for appellant.

Mr. Brook Bernacchi (Hastings) for respondents.

PRESIDENT : Yes, Mr. Yu.

MR. YU : May it please your Lordships. There are, in point of fact, 6 or 7 appeals before your Lordships and, before I address your Lordships on any one of them—anyway I shall be asking your Lordships to try these appeals together—may I ask your Lordships for a formal order of consolidation. That is subject to what my learned friend has to say on the point. The

appellant is the same person in each case for whom I appear instructed by Mr. Zimmern, and I gather my learned friend appears for all the respondents in all the respective cases. As I was saying, I am going to ask your Lordships to try these appeals together in any event and also, at the same time, I ask your Lordships for a formal order of consolidation. Your Lordships may think it convenient probably on the question of costs.

PRESIDENT: Wasn't it made in the Court below? The District Court?

MR. BERNACCHI: I oppose this application, my Lords. There was no order for consolidation made.

MR. YU: There was no order. By consent of the parties, the cases were heard together.

PRESIDENT: What do you say Mr. Bernacchi?

MR. BERNACCHI: My Lords, I have no objection to the appeals being heard together as, for instance, the famous Tasik Malaja case where the appeals both here and in the Privy Council were heard together but I have every objection to the order for consolidation at this late date, it affects costs. If I am successful in this appeal, my clients who are poor shopkeepers and there are, I think, 6 different notices of appeal, 6 different briefs have therefore been delivered. The Taxing Master knows his rules in respect to appeals that are heard together and of course you don't get 6 full sets of costs. In any event, a number of things are only allowed once but it affects costs and this application should have been made at a much earlier date if it is desired to have a consolidated appeal. There are 6 appeals before your Lordships and I ask that your Lordships hear the 6 appeals together which may in itself affect costs, but I ask that your Lordships don't make an order consolidating them into one appeal at this very late stage. I submit my Lords that the precedent is in fact the Tasik Malaja case where a similar application was made and the Court said that the appeals would be heard together but not consolidated. They were separate appeals on the record.

PRESIDENT: I have no knowledge of that.

MR. BERNACCHI: I don't think that your Lordship sat on the Full Court at that time.

PRESIDENT: No, I haven't and I don't know what happened there. If you are quoting it to me as a precedent—

MR. BERNACCHI: It was appeals 13 and 14 of 1950 I think.

PRESIDENT: I wasn't aware it was a similar type of action. There were not half a dozen different appeals.

MR. BERNACCHI: In that case, of course, there were 2 different actions in rem against the same ship and the Indonesian Government entered appearance in both and objected to the jurisdiction on the grounds of sovereign immunity. Mr. Justice Reece in the Court below held against their claim

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

and then it came by way of, as a matter of fact, 4 appeals altogether—2 interlocutory appeals and 2 final appeals. The 2 interlocutory appeals were adjourned sine die and the 2 final appeals were heard together but were not consolidated. They were appeals 13 and 14 of 1952.

CLERK OF COURT: 14 and 15.

MR. BERNACCHI: 14 and 15. I stand corrected.

PRESIDENT: You say the same application was made there and was refused.

MR. BERNACCHI: That is my recollection, and the Court said that they would hear the appeals together, and that was all. I think my learned friend Mr. Loseby wanted a consolidation there, my Lords. In fact I think there were 3. The Indonesian Government wanted them consolidated, one lot of plaintiffs wanted them heard together but not consolidated, and the other one wanted them heard quite separately and the Court adopted the middle course.

PRESIDENT: The Court feels that application for consolidation should have been made earlier if it was to be of any success. You cannot at this stage, after all these documents have been delivered, on the basis that you have 6-7 appeals suddenly ask for consolidation. The consolidation of the hearing only, and the Court doesn't feel disposed to grant the application in these circumstances but will hear the appeals together.

MR. YU: May it please your Lordships. This is an appeal from the decision of the District judge. The action in the District Court started with a claim by the appellant for possession of certain premises. Much was agreed between the parties at the hearing and in fact eventually the District judge was only called upon to determine two issues, and as he very properly put them in his judgment—if I may refer your Lordships to p.2 of his written judgment, I think your Lordships have the copy before you, I think it is document No. 3, middle of p.2. The first one:—

> "1. The Plaintiff having served notices on the Defendants under the Landlord and Tenant Ordinance, which the Defendants acted upon, is the Plaintiff estopped from denying that the Ordinance applies to the premises.
>
> 2. Are the buildings entirely new buildings under s.3(1) (a) of the Landlord and Tenant Ordinance."

The learned District judge found in favour of the appellant on the first point and found against him on the second point. I have no reason to disagree with the learned judge on his finding on the first point, and only the second point is now on appeal.

The facts of the case, again, are amply set out in the judgment and accurate except for some minor detail which I would draw your Lordships' attention to when I come to it. So I think I cannot do any better than to start off by reading to your Lordships the judgment of the learned District judge:—

" In this case six actions are before the Court which, for convenience between the parties, were heard together. To preserve the jurisdiction of the Court, each action is considered a separate action.

The facts proved not to be in dispute. 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 No. 1 to 17 Landale Street, Hong Kong. After the re-occupation"

—probably the occupation by the British Government of Hong Kong—

"the houses were found to be damaged."

Here is my first difference with the learned judge. I think probably "damaged" was an understatement. "Completely demolished" would be more likely.

PRESIDENT: That is a point not without interest. If you propose to rely on it at all, you will of course refer us to the evidence that says that it was completely demolished. You don't have to do it now.

MR. YU: Yes, my Lord. In due course I shall, my Lord.

". . . and on 28th November, 1946 plans were submitted to the Building Authority to build temporary shops mostly on the foundations of the houses. On the 17th January, 1947 Mr. H. S. Tam an authorised Architect wrote the Building Authority submitting an amended plan:

'I beg to re-submit herewith amended plan showing apparent enlargement to the kitchens of the shops, proposed to be built on the above premises, and to inform you that the approved plans were prepared while debris were still piling on the site. . .'

That is all one indication of the state of demolition.

'. . . it was only when these were cleared away that the exact positions of the existing foundations were exposed.

On account of the fact that these single-storey shops are of a temporary nature and which will be entirely demolished to make room for a proper re-development of the site in about six months' or one year's time, when building materials are easier to obtain and less expensive, my client intends to build all the rear walls on the existing foundations, and request me, on his behalf, to beseech you to give the matter your kind reconsideration and approval.'

The amended plan was approved by the Building Authority on 5th February, 1947 and an Occupation Certificate issued on 7th October, 1947. Mr. Tam, who gave evidence, 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 old foundations and it follows from Mr. Tam's letter, set out above, and the amended plan, that the ground plan of the temporary shops, apart from thinner walls, is the same as the ground floor plan of the original buildings. Certain notices were served on the Defendants by the Plaintiff. . ."

and then the learned judge went on to frame the two issues before him. He went on to deal with the first issue. I may just as well read it, my Lords :—

"The first issue is a simple one and is covered by clear authority. In Langford Property Co., Ltd. v. Goldrich (1948) 2 A.E.R. p.439 a landlord had assumed that the Rent Acts applied to a property, stated so in letters to the tenants, and served notices of increase of rent purported to be made under the Acts. It was held that the landlords were not estopped by such letters or notices from pleading that the Acts did not apply and judgment was given in favour of the Landlord. This conclusion is a logical and follows from the operation of the Rent Acts, and similarly the Landlord and Tenant Ordinance, being in rem."

And I agree, as I have said, with the learned District judge on his finding on the first issue.

"On the second issue I refer to the ruling in this case made on 8th February, 1954. That ruling was made on a point of law and is to be applied in relation to the facts which have been established."

That ruling related to the question of whether or not an Occupation permit by the Building Authority would be conclusive in itself as to whether or not a building was an entirely new building and the learned judge found that it was not conclusive and again I agree with him there.

"The buildings in this case comprise the foundations most of which are old, old walls to an average of three bricks above ground level, concrete floors and lavatories, most of which are old, the original drainage, new walls built on the old, and new roofs. There is express reference to the Buildings Ordinance in section 3(1)(a) of the Landlord & Tenant Ordinance and under section 2 of the Buildings Ordinance 'buildings' is defined to include :

'any part of a domestic building, house, school, shop, factory, workshop, bakery, brewery, distillery, pawnshop, warehouse, godown, place of secure stowage, verandah, balcony, kitchen, latrine, gallery, chimney, arch, bridge, stair, column, floor, out-house, stable, shed, pier, wharf, fence, wall, roof, covered way, canopy, kiosk, sunshade, garage, well, piling, septic tank, cow-shed, lift and hoarding.'

The scope of exemption being restricted in s.3(1)(a) of the Landlord and Tenant Ordinance to entirely new building, the word entirely would seem to exclude the buildings in this case from the exemption."

There I disagree with the learned judge :

> "The word entirely is not defined and great care must be exercised in assessing its meaning"

and I think I am right in saying that, until this case, that word, what is the meaning of an entirely new building, has not been made the subject matter of any judicial decision in Hong Kong.

PRESIDENT : Unless you exclude two of my rulings, you are not quite correct.

MR. YU : I stand corrected. I do apologize, I stand corrected.

PRESIDENT : I agree that I did not go very deeply into the meaning of the word entirely but I have given 2 decisions on this section.

MR. YU : I stand corrected as I say, my Lord. I am grateful to your Lordship for pointing it out to me.

> "The first principle of interpretation is admirably set out in Megarry on the Rent Acts 7th Edition at p.6 :
>
> > 'the court must endeavour to place a reasonable interpretation upon the statute if the language used admits of such an interpretation. A certain amount of commonsense has to be brought to the consideration of these Acts, and it is essential that, wherever possible, (the Acts) should be construed in a broad, practical, commonsense manner so as to effect the intention of the Legislature'."

and I cannot agree more with the learned District Judge that such should be the interpretation to be placed on the statute.

> "On these principles it is interesting to examine hypothetical cases, some of which were advanced in argument in this case. If old bricks are used in building a block of flats on land where cottages once stood it would seem the block of flats could be an entirely new building because bricks are not included in the definition of building referred to above and the flats have no physical resemblance in area or character to the cottages. If an antique staircase taken out of a mansion is built into an expensive house built on land where a cottage once stood the new house could be an entirely new building because the staircase never formed part of a building coming under the Landlord and Tenant Ordinance, the new house bears no physical resemblance to the old cottage and the standard rent ceased to exist with the demolition of the old cottage."

Again I cannot agree more with the learned District judge on those two hypothetical cases. From then onwards, I cannot help disagreeing with the learned judge.

> "In the case before the Court the shops conform in floor area to that of the former shops, in fact so much so that it was necessary to submit amended plans when the exact position of the old foundation became

known, the result is that the shops as such are substantially the same as the ground floors of the old buildings, the floor area is the same, except for a slight increase due to thinner walls, the floor plan is the same, the floors and lavatories are in most cases the original, and it would be reasonable to say that the standard rent of the ground floor of the old buildings is the standard rent of the present shops."

There was no evidence to that fact and I don't think this inference was a proper one. The old buildings on the site that had been demolished were in fact quite different in nature from the 6 so-called temporary one-storey shops which is now the subject matter of this action.

PRESIDENT: What was the nature of the pre-war premises? A four-storey building?

MR. YU: Four.

PRESIDENT: Business or residence?

MR. YU: A house, my Lord.

PRESIDENT: Domestic.

MR. YU: "Consequently in this case the foundations, stumps of walls, floors, lavatories and drains forming an integral part of the buildings and not being entirely new, and the present shops conforming in floor plan to the ground floors of the old buildings, section 3(1)(a) of the Landlord and Tenant Ordinance does not apply."

and then the learned judge goes on to found that this finding was a reasonable one.

"A landlord builds temporary shops on the foundations of four storey buildings, the temporary shops are uneconomic and the landlord wishes to demolish them and put up permanent buildings. The result of the judgment in this case is that the Defendants are protected under the Landlord & Tenant Ordinance and the Plaintiff cannot evict them, and as a result cannot build. Is this reasonable in view of the principles I have referred to above? The Ordinance must be construed as a whole—it may be that the Plaintiff would have succeeded had he proceeded under section 3(1)(b) of the Ordinance (premises vacant on 16th August, 1945 and made habitable at a cost of not less than seven years standard rent), or he could have protected his position in the beginning by granting five year leases under section 3(1)(b) of the Ordinance or contracted out under section 13 and 18(e) of the Ordinance. Should all these fail the plaintiff may still apply for exemption under s.31 of the Ordinance, and if successful re-build. This being so, construing the Landlord and Tenant Ordinance as a whole the result is seen to be reasonable and each action is dismissed with costs."

My Lords, my first point is this, that the learned District judge applied the wrong criteria in determining what is an entirely new building. On p.3, in the two examples he gives, the very obvious ones, staircase used for

a new building, old bricks used for an old building, he correctly came to the conclusion that in such circumstances a building would come within the definition of an entirely new building. But, if I may say so, it would seem that he arrived at it by a method with which I disagree. The reason he gave for such a conclusion was that old bricks and an old staircase was not included in the definition of building as laid down in the Buildings Ordinance, and then he went on to say that because in the present case the floor plan and so on were retained, that is why the building in question is not an entirely new building. With respect to him, I cannot agree there. If the learned judge were right, it would mean this, that if in any new building, so to say, if any of the items as laid down specifically in the definition of "building" which includes any part of it etc., etc., if any of these items were included in a new building, such a building would be automatically excluded from the definition of an entirely new building. That was the criteria which he applied to the determination of that question. That was how he arrived, in the hypothetical cases, at the conclusion that the building would still be an entirely new building. And, in the present case, the buildings are not entirely new buildings. For example, I think it would be ludicrous to suggest that an entirely new building otherwise, but having a cow-shed at the back which is old, would be excluded from the definition of an entirely new building; and yet, that would be the effect if the learned judge were right. Secondly, I would submit that his exposition as to what was a reasonable interpretation again would be wrong. I submit to your Lordships that there, in the last paragraph of his judgment, there he said "The landlord has other remedies. Therefore my finding against him is reasonable in the circumstances." With due respect to him again, I fail to agree with him. Surely, what is the reasonable interpretation of the words "entirely new building" has nothing whatsoever to do with the fact as to whether or not the appellant has other remedies? The construction must be placed, a reasonable construction must be placed on the words entirely new building irrespective of the fact that the landlord, the appellant in this case, may have other remedies under the Landlord & Tenant Ordinance. It would be natural to ask what would be a reasonable interpretation of the words "entirely new building." My Lords, I would submit that a very good clue would be found in the definition of "new building" in the Buildings Ordinance. If I may refer your Lordships to the definition there. Cap. 123, section 2 at p.463 about 10 lines from the top :—

> " 'new building' includes 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

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

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;''

My Lords, before I proceed to analyze this definition, may I just briefly refer your Lordships to the actual definition of ''building'' which the learned judge referred to. I think it is on p.461. Over the page, my Lord. ''Building includes . . .

PRESIDENT: You need not read that.

MR. YU: Yes, my Lord. I submit, my Lords, it may be relevant to ask what is the purpose of including in a building parts of a building etc. as laid down there. I would submit that the purpose is obvious. If your Lordships would look at sections 3 and 4 and in fact many other sections of the same Ordinance, section 3 to begin with at p.465:

> ''Every person who is about to erect or take down any building shall, before commencing to erect or take down such building, cause to be put up and maintained such hoarding . . .'' etc., etc.

My Lords, there certain conditions are laid down either for erection or pulling down of any building and it would be absurd that such a person would be exempted from the provisions of this Ordinance if part of the building is not included in the building. In other words, for example, if a person were to be erecting part of a building, part of a house, or part of a work shop, or a cow shed etc., he would still have to abide by this provision here. I think that is a good reason for including the definition of building as such. Again, Section 4, my Lords:—

> ''Except as hereinafter provided, the walls of all permanent buildings shall be constructed exclusively of good hard well burnt brick, sound stone, or other hard and incombustible material approved by the Building Authority.''

Again it would be absurd if anybody building part of a building were exempted from this requirement and if your Lordships would go through the whole of the Ordinance, you will find quite a lot of conditions laid down for a person pulling down or erecting and it would be absurd that such a person pulling down or erecting part of a building would be exempted from such a requirement. And that, my Lords, I would submit, must have been the purpose of this definition of a building as including part of a building etc. In other words, my Lords, that definition was included expressly for the purpose of this Buildings Ordinance only. My Lords, if I may go back to the definition of new building, it includes any building begun after that date. First of all, in other words, a new building in the true sense of the word. Then it goes on to deal with other cases of building which would come under this Ordinance, but I would draw your Lordships' particular attention to the reference to the word ''existing'' in every case almost:—

"and any then existing building thereafter altered . . ." etc., etc.

And then :

"The removal of the roof and the reconstruction of at least one-half of each of any two of its main walls"

implying there must have been a roof before then, and then "any existing building raised to a certain height" and that includes, "the conversion into a domestic building." Another existing building into "conversion of any building not built for that purpose, an additional storey being put in." Converting one domestic building into other buildings, so to say. My submission my Lords is that when reading this, the words "entirely new building" under the Landlord and Tenant Ordinance, together with this definition of new building, the correct interpretation of entirely new building would be as follows :

"An entirely new building is one which has newly come into existence as a building as distinct from buildings which were already in existence but which qualified to be described as new merely by virtue of the fulfilment of certain conditions laid down in the definition of new building in the Buildings Ordinance."

My Lords, that is my submission.

PRESIDENT : Well, will you read that again a little bit more slowly please?

MR. YU : "An entirely new building is one which has newly come into existence as a building as distinct from buildings which were already in existence but which qualified to be described as new merely by virtue of the fulfilment of certain conditions laid down in the definition of new building in the Buildings Ordinance."

Now, my Lords, that being my submission as being an entirely new building, if I may refer your Lordships to the evidence adduced in this case, and my Lords, if I may first of all refer your Lordships to the question of the state of demolition, if I may refer your Lordships to Ex.M which is document 21 of your Lordships' file which was put in evidence, the agreement made between the Hong Kong Land Investment Co. . . .

PRESIDENT : Where is this?

MR. YU : My Lord, it starts with the agreement made between the parties. Then para. 1 says :—

"The vendors shall sell . . ." etc.

I draw your Lordships' attention to the last few words of that paragraph, rather, the typewritten words : "Nos. 1, 3, 5 etc., Landale Street having been demolished."

MR. BERNACCHI : I strongly object, my Lords, to my learned friend relying upon the evidence of a recital as evidence of the truth of the facts therein.

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

PRESIDENT: I am sorry. What was your objection again?

MR. BERNACCHI: I must formally object to my learned friend's reliance on evidence of the recital as evidence of the truth of the facts therein. My friend has a record of the state but I must object to my learned friend saying that any conclusion of fact can be drawn from recitals of fact. The document as such was put in and admitted as evidence by my learned friend for the purpose of establishing his title. My friend Mr. Zimmern at the time put a document in for the purpose of establishing his title. Whether it was necessary for him to do so or not is one question, but he did it.

PRESIDENT: It is a document signed by your clients? 10

MR. BERNACCHI: No my Lord. There is in fact evidence on the record of these conditions.

PRESIDENT: Yes, Mr. Yu? I am personally inclined to agree. I don't know whether you want to argue on that—unless you have a deed 20 years' old.

MR. YU: As a matter of fact, I was just drawing your Lordships' attention to the fact that this deed was in evidence, apart from the other evidence adduced before the court, other pieces of evidence. I just wanted to draw your Lordships' attention to those words.

My Lords, for example, p.2 of document No. 2, my Lords. Cross- 20 examination of the first witness. At p.2 of the notes of the Judge's notes. Document No. 2, p.2. Ma Kam Woon under cross-examination :—

> "I know about these houses. The houses were built after the war. I do not know if there were buildings on the sites 1, 5, 7, 13, 15 and 17. I was only told that by the predecessor in title. I knew that the houses were bombed during the war. I say they were knocked down to the ground."

And then, my Lords, in the letter that I pointed out earlier on, of the architect to the Building Authority, he referred to the piling of debris.

PRESIDENT: Well, I read that. It seemed, prima facie, it could mean 30 debris which was there already, or put there by actual work of demolition prior to re-construction.

MR. YU: That is also possible, my Lords. But if your Lordships would read it together with the suggestion that he in fact could not find the foundation, which would mean that if there were any building left, such foundation would be ascertainable immediately.

PRESIDENT: That is true.

MR. YU: It would be difficult to ascertain the foundation as such.

That being such, my Lords, I would submit that the buildings in question, which now form the subject-matter of this action, must come within the definition of an "entirely new building" as I have put forward to your Lordships, which is that they are buildings which have newly come into existence as buildings, because, my Lords, what was left was the foundation, the floor to some extent, and the latrines, and by "the foundation" the architect included—

MR. BERNACCHI: And the drainage.

MR. YU: And the drainage—yes.

PRESIDENT: What about the three bricks to a wall?

MR. YU: Yes. Old walls to an average of three bricks. My Lords, I submit to your Lordships that before the building of these buildings were completed, there was no building in existence. At the material time, there was no building in existence. The landlord, at the material time, brought these new buildings into existence by building on the old foundation, and in the course of which he utilised the old foundation, the old latrines, and the old walls to an average of three bricks above ground level, and the drainage of course.

APPEAL JUDGE: You say "old walls to an average height of three bricks."

MR. YU: Above ground level.

APPEAL JUDGE: So at the time he started to build, the wall was three bricks high above the ground?

MR. YU: Yes, three bricks above the ground. And as a matter of fact, I think that was also found by the Judge and substantiated by the evidence.

MR. BERNACCHI: Exhibit L, I think, is the architect's own diagram.

MR. YU: Document 20. New walls were built on old walls to the height of 3 brick level.

PRESIDENT: This is an elevation, not a plan. The parts below ground level are the foundations.

MR. YU: The line across shows the ground level, and the wider picture there of the bricks above shows the 3 brick level and then on top of that the thinner walls shows the new walls. For the purpose of my submission, the important point is that when building was commenced on this old site, there was no building in existence as a building as such. The old building had been bombed during the war and had been knocked to the ground except for this three brick level stump wall. And, in my submission my Lords, the question whether or not a new building was an entirely new building doesn't depend on how much of the old building was retained—although it could be relevant in certain cases but certainly not in this one—but where such new building could be said to be a conversion or simply an alteration or reconstruction of the old building. In this instance, my Lords, the

buildings now standing on the site are one-storeyed temporary buildings. They can hardly be said to be a conversion or alteration or reconstruction of the old buildings which were 4-storey buildings, 4-storeyed houses, in this case shops, and it certainly cannot be said that the standard rent of the one would be the same as that of the other. My Lords, if I may go further, why should the legislature include in this exclusion from the Landlord and Tenant Ordinance the word "entirely"? My Lord, if my interpretation of the definition is correct, then the reason would be obvious. It would seem certain in my submission that the intention obviously is to protect existing tenants in existing buildings which are being reconstructed altered, or converted by the landlord; and my Lords, that stands to reason because, if I may probe the intention of the legislature a bit further, surely the object of the legislature is not to restrict landlords to an undue extent apart from the question of controlling the rent on existing old buildings and rendering some protection to tenants. The object of this exclusion must also be to encourage landlords to build because, in other words my Lords, new buildings otherwise would not be exempted in the prevailing housing shortage. It must be the intention of the legislature on the one hand to protect existing tenants, and on the other hand to encourage landlords to build, and taking into consideration the question of costs of material and labour, it would stand to reason that landlords building new buildings as such in the true sense of the word and not in the sense as laid down in the Buildings Ordinance should be given a free hand, so to say, to recover the costs of building.

My Lords, there remains a question to be dealt with, the question of whether it could be said, since the learned District judge mentioned the question of 3(1)(b), if I may refer your Lordships to section 3(1)(b) of the Landlord and Tenant Ordinance.

> "This Ordinance shall not apply to any premises which after the 16th day of August, 1945, have remained continuously untenanted and which after the coming into force of this Ordinance have been rendered habitable by extensive repairs effected at the expense of the landlord. For the purpose of this paragraph the expression extensive repairs means repairs wholly necessary for rendering the premises reasonably habitable and in respect of which expense incurred amounts to not less than the equivalent to the standard rent of the premises for seven years."

This point was raised by my learned friend in the court below as well as by the learned judge so I will now deal with it. But I don't think it is absolutely fatal to my case if it is found that the appellant had a remedy under this section. In passing I will deal with it as well. In point of fact I will argue that the only section under which the appellant could proceed with would be section 3(1)(a), the reason being that extensive repairs in my submission cannot be interpreted to include the building work as carried out in this case, not to this extent.

MR. BERNACCHI: I think I should clarify a point there straightaway. My learned friend said that it was suggested that his client should have done it under 3(1)(b), that was the suggestion. My friend Mr. Zimmern con-

ceded it. Had he spent enough on the premises, had he done considerably more than he had done, then he would not have indeed to rely on section 3(1)(a) but on section 3(1)(b), but it was never suggested as a matter of argument that he failed to choose the right section.

MR. YU : I fail to see any of these in the record and I am instructed that this wasn't given in evidence.

MR. BERNACCHI : It is 22,500 dollars for all the houses combined

MR. YU : I fail to see any of these in the record. I gather that this question was not given in the evidence certainly, and I am instructed that this was not given in evidence.

PRESIDENT : I should be very surprised if $22,500 was not equivalent to the standard rent for the premises for 7 years.

MR. BERNACCHI : It is $22,500 for all the houses, 12 houses my Lord. You have got to divide it. 12 houses I think were done altogether and the total cost was $22,500 for all the 12. It was only a matter of about $2,000 per house.

MR. YU : My Lords, I am instructed to object to this mention of this evidence and I am instructed that this evidence was never given in Court. We never conceded to anything of that sort and I ask your Lordships to reject any inference that my learned friend asks your Lordships to draw. It is evidence which is not before the Court.

MR. BERNACCHI : It is only, my Lords, that it was never said in the course of argument that the present appellants should have relied upon section 3(1)(b). That wasn't the argument. The argument was that had they spent enough on their premises, they might have relied on section 3(1)(b), which was some argument for showing that 3(1)(a) was not intended to cover matters of this sort. It was never my argument that Mr. Zimmern would have succeeded had he gone under 3(1)(b). He would not have succeeded and in fact it is my recollection, for what it is worth, when my friend said that the money spent was not nearly enough to bring it under 3(1)(b). I understand that my learned friend Mr. Zimmern says that he doesn't recollect that.

PRESIDENT : All right, I don't think we need worry very much about that. I don't think that that section is going to have much influence on my view.

MR. YU : The point I was going to mention in passing to strengthen my submission is that, it is my submission that this building, the premises in question, must be interpreted as coming within the meaning of an entirely new building on my own definition although there were old stump walls etc. because it cannot be said that this was a repair or alteration or reconstruction of an old building. On the question of repairs, whether repairs means building anew, if I may read to your Lordships (1911) 1 K.B. p.905, the well known Court of Appeal case of Lurcott v. Wakely & Wheeler :—

"A lease of a house in London contained a covenant by the lessee to substantially repair and keep in thorough repair and good condition the demised premises and at the end or sooner determination of the term to deliver up the same to the lessors so repaired and kept. Subsequently the reversion expectant on the lease was assigned to the plaintiff and the lease to the defendants. Shortly before the expiration of the term the London County Council served a notice on the owner and occupiers requiring them to take down the front external wall of the house to the level of the ground floor as being a dangerous structure, and the plaintiff called upon the defendants to comply with this notice, which they failed to do. After the expiration of the term, the plaintiff, in compliance with a demolition order of a police magistrate, took down the wall to the level of the ground floor, and then, in compliance with a further notice of the London County Council, took down, the remainder of the wall and rebuilt it in accordance with modern requirements. The house was very old and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it :—

Held, that the defendants were liable under the covenant to recoup the plaintiff the cost of taking down and rebuilding the wall."

If I may refer your Lordships to the judgment of Cozens-Hardy M.R. at p.911 bottom of the page or if I may go rapidly through the judgments of all three Lords with your Lordships.

PRESIDENT : Before you go on, it might help us if you tell us what is the point you are extracting from this case.

MR. YU : The point is this, that repair doesn't include building anew. It only includes building a subsidiary part thereof. In other words it cannot be argued in this case, in our case where there is no building in existence, that it might be said that it was only repairs and not a rebuilding of the old building. A subsidiary point really, but I was saying that since the learned judge mentioned it and my learned friend cited authorities in the lower court which had a bearing on this point, I am citing to your Lordships this authority which is very useful.

"Notwithstanding the very able arguments which have been addressed to us on behalf of the appellants I feel no doubt that the decision of the Divisional Court was perfectly right. (The Master of the Rolls stated the facts, and continued.) The question is whether the appellants, the lessees, are entitled to say that the destruction of the wall in question was due to the effect of time and the elements and not to any negligence on their part, and that, therefore, they are not liable to make it good. Against that it is said that the covenants to repair in this lease are very wide and that in many cases repair necessarily involves, not repair strictly so called, but renewal. If an earthenware pipe breaks, you can only repair it by renewing it. Or again, if window frames become rotten and decayed, you cannot repair them except by renewing; and many other instances might be given.

Our attention has been called to a number of authorities some of which contain expressions which taken apart from the context in which they were used seem to me to be far too wide. I refer particularly to the summing up of Tindal C.J. in Gutteridge v. Munyard, and I pass it by with the remark that that was a nisi prius case. . .''

and I won't trouble to read all through it.

APPEAL JUDGE : It seems to be a question of where repairs end and where building anew begins again.

MR. YU : Yes, my Lord. I think the judgment of Lord Fletcher Moulton is more directly in point if I may draw your Lordships' attention to save time to p.919 at the top of the page :—

> ''For my own part, when the word 'repair' is applied to a complex matter like a house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down, or was down, the word 'repair' could not be used to cover rebuilding. It would not be apt to describe such an operation. But, so long as the house exists as a structure, the question whether repair means replacement, or, to use the phrase so common in marine cases, substituting new for old, does not seem to be at all material.''

If I may read further, Lord Justice Buckley at the bottom of p.923 says :—

> '' 'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace.''

My Lords, I think I have made my point there. What I have said is sufficient. My point is that in this case it cannot be said that it was a repair operation. It was a building of a new building, it was the erection of a new building and, in the course of the building of a building, the old foundation, stump walls were used to the level of three bricks above ground level. It would be ludicrous to differentiate between a building of this sort and, for example, if the appellant had gone to the extent of taking out the foundation and building up the foundation and putting the same back again. I don't think any argument can be raised as to whether or not such a building would have been an entirely new building and in this instance I

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

would submit that this is not the criterion. The criterion is whether the building is a building which has newly come into existence which I said in this case means simply a new building by virtue of the provisions of the Buildings Ordinance, and I ask your Lordships in the circumstances to give judgment to the appellants with costs.

PRESIDENT: Mr. Yu, the Court proposes to take the mid-morning adjournment. If you would care to look at the judgment in this case, you might have occasion to add a few words. (President hands down to Counsel copy of a judgment in S.J.110/1952).

MR. YU: I am much obliged to your Lordship.

Court adjourns at 11.15 a.m.
Court resumes at 11.32.

Appearances as before.

PRESIDENT: Yes Mr. Yu?

MR. YU: May it please your Lordships. My Lords, I am much obliged to your Lordships in making this judgment available to me and, if I may say so, the judgment in this case is very much in point. In fact, the facts are almost identical to my case except with this exception that in the case before the Court now, there are these wall stumps to the height of three brick level. My Lords, I would submit that the three brick level stump walls could hardly make any difference in this case because, in the first place, no reasonable interpretation should be given to it as being a building as such. It would be in fact unreasonable indeed to construe wall stumps to the level of three bricks as being an existing building otherwise, my Lords, one would be driven back again to the criteria which was applied by Mr. Justice Wicks in this case, falling back on the definition of part of a building with which I have already disagreed with and given my reasons. I would say therefore that this judgment of your Lordship is directly in point and I ask your Lordships to take it into consideration in this present case.

PRESIDENT: Yes Mr. Bernacchi?

MR. BERNACCHI: May it please the Court. My Lords, it having been conceded that the Building Authority Certificate, although it is a requirement of the Ordinance, is not the only requirement of the Ordinance, I take it therefore your Lordships don't want me to address your Lordships on the correctness of the learned judge's preliminary decision in law which he delivered during the course of the case. That having been conceded, my Lords, I say with respect that every case is a decision of fact depending upon the facts of the particular case unless it is clearly shown that the learned judge has misdirected himself which of course, in a case of this nature, means in effect that the facts could not possibly constitute or support, I should say, the decision that he arrived at. Let me take for instance just as an example my Lord the President's decision sitting as a judge in the old Summary Jurisdiction of the Supreme Court in the case that has just

been referred to by my learned friend, S.J. Action No. 110/1952. Now, my Lords, the material passage of that judgment, if I might respectfully say so my Lords, is the penultimate paragraph, paragraph 2 :—

> "Certainly, in my opinion, if a building is demolished and a new one built, the fact that some of the old bricks which came from the former building were used in the new building would not render it any the less an entirely new building. To hold that would be almost to say that if you used second-hand material in your new building, it would not be an entirely new building."

I think that is virtually the same as what Mr. Justice Wicks has said in both of his judgments in this case.

> "That, I am quite certain, is not the intention of the Ordinance. The same thing, I think, applies to the foundations. In the present case, something like one-half of the foundations of the old building, all of which were underground, were not replaced, but there has been complete demolition of the building as a building. I cannot see that it would be of any avail to break up the old foundation, or what remained of the old foundation, and then restore it to its original condition in order that you might be said without doubt to have an entirely new building. To utilise a portion of the foundations in the condition in which it was. . ."

and then my Lord the President was careful to use these controlling words "in the condition in which it was", he goes on :

> ". . . is, I think, merely an architectural and building expedient, to make the best use of the materials on the site."

Now, my Lords, this case is again a totally different one, and one which is primarily dependent upon its own facts. It is quite clear what happened, my Lords. A total of 9 buildings altogether were badly bombed during the war and it is clear that as a result the site was very largely debris. I think the subsequent purchaser just after the war decided to take certain temporary measures for the purpose of being able to let the ground floor premises intending afterwards, it is said in evidence, a year later—but he didn't do it—to in fact build entirely new buildings which never happened. It is clear, my Lords, that for the purpose of carrying out these temporary measures—and they are called temporary structures actually—they levelled off the walls at a height of 3 bricks and then, from that, built them up at one brick thickness instead of the normal 2 brick thickness. Obviously the bombing would not have left the wall evenly at 2 bricks. It was obvious what they did was to level the wall off at 3 bricks. They left, in most cases, the old concrete floors, so that the very floors that my clients walk on to-day are the old floors; they left the old lavatories and they left the old drainage. On these facts Mr. Justice Wicks has found as a fact that these structures cannot be called entirely new buildings.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

May I in passing refer your Lordships (I am sure your Lordships will know the case) to the well known authority of Watt v. Thomas (1947) 1 A.E.R. p.582. I don't suggest for a minute here that your Lordships should come to any different conclusion on the facts but in this case, my Lords, the House of Lords went so far as to say that it doesn't even matter if the appellate Court does come to a different conclusion on the facts unless they found that the learned judge has misdirected himself.

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

I am concerned only with the principle. I don't think I want to read your Lordships long passages from the judgment.

PRESIDENT: There is no point there Mr. Bernacchi because there are no facts in dispute. The only question in dispute are the conclusions of fact and I don't think that is dealt with in Watt v. Thomas.

MR. BERNACCHI: I would say that that does deal with conclusions, my Lord. They do use the expression there "conclusions of fact". I am concerned only with this, that in this case the learned judge has found on certain facts as a fact that this is not an entirely new building. I conceded once that if those flats could not constitute an entirely new building, then of course it is a case of misdirection. But if it is merely a case, even if it were merely a case of your Lordships saying "I would have been inclined to hold that it was an entirely new building", then my Lords that is not good enough. My learned friend has to go so far in an appeal of this nature as to say that those facts could not in law deprive him of his judgment. They could not in law deprive him of his judgment. That is, my Lords, as far as my learned friend has got to go to get out of the general principle of Watt v. Thomas that the Court will not reverse a decision of fact unless it is tantamount to a misdirection. It would of course be a misdirection of himself if on the facts the learned judge could not have found that it was not otherwise an entirely new building.

Now, my Lords, apart from the case that I had just mentioned of my Lord the President, there was another case of my Lord the President which I don't intend to refer your Lordships to because the facts there were so totally different and the principles involved were so totally different that it

doesn't apply. That was the case of a new—an entirely new storey, I think it was, my Lords, erected on a modern building—anyhow, a pre-war building—an entirely new storey erected on a modern building; let as a separate letting; and my Lord the President held that that storey constituted in itself an entirely new building, although the rest of the premises (calling the premises the whole building) were controlled premises. My Lords, I am not concerned with whether that decision is right or wrong because I say that the facts there were so totally different as to be of little or no assistance to your Lordships in this case. We are concerned here with the fact that very floor on which my clients walk is part of the old premises, the very drains they use are part of the old premises and part of the walls of their premises are part of the old walls. My Lords, to say that in such circumstances it is an entirely new building is, in my submission, to totally ignore the word "entirely". However much stress one may place upon the word "building", one cannot overlook the word "entirely". My Lords, I find little assistance in judicial decisions but I notice from the Oxford Dictionary which has indeed quite often been cited in Court—I am reading from the Shorter Oxford Dictionary Vol. 1 under the word "entirely", that the first meaning given is "whole, with no part excepted", and "entirely", "in an entire state or manner". Your Lordships will see that is the very first meaning given for the word "entire", "entirely" being referred to later on as the quality of entireness or the state of entirety. "Entirely", in an entire state or manner. That is just before the word "entirety".

My Lords, I would say as regards the Buildings Ordinance that it doesn't seem to me that your Lordships will get very much guidance from that Ordinance anyhow. It is always an unwise policy to interpret one Ordinance with reference to definition clauses in another Ordinance, but if any assistance is to be got from it, it is in my favour and not against me. My learned friend relies particularly, for instance my Lords, on the definition of "new building" in the Buildings Ordinance, and draws your Lordships' attention to the fact that by definition a new building is not only a building begun after the 21st February, 1903, it includes 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 etc. If that is a definition of a new building, it seems to me that when the legislature adds a word "entirely", one must go further than that definition. It is not enough in other words that it is a new building within the definition of new building in this Ordinance, namely, an existing building altered to such an extent as to necessitate reconstruction of the whole of any two of its main walls etc. It is not enough that it is a new building within that, it must be an entirely new building. This is clearly something more, something considerably more, my Lords. So that, as I say, if your Lordships are going to seek assistance in that Ordinance, then, if anything, the Ordinance clearly assists me and it also of course indicates the reason why a building certificate for a new building can be given under this Ordinance for a building which is not an entirely new building. The one Ordinance deals with new buildings which are by definition not entirely new buildings; the other Ordinance requires something more. My Lords, the whole facts of this case—and I do stress always that these decisions must turn on their own individual facts—militates against a finding that it is an entirely new building. It

is quite clear that it was not intended to be an entirely new building. It was intended to be some form of temporary reconstruction. It is all very well, my Lords, for Mr. Bottomley in re-examination to belittle the heading of the application form that the architect sent in, but your Lordships will see—I think it is on p.8 of the notes—that Mr. Bottomley agreed that it was headed an application to carry out building repairs and/or alterations. He did admittedly belittle it in his re-examination by saying that such applications were accepted in 1946 indicating, he goes on, "In 1946, the heading of the application was irrelevant". So it is admitted that he belittled it by saying that is rather irrelevant in 1946, they were sticking in all sorts of wrong headings. But nevertheless, the fact remains that that was the type of heading that the architect chose for his application. Then you have a feature, my Lords, that all the way through they were spending as little as possible in putting together these premises so that they could be lettable. Your Lordships will see from Mr. Bottomley's evidence that the total cost of 9 of these houses came to, I think it was, $22,500 which I calculate as somewhere in the neighbourhood of $2,500 per house. Again, my Lords, in itself a figure which is hardly indicative of the amount spent on an entirely new building. They couldn't have done it for that sum unless they had in fact utilized a considerable part of the old building. They didn't make it an entirely new building and for that reason they were able to do it for an extraordinarily low price in 1946 when indeed, as I think Mr. Bottomley indicated, building costs were high. Mr. Bottomley pointed out that they would probably have used the old bricks because building costs were high. It is quite clear what they did. They cleaned up the old walls to the 3 brick level and then they utilized the old bricks of the premises to build up the rest of the wall to roof height and they put a temporary roof on. Your Lordships will see that it is clearly a temporary roof. Mr. Bottomley himself explained what sort of roof it is: "Asphalt roofing on China fir boarding and joints" (foot of p.6 my Lords). In view of the fact that the old cement floors were left, somebody seems to have had some fund with some 6 tons of cement, but it is quite clear that the roof itself was a temporary roof and the whole thing was a temporary reconstruction with the intention of building proper new premises within a short while. If, my Lords, it is now the intention of the landlord to put up nice new premises of benefit to our city, then their remedy is clear. They can go for an exemption order where their plans are considered by the proper tribunal and, if found satisfactory, an exemption order is recommended. My Lords, the very fact that for a long time, and not acting as laymen but acting with due legal representation, if I may put it that way, for a long time consecutive landlords seem to have regarded these premises as being rent controlled premises, is itself some indication that this idea that the buildings were entirely new ones is a very recent trial. I am not taking it as an estoppel, the case which the learned District Court judge referred to, although I cannot say that I respectfully in any way agree with the ratio decidendi as did the appellate court in England and I feel that your Lordships would most probably follow it. I mention it in passing because that issue was before the learned judge and I am not proposing to make very much of it or arguing it at length.

PRESIDENT: I don't know, Mr. Bernacchi. Can you argue it at all in the circumstances? Can you give any notice of cross-appeal?

MR. BERNACCHI: It is not necessary at all, my Lord. I am not asking your Lordships to make any new order. I am asking your Lordships to sustain the judge's order. The only requirement under the Code of Civil Procedure is that I should give notice of cross-appeal if I am asking the Court to make a different order from the one made by the learned judge. I don't. The learned judge's order was an order dismissing the case and at the very best I was saying that there was another ground in which he could have dismissed it. But I am in your Lordships' hands. I am not pressing this point because this case is very much against me. Only if your Lordships say you are not going to follow that case, then it would have any relevance, but certainly I say it is open to me, quite clearly.

The Code of Civil Procedure only requires me to give notice if I am seeking from your Lordships an order reversing the order made by the learned judge. For instance, my Lords, had the learned judge made an order for costs which we didn't agree with and I wanted to bring that before your Lordships, I would ask your Lordships for a different order. But, my Lords, there is nothing in the Code which requires me to give notice of cross-appeal merely for the purpose of saying that the learned judge's views on one limb of the law was a wrong one when in fact he decided the case in my favour on another limb of the law.

PRESIDENT: But if we decided that he was wrong in so deciding, then you would be in the position of having the judgment upset on the particular face of it. If you want to rely on your estoppel point. It is rather a curious position.

MR. BERNACCHI: Yes, my Lord, it would be, but your Lordships would uphold the decision. If your Lordships decided it on the estoppel point in my favour, your Lordships would be upholding the decision on other grounds which of course we say one sees very often in these law reports: decision of the court below upheld on other grounds.

PRESIDENT: Yes. Well, what is your position? You are saying that you agree with the case by the Court of Appeal in England is right against you on this decision.

MR. BERNACCHI: Yes, right against me, and may I give your Lordships the reference? All I am going to say is that I invite your Lordships to say that the reasoning in that case is a complete non sequitur and your Lordships will not follow it. It is Langford v. Goldrich (1948) 2 A.E.R. 439. They decided, my Lords, in the headnote:

> " the landlords were not estopped by their letters, in which they assumed the applicability of the Rent Acts, or by the notice of increase of rent which purported to have been given under those Acts, from pleading that the Acts did not apply."

And they decided that because of a decision in an earlier case of Griffiths v. Davies. Now, my Lords, all I am going to say is this, that Griffiths v. Davies was a case of a tenant who had treated himself as not being in controlled premises and who afterwards discovered they were controlled

premises and claimed protection of the control. The Court said "If we were to hold that he was estopped, it would in effect be enabling anybody to get out of the Rent Restriction Acts". It would be a form of contracting out because it is not open to a landlord and tenant to agree whether by way of estoppel or any other way that the control should not apply if they do apply. Obviously that can be decided on the basic principle that you cannot contract out of the Rent Acts. If you cannot contract out, obviously a tenant cannot be estopped from saying that the Rent Acts apply because a clearer case of estoppel than a contracting out cannot be found.

PRESIDENT: Can you contract in? That is what your situation is, isn't it?

MR. BERNACCHI: All I am saying is, my Lords, that the ratio decidendi that the case of a landlord being estopped by his attitude over the premises very subsequently saying they are excluded from the Ordinance is a completely different position than the attitude of a tenant who seeks to claim protection for premises that he much previously treated as not being protected. The reason why a tenant can do that is because it is against public policy to enable the Acts to be contracted out of. But there is no rule that could prevent a landlord from being estopped when he has done acts which would normally constitute a clear estoppel. He has constantly represented to the tenant by notices which are in evidence right up to the very last increase of rent notice, under the amended Ordinance of 1953, he has constantly represented to the tenant that these are controlled premises. Can he in effect years later say, "Ah, I have a bright idea. I might be able to invoke 3(1)(a) to get these tenants out"? My Lords, I say no more than that. Although the Langford case as such is dead against me, the reasoning in that case, I submit, is a complete non sequitur and therefore not one which your Lordships should follow. But my Lords, quite apart from that, the very act of treating these as controlled premises for all this time is in itself some indication that the landlord himself did not consider that he had an entirely new building. I can't imagine that any landlord is quite so stupid as not to know that an entirely new building is outside the Ordinance; and had the landlord really thought, until a matter of a few months ago, that he had an entirely new building, it is inconceivable that he would have gone on for years treating them as rent controlled premises.

Then your Lordships also, I might mention, have the photographs which were put in in evidence. They show these old lavatories, these walls, in fact in one place Mr. Bottomley says there were 4 bricks but he might have been mistaken. Several of them show this thinner wall sprouting out from the stump wall 3 bricks high. I think Mr. Bottomley said that the lavatories appeared to him to be new but, when we came to the architect, he confirmed that they were the old lavatories; the same thing when we came to the floor and Mr. Bottomley was surprised that they were the old concrete floors. But once again, the architect fairly confirmed that that was the correct position. My Lords, when my learned friend refers your Lordships to the evidence of Mr. Ma who was a distinctly difficult witness when you read his evidence; one time saying that he didn't know anything about there being previous buildings, and the next

minute saying he knew they were razed to the ground by bombing. Of course, his evidence cannot be accepted so far as it conflicts with that of the architect. It has never been suggested in this case that the architect's evidence was untrue and indeed my learned friend Mr. Zimmern in his address to the Court used these words at the foot of p.10: "I agree that Mr. Tam was a very fair witness and does not propose to analyze this evidence". There is no suggestion that where Mr. Tam's evidence conflicts with that of the other witnesses, the learned judge did otherwise than right in clearly accepting Mr. Tam's evidence. He must accept it my Lords because he made statements which are partially in conflict with the other witness when he refers to parts of the old wall standing, to the old floors, to the old lavatories, drains etc. That is all really based on Mr. Tam's evidence. I think everybody in Court was impressed by the very fair manner in which Mr. Tam gave his evidence.

Now, my Lords, my learned friend has made reference to 3(1)(b) and I will say a few words on it. The reason why 3(1)(b) really arose in this case, I think, is indicated by the learned judge in his decision when he says that we must interpret the Ordinance in a reasonable manner and consider what the effect of a decision of this nature would have; whether it would work, in other words, produce a result which was not intended by the legislature. Whether that makes any difference or not is highly questionable but, assuming that it does make a difference, and he does cite a passage from 7th Megarry at p.6 that acts of this nature must be treated with common sense and they should be construed in a broad, practical, common-sense manner so as to effect the intention of the legislature. That was a passage which the learned judge cited from p.6 of 7th Megarry. So that, my Lords, in effect the learned judge says this in his judgment, assuming that sufficient amount of money had been spent on the premises—which of course has not been done in this case whether or not it is considered as such before the Court—then assuming that the correct amount of money had been spent on the premises, then would premises renovated in this manner be entitled to the assistance of 3(1)(b), and his answer was "Yes, they would" which is a further argument and no more. It is a further argument that 3(1)(a) does not apply and, my Lords, in that respect I submit that the learned judge was right in saying that 3(1)(b) would apply were the necessary amount of money spent, and indeed there is a further argument that it is extraordinary for a landlord to be able to get protection under 3(1)(a) when he has spent so little money on the premises as not even to be able to qualify under 3(1)(b). It is a strange result if that is the true result. It is an entirely different position from the one before my Lord Mr. Justice Gould in this S.J. case where a proper new building was in fact erected, they had merely made use of about half of the foundations proper under the ground of some old building that once stood there. It is an entirely different position altogether, an entirely new state of affairs, a different position altogether.

Now, my Lords, the only question that arose there was, did the word extensive repairs in 3(1)(b) cover circumstances like the present where the premises had been very badly bombed and where they were temporarily put together by being reconstructed from the 3 brick level utilizing in

effect everything below that level: the floors, the foundations, the lower walls, the lavatories, the drainage. That in effect is what they have done. Everything, every conceivable thing really, my Lords, from below a man's knees in these premises is the old building. Above his knees, they have rebuilt the walls and they have given him a temporary shelter over his head.

Now, my Lords, as always of course, one can cite decisions. My learned friend has cited the 1911 decisions; one can cite decisions that have gone both ways on words in a covenant. Here, of course, they are words in the statute and they are not only repairs but they are the words extensive repairs. And my Lords, may I just in passing to indicate to your Lordships that there is no straining of the language indeed to call such a thing extensive repairs as has happened in this case. May I cite to your Lordships 2 or 3 cases very briefly. The first is in In re Gray (1927) 1 Ch. 242. That was a case where trustees had expended, had done considerable substantial structural repairs and the question arose as to whether those came within the meaning of the word repairs in the Law Property Act, 1925, and the Settled Land Act, 1925. My Lords, the interesting passage is the judgment at p.250, the judgment of Mr. Justice Clauson at p.250.

> " It is suggested that a line ought to be drawn between current repairs and repairs of a more substantial nature or repairs occasioned by the fact that for some years the property had not been properly or sufficiently repaired from year to year. But I do not think that I am justified in cutting down the expression 'repairs' in sub-s. 2(b) of s. 102. I have looked at the specification. There are only one or two small items that it might be suggested are on a rather different footing to the other items. In my view they all come within the term 'repairs' in the broad sense in which the term is used in sub-s. 2(b), and I do not think that, having regard to the fact that the Legislature has put (as in my opinion it has) 'expense of repairs' and 'expense of rebuilding' on the same footing, it was intended by the Legislature to give a restricted meaning to the word 'repairs.' I think that the intention of the Act is to save the trustee from being too meticulous . . . " etc.

So that my Lords in effect he holds that he should treat rebuilding and repairs as being on the same footing and as equivalent expressions in that particular Act. There was an old case which I cited to the learned judge in the Court below, the old case of Bullock v. Dommitt where the Court held that premises which had been completely destroyed by fire had to be reconstructed under a covenant in the lease to repair. That is 6 Durnford & East's Reports, p.650. The side-note:

> " A lessee of a house, who covenants generally to repair, is bound to rebuild it, if it be burnt by an accidental fire".

And Lord Kenyon at p.651:—

> " The cases cited on behalf of the plaintiff have always been considered and acted upon as law. In the year 1754 a great fire broke out in Lincoln's Inn, and consumed many of the chambers, and among the

rest those rented by Mr. Wilbraham; and he, after taking the opinions of his professional friends, found it necessary to rebuild them. On a general covenant like the present, there is no doubt but that the lessee is bound to rebuild in case of an accidental fire; the common opinion of mankind confirms this, for in many cases an exception ‹ accidents by fire is cautiously introduced into the lease to protect the lessee."

So that my Lords it is clear that when we come to decided cases, no hard and fast line can be drawn between rebuilding and repairing in the sense of repairing a skylight which my learned friend cited in another case of his. And finally, my Lords, if I might cite your Lordships Jacob v. Down, (1900) 2 Ch. 156. I am going to read from p.161, Mr. Justice Stirling:

" A covenant to keep in good repair imposes an obligation to put in repair premises which at the time of the demise were not in repair. That has been decided in Payne v. Haine; Proudfoot v. Hart. It also imposes an obligation to rebuild the demised premises if these are destroyed by fire during the term; see, for example, Bullock v. Dommitt and Clark v. Glasgow Assurance Co. In Bennett v. Herring, already cited, a lease contained covenants by the lessee to complete within two months two messuages described as having been lately erected, and to keep 'the said messuages and premises' in repair during the term. The messuages were never completed, and it was held that there was a breach of the covenant to repair. It is to be observed, however, that in this case the covenant related to messuages which were treated as being in existence though not complete at the time of the demise. None of these authorities completely covers the present case, but they go far to shew that such a covenant imposes an obligation to do everything necessary in order that the premises may be found during the term in existence and in a proper state of repair. Here the covenant is not to keep in repair 'the messuages and premises if and when erected,' but 'the said messuages and premises so to be erected as aforesaid,' words which seem to me to refer simply to the nature and character of the messuages and premises, and not to the time of their erection. The object of the covenant is to secure that at all proper times the messuages referred to shall be in proper repair; and in my opinion the covenant imposes an obligation to do all things necessary for that purpose, including the erection of the messuages, if not completed within the period prescribed in the building covenant. If this be not so, it seems to me that the lessee by omitting to perform the building covenant might practically escape from any obligations of the lease."

And there again, my Lords, is an indication how difficult the courts have found it to draw a hard and fast line as to where the word repair can be said to end. Indeed, my Lords, even in my learned friend's case where he cited as being suggestive that there were invitations, the passage that he read at p.923 of (1911) 1 K.B., that very passage of Lord Justice Buckley begins:

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

" 'Repair' and 'renew' are not words expressive of a clear contrast."

And Lord Justice Fletcher Moulton in pp. 922-3 refers to Torrens v. Walker which he does not say, which he says he will not decide whether it was decided rightly or otherwise because it is not necessary to do so, but he points out that in that case the premises were in fact destroyed. He said that they were virtually destroyed and that nevertheless it was held that the tenant was bound to repair.

My Lords, in a case of this sort, one comes back the whole time to exactly the same point. It is a question of fact. We must give due weight to every word in the Ordinance. Whatever is the most important is not so material, or is material but it is not so material that we can in any way disregard the other words. The legislature must not be taken to intend a surplusage or certainly it must not be taken to intend that the natural meaning of a word should not be applied in a case of this sort. The word "entirely" is deliberately inserted in this Ordinance, and I submit my Lords that it is inserted deliberately to prevent a case like this: a landlord expending so little money on his premises but he doesn't begin to come under 3(1)(b).

PRESIDENT: We haven't had that admitted, Mr. Bernacchi.

MR. BERNACCHI: I don't mind if it is not admitted; it is in Mr. Bottomley's evidence. I am sorry, my Lord, I should have just given your Lordships that evidence.

MR. YU: It is an estimate only.

MR. BERNACCHI: It is an estimate but I don't think that the estimate is so much less than to make the figures any real difference. He is referring all the way through to the buildings. He starts off at p.5 by telling your Lordships that the buildings were Nos. 1 to 17 Landale Street. Actually, that is not entirely clear, there were not 17 houses, there were 9 houses because they were odd numbers only. And then at the foot of p.6:

" My records show that 6 tons of cement were used in the construction of the buildings the estimated cost of which was $22,500."

MR. YU: An estimate.

MR. BERNACCHI: I am sure my friend Mr. Zimmern would not suggest that Mr. Bottomley didn't mean anything else.

MR. YU: 6 tons of cement were used. We are dealing with the record.

PRESIDENT: How much does the cement come to?

MR. YU: I am afraid I haven't got any idea.

MR. BERNACCHI: My Lords, certainly no one could suggest that Mr. Bottomley meant that 6 tons of cement cost $22,500. He said the estimated cost of the building was $22,500. There is no doubt at all about Mr. Bottomley's meaning and I invite my learned friend Mr. Zimmern to instruct his counsel not to suggest that that was the cost of the cement.

MR. YU: I am so instructed that there is no question of any cost of the building or construction in the course of the proceedings or at any time. There was no mention at any time of the cost of the construction of the building. We admit that Mr. Bottomley said that the cost of the 6 tons of cement cost $22,500. We are relying on the record.

MR. BERNACCHI: Mr. Yu, your solicitor is trying to say something to you.

MR. YU: My instructions, my Lords, are that we are not interested in any estimate which Mr. Bottomley might place on the construction work or on the cement. We did not carry out the construction ourselves. It is our predecessors who carried out the building of the shops and we had no instructions on that point; but we certainly do not dispute any estimate that Mr. Bottomley might place on the cost of the construction but certainly either we are relying on the record or we are not. If my friend proposes to give evidence.

PRESIDENT: Well, the record is ambiguous actually if you take it grammatically. It might be referring to . . .

MR. YU: It is at best ambiguous and there is no evidence. It is only an estimate at any rate.

PRESIDENT: But unfortunately, the judicial knowledge of the Court does not extend to the price of cement so we cannot take the estimate which was referred to. Is there any evidence of the standard rent in 1941 of the ground floor?

MR. BERNACCHI: Yes, your Lordships will find that from Ex. K1 which is the notice as late as August 1953 of increase of rent. Your Lordships will see that under the words "standard rent" is the figures $117.50. Notice of increase of rent, my Lords. It is signed by the man who gave evidence actually. No, I think it was the landlord himself, the plaintiff himself, and it states that the standard rent is $117.50. So it constitutes an admission by him of the standard rent.

MR. YU: I would like to draw your Lordships' attention to document 18 in this connection.

MR. BERNACCHI: I have not been given the benefit of your numbering.

MR. YU: Ex. K2.

MR. BERNACCHI: Which is what?

PRESIDENT: A letter from the Commissioner of Rating.

MR. YU: Yes.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12
Transcript of the Proceedings on Appeal —(*Contd.*)

MR. BERNACCHI: Oh yes, but I am not concerned with that. The Commissioner of Rating expressed a purely personal view on the matter which I said in the court below was the reason why this trial started. I made this as a submission that having got this letter from the Commissioner of Rating declining to certify the standard rent as, in his personal view, the Ordinance didn't apply, the landlord thought it was a marvellous idea and then took out these C.J. writs. That, my Lords, was my suggestion on the face of the documents before the Court. But the evidence of the pre-war rent, standard rent, for the ground floor of the premises, the very concrete floors on which we are now walking, is that it was $117.50. So that 7 years rent, my Lords, would be about $9,000 per house I think at least. My Lords, I say this firstly, that even if your Lordships found this record ambiguous in the matter of Mr. Bottomley's evidence and, in that respect I say that there was no ambiguity in Mr. Bottomley's evidence, I think one is entitled to give one's views to the Court. As counsel there, I was present and, however it may read in the learned judge's notes, I say that there was no question in anybody's minds before the learned judge at the time but that Mr. Bottomley was referring to the question of the costs of the building. If my learned friend Mr. Zimmern doesn't agree with that, I can't help it. It is ridiculous to suggest that it is intended to refer to the cost of 6 tons of cement.

PRESIDENT: But it is not worth it anyway. The question is whether, on a proper consideration of section 3(1)(b), I think it would relieve those who could not come under 3(1)(a); it doesn't matter.

MR. BERNACCHI: Yes, that is the question and it all arose really out of the remark that I was making that it is amazing to consider that premises which—to put it no higher—my learned friend's did not even rely on 3(1)(b) as an alternative before the learned judge, and I say they cannot rely on it because they were so cheaply done up, that premises was cheaply done up and could never come under 3(1)(a). In my submission, it was the intention of the legislature by inserting that word "entirely" to prevent a landlord from doing up his old premises in a shabby fashion and turning around and saying "I can claim the benefit of this section for these eye sores to the community". Not even a permanent roof, my Lords! The very argument that will assist my friend before an exemption tribunal seeking exemption from the premises is an argument which is fatal to him in a case of this nature. It is one thing to come before an exemption tribunal and establish that you are going to pull the eye sore down, and another thing to seek a ruling that your eye sore, as it stands, or cheap temporary structure as it stands, is entitled to enormous rentals if you want to leave it there because it was outside the Ordinance. That never was the intention of the legislature. I go so far as to say that the clear intention of the legislature in inserting 3(1)(a) was to encourage land owners to build decent new buildings by giving them exemption, and was not intended to cover a temporary reconstruction of this nature.

PRESIDENT: You are making a point there on the nature of the building actually built. Assuming that the landlord erected a nice strong 2 storey structure with air-conditioning on the walls which started with 3 rows of bricks.

MR. BERNACCHI: Your Lordships come back to what I have said at the beginning, that it is a question of fact in each case. I wouldn't like to say. I go so far to say that I would be prepared to argue it either way. I say it is a question of fact in every case. The very fact that it is a temporary reconstructed building is something to be taken into consideration. It is not something that you can lay down hard and fast rules on. Interpreting those words in a common sense fashion, I am perfectly prepared to adopt those words of Megarry which the learned judge cites. Interpreting those words in a common sense fashion, you have got to apply them to individual facts in every case. Stand back and look at it. Is it an entirely new building? Now really, is it? The first answer is that if it is a nice luxurious air-conditioned 2-storey building, one cannot expect that they would have left the old floors, lavatories, drainage. But, standing back and looking at this thing, what is it? Everything below the knee level is old; everything above the knee level is something temporarily put together to afford a cover to enable it to be let so that it could bring in money.

APPEAL JUDGE: Supposing that I had constructed a temporary building without using the old concrete floor at all, would the fact that it was a temporary building preclude them from applying under 3(1)(a)? You are emphasizing that this was a temporary building.

MR. BERNACCHI: Not so much that it was a temporary building, but that it was a temporary reconstruction. I don't say that had they in fact built it from scratch, anew, they could not have said . . .

APPEAL JUDGE: But it is an entirely new building, so temporary nature has very little to do with it.

MR. BERNACCHI: But, my Lord, it has this. It is highly doubtful, to say no more, that they would have got permission to put up an entirely new temporary structure. What they were saying was, they were saying —as well: "As a temporary measure, allow us to build up these walls to the height of which we can put up a temporary roof". That is in effect what they were saying. My Lords, had they in effect got permission to put up an entirely new temporary structure, I agree they would have got the benefit of that Ordinance but I am stressing the temporary only as a factor here that when you stand back, look in the mind's eye at this building from the other side of the street . . .

APPEAL JUDGE: So a temporary building might conceivably be entirely new.

MR. BERNACCHI: Oh yes, my Lord, it might conceivably be new. What I am saying is that when you take all these factors and put them together into this particular line of houses Nos. 1 to 17 Landale Street, you are faced with structures that clearly the legislature never intended to be entirely new buildings within the meaning of those words. The facts are there, my Lords. The actual facts are foundations and walls, not merely foundations, foundations and walls, debris, which appears 3 bricks below the ground and 3 bricks above the ground; that wall is old, cement floors, drains, lavatories, and then it

goes on to say "What have they done above?" Erected a temporary cover, that is what they have done above. That is what they have done. They put up the thinnest possible wall they could put and a cheap roof of asphalt, almost paper stuff, it is a bit harder than paper. So that, my Lords I go so far as to say this, what is the prominent feature of what you have got here? The prominent feature is the stuff below the knee level. The superficial feature is what they have done, to put up a roof above the stuff above the knee level. They say here, "We have got a perfectly good lavatory, drains, a perfectly good concrete floor, perfectly good wall. How can we let it? Put a cover on it. What is the cheapest way of putting a cover on it? By building up these walls". They are down to knee brick level so they have got to be levelled down to 3 bricks, build them up with a very thin one brick wall and then you can let it out. There it is. So that, My Lords, there again it is all part of the facts. I wouldn't like to commit myself for one moment with some other case, some other facts. It is all part of the facts of the case which is that the essential feature of the building is the stuff below knee level. The rest is nothing more than an arrangement to put a cover over that ground floor. The ground floor, that is what it is, of No. 1 Landale Street—Number anything, Landale St. ground floor. There it is. All there, waiting to be let. "As soon as we can put some cover on it, and we can do that by levelling the old wall at the 3 brick level and putting a roof on". On those facts, my Lords, I say that the legislature never intended that it should be an entirely new building and on those facts I submit that the learned trial judge was perfectly right in coming to the conclusion that the premises were not exempted from the Ordinance, and I ask your Lordships to uphold that decision.

PRESIDENT: Do you not intend to deal with the reasons given by the learned District Judge for his decision?

MR. BERNACCHI: Oh yes, I support them entirely. Do your Lordships have in mind something that I have left out?

PRESIDENT: I thought you had. It was in respect to something said by Mr. Yu. I think it is on p.3. Actually I don't find it easy to find the exact reason of the learned District judge for his decision.

MR. BERNACCHI: I would say with respect that the reason is really best set out at p.4 of my copy in the paragraph that starts "In the case before the Court" and really, my Lords, in the last part of that paragraph:

> " In the case before the Court the shops conform in floor area to that of the former shops, in fact so much so that it was necessary to submit amended plans when the exact position of the old foundation became known, the result is that the shops as such are substantially the same as the ground floors of the old buildings, the floor area is the same, except for a slight increase due to thinner walls, the floor plan is the same, the floors and lavatories are in most cases the original, and it would be reasonable to say that the standard rent of the ground floor of the old buildings is the standard rent of the present shops. Consequently in this case . . . "—and there I would say you must relate

it to the particular case and these are the vital words—"Consequently in this case the foundations, stumps of walls, floors, lavatories and drains forming an integral part of the buildings and not being entirely new, and the present shops conforming in floor plan to the ground floors of the old buildings, section 3(1) (a) of the Landlord and Tenant Ordinance does not apply."

He finds, my Lords, as a fact that these features in this case—exactly my Lords what I have been saying—they may not in some other hypothetical case but these features in this case form an integral part of the buildings as they now stand and therefore they are not entirely new buildings. That my Lords I would say with respect is the ratio decidendi of this whole decision.

PRESIDENT: The passage that rather puzzles me is just before that:

> " On these principles it is interesting to examine hypothetical cases, some of which were advanced in argument in this case. If old bricks are used in building a block of flats on land where cottages once stood it would seem the block of flats could be an entirely new building because bricks are not included in the definition of building referred to above and the flats have no physical resemblance in area or character to the cottages".

Now that reason "because bricks are not included in the definition of building", I must confess I don't follow. I don't know.

MR. BERNACCHI: Yes, I did leave that passage out because your Lordships will recall that I said earlier on that I was personally far from certain that it is really of any great assistance to look at definitions in one Ordinance for the purpose of another Ordinance.

PRESIDENT: I agree fully and that is where possibly the learned District judge could have misdirected himself if he did rely on any such construction in coming to his decision in this particular case. But then, in the next paragraph, the one you have just read, he doesn't seem to rely on such reasoning. He merely goes into the proportion of old buildings which were left.

MR. BERNACCHI: Yes, my Lord. I respectfully submit that that is the position and I go so far as to say that I think this passage your Lordship has just referred to has possibly its foundation in the arguments addressed to the learned judge by my friend Mr. Zimmern at an earlier stage when he was arguing that the certificate of the Building Authority was all that he need proof to bring himself within 3(1) (a). That, as I say, has not been argued before your Lordships, and he ruled against it and, for that purpose my Lords, my friend Mr. Zimmern himself went into the details of the Buildings Ordinance and that is how the Buildings Ordinance really got introduced into this case. But in effect, whether the reasoning in that paragraph is right or wrong, it is not a reasoning on which he finally based his decision and it amounts to no more than this: that he rejects any argument that the use of old bricks is itself indicative of whether the premises are entirely new or not. That in effect is what he says.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 12 Transcript of the Proceedings on Appeal —(*Contd.*)

Whether his reasoning for rejecting that is a good or bad one, I submit it doesn't affect the reasoning why he finds that in this particular case it was not an entirely new building.

PRESIDENT: I must interrupt you Mr. Bernacchi. There is another Full Court which must sit for a few moments. So I take it you are nearly finished? Mr. Yu will want to reply. We will sit at 2.30 again.

Court adjourns at 12.48 p.m. and

Court resumes at 2.46 p.m.

Appearances as before.

PRESIDENT: Yes Mr. Bernacchi? Do you want to add anything?

MR. BERNACCHI: I have nothing to add. I submit that the learned judge had put the issue extremely clearly in those words "Consequently in this case the foundations, stumps of walls, floors, lavatories and drains forming an integral part of the buildings and not being entirely new, and the present shops conforming in floor plan to the ground floors of the buildings, section 3(1)(a) of the Landlord and Tenant Ordinance does not apply."

PRESIDENT: Yes Mr. Yu?

MR. YU: May it please your Lordships. I have several points I would like to mention in my reply. The first is, my friend rather emphasized the fact that a definition taken from one particular Ordinance is not a guide to an interpretation of another Ordinance which is correct to some extent, but I would submit, my Lords, that in this particular case the definition of new building is definitely relevant, and in fact most material to the interpretation of the phrase "entirely new building" under the Landlord and Tenant Ordinance because of this reason. If I may refer your Lordships to the Landlord and Tenant Ordinance, section 3(1)(a), it expressly says:

> " This Ordinance shall not apply to 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 Buildings Ordinance, after the 16th day of August, 1945".

There is direct reference there to this particular section of the Buildings Ordinance and when one turns to this particular section of the Ordinance, section 137, it starts off by saying:

> " No new building shall be occupied or used in any way, except by caretakers only not exceeding two in number, until an authorized 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 structurally safe, nor until the owner shall have received from the Building Authority a written permit to occupy such building."

In other words, until they have been certified by an authorized architect and permit has been granted by the Building Authority. Therefore, my Lords, I would submit to your Lordships that section 3(1)(a) in the first place must be read together with section 137(1) of the Buildings Ordinance and there one must go even further and ascertain the meaning of new building, and one can only do that by looking at the interpretation clause of this Ordinance which is the definition I have given your Lordships earlier on and that is the reason why I arrived at the conclusion that an entirely new building was one, as I gave your Lordships, which has newly come into existence.

APPEAL JUDGE: Do you mean to say in fact Mr. Yu that an entirely new building would be a building in respect of which a certificate has been issued?

MR. YU: No, my Lord, it must be a new building in the first place.

APPEAL JUDGE: Must be entirely new?

MR. YU: Not necessarily entirely new but I say that one can get a clue. I say that section 3(1)(a) of the Landlord & Tenant Ordinance must be read together with section 137 and therefore the definition of new building becomes directly relevant and material and that was what led me to my exposition, suggestion, that this should be the proper interpretation of the meaning of entirely new building as I earlier on gave to your Lordships. My learned friend suggested that entirely new building must go a bit further than a definition of new building. With that I agree, but he has given no indication as to what he means by going further whereas I have suggested that entirely new building means no more than this: that it is a new building which has newly come into existence as a building as distinct from the other new building as defined therein.

APPEAL JUDGE: Yes.

MR. YU: My Lords, the second point I would just like to mention, because my learned friend mentions it, is this question about the application to the Building Authority being made under the question of repairs, alterations. The word "extensive repairs" was mentioned. I would mention that Mr. Bottomley, both him and the architect, I think, have made quite clear that all such applications have in any event to be made under section 128 of the Buildings Ordinance. In other words, my Lords, I would submit that that surely is no indication as to the nature of the building work he actually carried out. It was no more than a formal application coming under section 128. The important section is 137 whereby the architect certifies that the building is a new building and has complied with all the provisions of the Ordinance and thereon a permit would be granted by the Building Authority. My learned friend seems to capitalize on the fact that this building was a cheap building and is of a temporary nature. Your Lordships have already made observations on that point, but if I may further emphasize that point, it would hardly seem correct for my friend to put himself in the position of the legislature, because the legislature says no more than "an 'entirely new

building' is a building in respect to which a permit has been granted." It doesn't say "in respect to so much" or "is less than so much". There is definitely no indication, no suggestion anywhere in the Landlord & Tenant Ordinance as to the permanent nature of the building and the cost of the building. We are not concerned in the slightest with what it cost to build. In any event, there was no evidence to that effect, and we are certainly not concerned with whether such a building was of a permanent or temporary nature.

My learned friend, again, seems to be rather fond of these examples of "knees upwards", "knees downwards". For example, on this question of knees upwards, supposing a man were to lose both of his legs and had to use two wooden legs which somebody had discarded. Could it possibly be said that this person with these two wooden legs, compared to him, would not be a new person compared with the other person, just because he utilised the wooden legs? He would be the same old person as the previous person owning that, the two wooden legs.

And finally, my Lords, I will just deal briefly with this question of Watt v. Thomas. My learned friend seems to suggest that your Lordships cannot disturb the finding of the District Judge unless the facts show that no other interpretation except mine is sustainable on the facts. I don't agree there. Watt v. Thomas does no more than this: It says if the judge made a finding on fact—on fact—on the evidence itself—then your Lordships not having seen the witnesses, heard the witnesses, would be reluctant to disturb such a finding of fact. But in this instance, my Lords, the facts were never in dispute. It was a question of law. How the District Judge applied the facts to the law is a point of law, a point of interpretation, which your Lordships have complete discretion and jurisdiction to determine, upset, or uphold. And in this case I would submit that the learned Judge misdirected himself in applying this wrong criterion. I would read into that paragraph at p.3. I would read the last paragraph beginning with p.3 of the judgment, that is, document 3. I would read the paragraph beginning "In the case before the Court" etc. In other words, talking about the case itself. I would read the paragraph itself, together with the paragraph immediately preceding it. For this reason, my Lords, that in the previous paragraph it was expressly stated that he accepted such a building with old bricks and old staircase as being an "entirely new building" because old staircase and old bricks were not included in the items provided for in the definition of building. And then he goes on: "In this case"—"Consequently in this case" etc., and he mentioned at least two items—stumps of wall and floor were expressly items which came under this definition of building.

PRESIDENT: "Stumps of wall", or "walls"?

MR. YU: The learned Judge, of course, used "stumps of wall", but anyway the words "walls" and "floors" came within the definition of this Buildings Ordinance. If your Lordships will read that definition, half-way through:—

" column, floor, out-house, stable, shed, pier, wharf, fence, wall, roof". So in other words at least two of the items were found in this definition of the Buildings Ordinance, and I read the two paragraphs together. I said the only logical conclusion to draw was the learned Judge was in fact relying on this description of building in coming to the conclusion that the buildings in the present case are not entirely new buildings. I submit that the learned Judge misdirected himself there, and therefore your Lordships have full jurisdiction and discretion to decide whether his judgment should be reversed, and, in the circumstances, once again I ask your Lordships to give judgment to the appellant.

PRESIDENT: In view of, what I might call, the obscurity of the section, and the possible repercussions of any judgment which deals with it, the Court will reserve its decision and reduce it to writing.

2.58 p.m.

We certify that to the best of our knowledge and ability the foregoing is a true transcript of the shorthand notes taken at the hearing of the above Full Court Appeal.

Sd. F. A. Gutierrez,
Court Reporter.
21.7.54.

Sd. G. F. Remedios,
Court Reporter.
21.7.54.

No. 13.

No. 13 Judgment on Appeal

THE JUDGMENT ON APPEAL

Coram: Gould, Actg. C.J.
& Gregg, J.

JUDGMENT

This is an appeal against a decision of a District Judge refusing an order for possession of premises known as No. 1 Landale Street. The appellant is the owner of the premises and had determined the contractual monthly tenancy of the respondent by sufficient notice. The respondent claims the protection of the Landlord & Tenant Ordinance (Cap. 255). The appellant's contention is that the premises are taken out of the scope of that Ordinance by Section 3(1)(a) thereof which is as follows:—

" 3(1) 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 Buildings Ordinance, after the 16th day of August, 1945."

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 13
Judgment on Appeal —(*Contd.*)

There is little or no dispute about the essential facts. Before the Pacific war, the site was occupied by a four storey building intended for residential purposes. During the war, in common with adjoining premises, they suffered damage amounting to almost complete demolition. After the passing of the Landlord & 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 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.

During the hearing in the District Court, the District Judge ruled that the granting of the permit under the Buildings Ordinance (Cap. 123) mentioned in Section 3(1)(a) was not decisive of whether the building was an entirely new building for the purposes of the Landlord & Tenant Ordinance and with this ruling (which was not challenged before this Court) the Court is in agreement. In the present case, the certificate was duly granted at a date later than 16th August, 1945, and the only question for decision is whether or not the building was an "entirely new building" within the meaning of Section 3(1)(a). It should be noted that in Section 2 of the Buildings Ordinance there are long lists of what the words "building" and "new building" are deemed to include but they do not appear to be of any assistance in the present problem. For example, "building" includes such things as an arch, a septic tank, a lift and a hoarding. "New building" includes buildings which have been altered in specified ways and the conversion into a domestic building of one not originally constructed for human habitation. While an entirely new building, for the purposes of the Landlord & Tenant Ordinance, must be included in what the Buildings Ordinance regards as a new building (otherwise the permit under Section 137 would not be granted), it is obvious from the definition that every such new building is not necessarily an entirely new building for the purposes of the Landlord & Tenant Ordinance. The meaning of that phrase must, I think, be determined with regard to the provisions and objects of the Landlord & Tenant Ordinance itself, and it is not impossible that the word "entirely" was inserted to make it quite clear that the description of "new building" in the Buildings Ordinance did not apply.

Judicial notice can be taken of general building and housing conditions in the Colony since 1945, and in view of those conditions it is quite plain that such provisions as Section 3(1)(a) of the Landlord & 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. Section 3(1)(a) has already been set out. A further provision is contained in Section 3(1)(b).

" 3(1) This Ordinance shall not apply to—

(b) any premises which after the 16th day of August, 1945, have remained continuously untenanted and which after the coming into force of this Ordinance have been rendered habitable by extensive repairs effected at the expense of the landlord. For the purpose of this paragraph the expression extensive repairs means repairs wholly necessary for rendering the premises reasonably habitable and in respect of which expense incurred amounts to not less than the equivalent to the standard rent of the premises for seven years."

This holds out encouragement to repair badly damaged premises, recognizing the comparatively low level of pre-war rentals in relation to post-war building costs.

What then is an "entirely new building"? Obviously it includes, as its primary meaning, a building erected on a site never previously built upon. It is equally obvious, I think, that the legislature did not intend to use the word "new" in relation to the materials of which a building was constructed but in relation to the building qua building. Second hand bricks could not detract from the entirely "new" nature of the building as such—and I cannot see that it would make any difference if the bricks were from a demolished building previously on the site.

Doubts begin to arise however when some portion of the original building has survived and is built into, or utilized, in the building without being broken up into its component bricks or blocks of granite. It is easy to say in such circumstances that such a building cannot be entirely new because it is comprised of part of an old one. That, however, is in my opinion to confuse once again "materials" with "building" and I would be reluctant to hold that the legislature intended that the utilization of any part of an old building, however small, automatically took it out of the category of "entirely new building". I have in fact already held, in S.J.110 of 1952, that the incorporation of about one-half of an old foundation does not have that effect. To hold the contrary might lead to strange results for it would follow that a man who erected a five-storey building on part of an old foundation would find that it was subject to rent control, whereas his neighbour who had a substantial part of his old house left, and did "extensive repairs" at far less cost than the new building, would escape under Section 3(1)(b).

It could of course be argued that exemption could be had in both of the examples mentioned above under Section 3(1)(b), but in my opinion that could only be the case if the word "repairs" were given a strained meaning. In its most usual meaning "repair" does not include "rebuild". It can do so if used in a covenant to repair contained in a lease and if the subject matter of the covenant is destroyed by fire or some like agency. Even then it imports a restoration as nearly as possible of the building destroyed, which is not a requirement of Section 3(1)(b). In its ordinary meaning the word can include renewals of portions of an entity, but not the replacement of the whole of that entity when it has been destroyed to a point at which, in the common phrase, it is beyond repair. The distinction is expressed in the case of Lurcott v. Wakely and Wheeler, (1911) 1 K.B.D. at 919 as follows:—

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 13
Judgment on Appeal —(*Contd.*)

" For my own part, when the word 'repair' is applied to a complex matter like a house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down, or was down, the word 'repair' could not be used to cover rebuilding. It would not be apt to describe such an operation."

In the judgment of Buckley, C.J., at pages 923-4 of the same case is the following:—

" 'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace."

It does not seem appropriate, in view of these opinions, to say that when a person erects a building which is quite new except for a part of an old foundation, that he is doing "extensive repairs". Another example could be taken. Assume that by a freak of bomb damage one of two adjoining houses is completely demolished except for a party wall which it had shared with its undamaged neighbour. A newly built house which again utilized the party wall could not be described as "repairs". Repairs to what? In such a case Section 3(1)(b) could not apply and if the incorporation of the party wall into the new building were to be fatal to its claim to be deemed "an entirely new building", it would be within the Ordinance. It is difficult to see upon what basis it would then be equitable to fix the standard rent.

It is plain that this is not the intention of the Ordinance, nor, in my opinion, is it the correct interpretation of its provisions. The degree of damage which a building may suffer by the ravages of war varies, of course, immensely. Section 3(1)(b) is appropriate when there has been extensive damage but the building still remains capable of repair in the ordinary sense of that word—even if there were only what is called the "shell" of a building remaining: But where the damage has been so extensive that repair is impossible, where there is nothing left which could possibly be called a building, then surely the existence of that building as such is terminated. It is no longer an entity. In that case I think that a building replacing it would be an entirely new building even though it was built on the same foundations and had the same floor. This interpretation, while it emphasizes the idea of a building as distinct from the materials comprised in it, does not in my opinion do violence to the meaning of the phrase under consideration and avoids the absurdities indicated above.

The District Judge gave careful consideration to the facts and came to the conclusion that the word "entirely" excluded the building from the exemption. He said "Consequently in this case the foundations, stumps of walls, floors, lavatories and drains forming an integral part of the buildings and not being entirely new, and the present shops conforming in floor plan to the ground floor of the old buildings, Section 3(1)(a) of the Landlord & Tenant Ordinance does not apply." There are two elements in this reasoning —firstly, incorporation of part of the old building; secondly, similarity of plan of the ground floor. I have explained above why I do not consider the first of these to be the correct, or perhaps it would be better expressed as "a sufficient" test. There is no doubt that its strict application would lead to either absurdity or to questions of degree to which there appears to be no answer. As to the second element—similarity of plan—I am unable to see how it assists. If a perfect replica of the old building were built without incorporating any part of the latter in the new construction, the result would still be an entirely new building. On the other hand, if the incorporation of part of the old building is the exclusive test, one could put any sort of building on the old foundation and still it would not be an entirely new building. On the facts in the present case, the new building can bear no resemblance to its predecessor—except in that one particular—the layout of the ground floor.

For the reasons indicated above, I think that the District Judge did not apply the correct test which I believe to be whether the old building was so far beyond repair that it could no longer be said to exist as a building; whether it is not, in the words of Buckley C.J., "reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion." The original four-storey domestic building in the present case was reduced to a foundation, a concrete floor, some drains, and the bases of walls to the height of three bricks. Surely what remained was not a building (a word which for the purposes of the Landlord & Tenant Ordinance must be closely linked with the idea of human habitation); surely what was done on the site could not properly be described as repairs. In my opinion, the old edifice had gone out of existence and past all repair; therefore its successor must be for the purposes of the Ordinance an entirely new building.

It follows that in my view the appeal must be allowed. By agreement the appeal in which this judgment is intituled was heard together with appeals Nos. 8—12 (inclusive) of 1954 and it was also agreed that all the appeals were dependent upon the same facts and principles and must succeed or fail together. The appeals in all the actions mentioned are therefore allowed.

(sd.) T. J. Gould,
President.

I concur.

(sd.) J. R. Gregg,
Appeal Judge.

2nd July, 1954.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 14
Notice of Change of Solicitors

No. 14.

NOTICE OF CHANGE OF SOLICITORS

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

Appeals Nos. 7-12 of 1954.

(On Appeal from Victoria District Court Civil Actions Nos. 843, 845, 846, 848, 849 & 850 of 1953.)

Ma Kam Chan — Appellant (Plaintiff)

and

Kai Nam (a firm) & 5 Others — Respondents (Defendants)

TAKE NOTICE that Messrs. LAU, CHAN & KO of Prince's Building, 1st floor, Victoria in the Colony of Hong Kong, have been appointed to act as the Solicitors of the above named Respondents (Defendants) in the above Appeals, in the place of Messrs. Hastings & Company.

The address for service of the above-named Messrs. Lau, Chan & Ko is Prince's Building, 1st floor, Victoria aforesaid.

Dated this 16th day of July 1954.

Sd. Lau, Chan & Ko,

Solicitors for the above-named Respondents (Defendants) in the above Appeals.

To:

The Registrar of Supreme Court,

and

Messrs. F. Zimmern & Co., Solicitors for the Appellant,

and

Messrs. Hastings & Co., then Solicitors for the Respondents.

No. 15.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 15 Petition for Leave to Appeal to The Privy Council

PETITION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
APPEAL No. 7 of 1954

(On Appeal from Victoria District Court Civil Action No. 843/1953)

Between Kai Nam (a firm) Petitioners (Defendants)

and

Ma Kam Chan Respondent (Plaintiff)

PETITION FOR LEAVE TO APPEAL TO PRIVY COUNCIL

To the Honourable the Judges of the Supreme Court of Hong Kong.

THE HUMBLE PETITION of Kai Nam (a firm), RESPECTFULLY SHEWETH:—

1. That this Action was brought by the above-named Respondent against Your Petitioners by a Writ of Summons issued out of the Victoria District Court of Hong Kong on the 16th day of December 1953 in which the Respondent claimed against Your Petitioners for recovery of possession of the premises known as No. 1 Landale Street, Hong Kong, and for payment of mesne profits.

2. That this Action was heard by His Honour District Judge James Wicks on the 28th day of January 1954, the 17th day of February 1954 and the 16th day of March 1954.

3. That on the 8th day of April 1954 His Honour gave judgment for Your Petitioners and dismissed the said Action.

4. That on the 14th day of April 1954 leave was granted by His Honour to the Respondent to appeal to this Honourable Court.

5. That on the 29th day of April, 1954 the Respondent filed a Notice of Motion appealing to this Honourable Court against the said judgment.

6. That the said Motion was heard before this Honourable Court consisting of the Honourable Mr. Justice Trevor Jack Gould, Acting Chief Justice, and the Honourable Mr. Justice James Reali Gregg, Puisne Judge, sitting together on the 8th day of June 1954. Five other appeals in respect of the premises known as Nos. 5, 7, 13, 15 and 17 Landale Street, Hong Kong, also owned by the Respondent, were heard together.

7. That on the 2nd day of July 1954 this Honourable Court delivered judgment allowing the appeal by the Respondent and reversing the said judgment of His Honour District Judge James Wicks.

8. Your Petitioners feel aggrieved by the said judgment of this Honourable Court and desire to appeal therefrom.

9. The said judgment of this Honourable Court affects matters in dispute of the value of $5,000.00 or upwards and further involves directly a claim or question of property or civil right of the value of $5,000.00 or upwards.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 15 Petition for Leave to Appeal to The Privy Council —(*Contd.*)

10. YOUR PETITIONERS THEREFORE HUMBLY PRAY:—

(a) That this Honourable Court will be pleased to grant to Your Petitioners formal leave to appeal from the said judgment of this Honourable Court to Her Majesty the Queen in Her Privy Council.

(b) That this Honourable Court will be pleased to order that execution of the said judgment be stayed pending the appeal to Her Majesty the Queen in her Privy Council.

(c) That this Honourable Court may make such further or other Order as may seem just.

AND YOUR PETITIONERS will ever pray, etc.

Dated this 16th day of July, 1954.

Sgd. Lau Chan & Ko,
Solicitors for the above-named Petitioners.

Sgd. Brook Bernacchi,
Counsel for the above-named Petitioners.

This Petition is filed by Messrs. LAU, CHAN & KO of 1st floor, Prince's Building, Victoria in the Colony of Hong Kong, Solicitors for the Petitioners.

No. 16 Chan Ying Hung Affidavit

No. 16.

AFFIDAVIT OF CHAN YING HUNG IN SUPPORT OF PETITION

I, CHAN YING HUNG, of First Floor, Prince's Building, Victoria in the Colony of Hong Kong, Solicitor, hereby make oath and say as follows:—

1. I am a Solicitor practising in the Supreme Court of Hong Kong and a partner of Messrs. Lau, Chan & Ko of First Floor, Prince's Building, Victoria aforesaid, and as such I have the conduct and management of these proceedings on behalf of the Petitioners.

2. The statements made in the Petition filed herein on even date for leave to appeal to Her Majesty the Queen in her Privy Council are to the best of my knowledge information and belief true in substance and in fact.

Sworn at the Court of Justice Victoria
Hong Kong this 16th day of July, 1954.
Sd. Chan Ying Hung.

Before me,

Sd. C. M. Leung,
A Commissioner &c.

No. 17

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 17
Chan Kai Nam
Affirmation

AFFIRMATION OF CHAN KAI NAM IN SUPPORT OF PRAYER FOR A STAY OF EXECUTION

I, CHAN KAI NAM (陳啓南) trading under the firm name of "Kai Nam" at No. 1 Landale Street Victoria in the Colony of Hong Kong Merchant do solemnly sincerely and truly affirm and say as follows:—

1. I am the Sole proprietor of the Kai Nam Firm, the Petitioners herein.

2. My firm has been tenart of the premises No. 1 Landale Street since their reconstruction in 1947.

3. Having carried on business in the said premises for almost 8 years my firm has become well known to the inhabitants of the vicinity in which the said premises are situated and I have consequently acquired a goodwill of considerable value to me in respect of both my business and the said premises.

4. I verily believe that the Respondent herein intends to demolish the premises and to erect a new building in place thereof as soon as vacant possession is given to him.

5. In view of the above and of the facts referred to in the judgments of the Full Court and of His Honour Judge Wicks in these proceedings, I respectfully submit that the prayer contained in the petition herein for a stay of execution should be granted by virtue of the following special circumstances:—

(1) That the interpretation of the term "entire new building" is a matter of extreme importance to landlords and tenants as a whole and the ultimate decision of the Privy Council thereon will determine the status of many houses in Hong Kong of a similar character.

(2) As stated above a goodwill has been acquired by me not only in respect of my business but in respect of the premises the loss of which will be irreparable.

(3) It is impossible or extremely difficult for me to find alternative accommodation suitable for my business or at all upon terms reasonably within my means.

(4) Unless execution is stayed the premises which form the subject matter of these proceedings will be demolished and I shall be deprived permanently of the benefit thereof which cannot possibly be restored by a successful appeal.

(5) I could not be adequately compensated by any money payment in the event of the appeal succeeding in that once my business is closed the means of livelihood of myself and my dependents will be lost forever.

(6) I am prepared to pay rent or mesne profits as and when due pending the Appeal and have in fact paid all mesne profits payable up to now.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 17
Chan Kai Nam
Affirmation
—(*Contd.*)

(7) I am prepared to do all things necessary to bring on the Appeal as expeditiously as possible.

AND lastly I do solemnly sincerely truly affirm that the contents of this my Affirmation are true.

AFFIRMED at the Courts of Justice, Victoria, Hong Kong, this 26th day of July 1954, the same having been duly interpreted to him in the Cantonese dialect of the Chinese language by:— (sd.) 陳啓南

(sd.) Dennis Woo,
Sworn Interpreter.

Before me,

(sd.) Lang Ching Yu,
A Commissioner for Oaths.

No. 18
Ma Kam Chan
Affirmation

No. 18.

AFFIRMATION OF MA KAM CHAN IN OPPOSITION TO PRAYER FOR A STAY OF EXECUTION

I, MA KAM CHAN (馬錦燦) of No. 50 Bonham Strand West Victoria in the Colony of Hong Kong Banker do solemnly and sincerely affirm and say as follows:—

1. I am the Respondent in the above-mentioned Appeal.

2. I have had read and explained to me the Petition of the Applicant filed herein, the Affidavit of Chan Ying Hung sworn herein on the 16th day of July 1954 and the Affirmation of the Appellant made herein on the 26th day of July 1954.

3. On or about the 15th day of November 1947 I purchased all that piece or parcel of ground registered in the Land Office as Inland Lot No. 2245 together with the buildings thereon known as Nos. 1-17 (odd numbers only) Landale Street, part of which is the subject matter of the Above Action, with a view to developing the same.

4. The said property comprises an area of approximately 6,917 square feet and at the date of purchase above-mentioned there were, as there are now, nine temporary structures of one storey each thereon suitable only for carrying on small trades.

5. The said temporary structures were erected in or about October 1947 and have always been let severally to the Appellant and others respectively carrying on various trades therein.

6. Early in the year 1953 I gave instructions to Mr. Li Hin Lung, Authorised Architect, to prepare plans for the development of the said property. The said plans were duly prepared and approved by the Building Authority on the 12th day of December 1953. The approval of the Building Authority of the said plans is now produced and shown to me and marked "A".

7. The said plans provide for the erection of 9 houses of 4 storeys each on the said property and it is my intention to proceed to erect the buildings in accordance with the said plans as soon as possession of the said property is recovered by me.

8. After my said Architect had prepared the said plans, I approached the Appellant with the offer that in exchange for his vacating the premises occupied by him to enable the development scheme to be carried out I was prepared to grant him a tenancy of the ground floor of the new building for a reasonable sum and at a reasonable rent. At one stage the sum of $5,000.00 and a rent of $500.00 were mentioned. But this offer was turned down by the Appellant and I had no alternative but to bring action against the Appellant to recover possession. The erection of the said new buildings can be completed in four to six months from the date of recovery of possession.

9. Any stay of execution will only further delay the development scheme and I verily believe that the Appellant is in no position to furnish security for the damage I shall sustain by reason of such further delay. In this connection I would refer this Honourable Court to a letter dated the 24th day of July 1954 from the Appellant's solicitors to my solicitors a copy of which is now produced and shown to me and marked "B".

10. In the event of this Honourable Court refusing to grant a stay of execution I am prepared to furnish such security as this Honourable Court may order to meet any claim for damages by the Appellant should his Appeal to the Privy Council be successful.

11. The document now produced and shown to me and marked "C" is the Notice of Valuation of the premises the subject matter of these proceedings for the year 1952-1953. I therefore deny the allegation in paragraph 9 of the Petition that the matter in dispute on the Appeal from this Honourable Court is above or of the value of $5,000.00.

And lastly I solemnly and sincerely affirm and say that the contents of this my Affirmation are true.

AFFIRMED at the Courts of Justice Victoria Hong Kong this 28th day of July 1954 the same having first been duly interpreted to the Affirmant in the Chinese language by:— (sd.) 馬 錦 燦

(sd.) Wong Cheuk Kwai,
Sworn Interpreter,

Before me,

(sd.) Lee Ching Yu,
A Commissioner &c.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 18
Ma Kam Chan
Affirmation
—(*Contd.*)

This is the exhibit marked "A" referred to in the Affirmation by Ma Kam Chan dated the 28th day of July 1954.

Dated this 28th day of July 1954.

Before me,

(sd.) Leung Ching Yu,
A Commissioner &c.

ORIGINAL

BUILDING AUTHORITY'S OFFICE.

No. 1841 Hong Kong, 12th Dec. 1953.
Ref. No. 2/2526/53

Notice has been duly received from Mr. Ma Kam Chan, ...
of intention to erect nine Chinese houses at Nos. 1 to .....
17, Landale Street on I.L. 2245/ .....
.....
.....
in accordance with the ..... plans ..... dated 28-11-53 deposited
in this office by Mr. Li Hin Lung .....

The work is to be carried out in accordance with the terms of the Buildings Ordinance (Chapter 123 of the Revised Edition, 1950).

I approve of the plan ..... accompanying the said notice as being in conformity with the Buildings Ordinance (Chapter 123 of the Revised Edition, 1950).

This approval is given in respect only of the requirements of Section 128 of the Buildings Ordinance and before proceeding with the proposed development the applicant should satisfy himself that it does not in any manner contravene any other Ordinance or Regulation or the provisions of the Crown Lease of the property.

(Signed) Illegible
pro Building Authority

N.B. This paper should be handed to the person in charge of the work.

This is the exhibit marked "B" referred to in the Affirmation by Ma Kam Chan dated the 28th day of July 1954.

Dated this 28th day of July 1954.

Before me,

(sd.) Leung Ching Yu,
A Commissioner &c.

LAU, CHAN & KO.
Our Ref. C/1502/54.
Your Ref. FZ/PTY/K.
Messrs. F. Zimmern & Co.

24th July 1954.

Dear Sirs,

Re: CJ Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953 and Appeal No. 7 of 1954.

With reference to your letter of the 22nd inst., we note that your client requires the sum of $5,123, being taxed costs herein, to be paid to you by 12 noon on Monday, the 26th inst.

In reply we are instructed to request an extension of time within which to pay the said sum upon the understanding that if the same is not paid before noon on Friday next, the 30th inst., our clients will not pursue the appeal herein and the same will be deemed to have been abandoned.

Kindly let us hear from you as soon as possible.

Yours faithfully,
Sd. Lau, Chan & Co.

YHC/P

This is the exhibit marked "C" referred to in the Affirmation by Ma Kam Chan dated the 28th day of July 1954.

Dated this 28th day of July 1954.

Before me,

(sd.) Leung Ching Yu,
A Commissioner &c.

HONG KONG (ss. 12, 26, 28)

Form No. 4.

NOTICE OF VALUATION

THE RATING ORDINANCE 1901—VALUATION

FOR THE YEAR 1952—1953

1st April to 31st March

To

MR. MA KAM CHAN,
50 BONHAM STRD., W.
} owner or occupier of the tenements mentioned below

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 18
Ma Kam Chan
Affirmation
—(*Contd.*)

You are hereby informed that the tenements specified below have been assessed to the rates for the above year at the rateable values separately entered against them.

Dated the day of 19 .

1 FEB 1952

(Chopped)

RATING & VALUATION DEPARTMENT

(Signed) F. SHANKS

Commissioner,

Rating & Valuation Dept.

No. of Assessment	Lot		Street		Description of Tenement	Rateable Value	Remarks
	Description	No.	Name	No.			
	1 Landale St.				$106.25	$ 2,500	4/2

No. 19
Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution

No. 19.

TRANSCRIPT OF THE SHORTHAND NOTES TAKEN BY THE COURT REPORTERS OF PROCEEDINGS ON THE HEARING BEFORE THE FULL COURT OF THE PETITION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL AND FOR A STAY OF EXECUTION

Coram: Gould, Actg. C.J.
& Gregg, J.

30th July, 1954 @ 12.15 p.m.

Present: Mr. Brook Bernacchi (Mr. Chan of Messrs. Lau, Chan & Ko) for Petitioners.

Mr. Patrick Yu (Mr. F. Zimmern) for Respondent.

PRESIDENT: Yes Mr. Bernacchi?

MR. BERNACCHI: May it please the Court. This is my application for provisional leave to appeal to the Privy Council in the matter of a series of appeals that came before this Court a short while ago in which your Lordships reversed the decision of His Honour Mr. Justice Wicks in a matter of the interpretation of the Landlord & Tenant Ordinance. I am instructed by Mr. Chan of Messrs. Lau, Chan & Ko, for the Appellants in each case, and my learned friend Mr. Yu, instructed by Mr. Zimmern, appears for the respondent.

The first matter is the question of whether the appeals lie as of right or at your Lordships' discretion in that a matter of great general or public importance arises. My Lords, it is my submission that although these estates, all these properties, were within the meaning of the jurisdiction of our District Court Ordinance as having an annual value of under $5000, when one comes to the different phraseology of the Privy Council Rules the value of the matter in dispute is very definitely more than $5000. Indeed, the very assessment, the rental assessment, attached to the affidavit of Mr. Ma Kam Chan clearly shows that the property, the matter in dispute, must be regarded as having a value of more than $5000. The rateable value of each of these properties, my Lords, is $2,500 per annum, as shown in this Notice of Valuation attached to the affidavit of Mr. Ma Kam Chan. None of them are under $2000 and many of them are $2,500. That is the exhibit attached to the affidavit of Mr. Ma Kam Chan, who is the respondent and filed an affidavit in reply to our affidavit, and he has attached three copies altogether my Lords, 3 exhibits. The first exhibit is a Building Authority notice of December, 1953; the second is a letter to Messrs. Zimmern & Co. of 24th July, 1954—that is Exh. B, and the third is a Rating & Valuation exhibit. If your Lordships would take, for instance, Appeal 7, it is No. 1 Landale Street, Description of Tenement and it is $106.25, Rateable Value $2,500.

PRESIDENT: Yes, that is per annum.

MR. BERNACCHI: Yes, per annum. The wording of the Privy Council rule (2) is subject to provision of these rules:

" An appeal shall lie—

(a) As of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of $5000 or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $5000 or upwards".

"Some claim or question to or respecting property", and it is quite clear that the value of property is more than $5000. It is simply a difference in phraseology between the District Court Ordinance and the Privy Council Rules. The words are very wide, "directly or indirectly, some claim or question to or respecting property or some civil right amount to or of the value of $5000 or upwards".

PRESIDENT: But the Privy Council's view on this very point, as a matter of fact, is that where rent-controlled premises are concerned and the position is almost similar, it has been decided that it is as of right.

MR. BERNACCHI: Yes. So your Lordships don't need me to develop this any further.

PRESIDENT: If Mr. Yu takes a different attitude, we will hear him.

MR. YU: No, my Lord. My only objection is as to stay of proceedings.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19
Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

MR. BERNACCHI: The questions then that arise as as to the terms of the leave to appeal and, in particular, as to the question of whether or not the judgment that your Lordships delivered should be carried into execution or should be suspended pending appeal. My Lords, that involves paras. 4 & 5 of the Privy Council Rules, or I should say, Rules 4 & 5. My Lords, the security for costs as such is in a sum not exceeding $5000. My Lords, the amount that your Lordships order is entirely in your Lordships' discretion up to that amount but, in fixing the sum, I am desirous to say this, that I would ask your Lordships to bear in mind that in fact these cases have always either been heard together—or one has been which decided the lot—and your Lordships made an order that the costs of the appeals before this Court should be taxed as on a consolidation.

PRESIDENT: Yes, we did so at the request of Counsel. You are going to have to prepare 6 or 7 different records for this . . .

MR. BERNACCHI: It seems to me that that would be a completely unnecessary situation. I don't know what my learned friend's attitude is on this. I should have thought that the most convenient thing is to prepare one record in Appeal No. 7 and to have agreed that all the appeals would abide the decision of the Privy Council on Appeal 7. I don't know what my learned friend's attitude is on that.

PRESIDENT: It seems to me to be the sensible thing to do. I don't think this Court can do anything about it now. You specifically asked us not to consolidate the appeals at one stage and I don't think that now we can. A consolidation of appeals under Rule 15 seems to deal with either two or more applications for leave to appeal arising out of the same matter. The Court may direct the appeals to be consolidated and grant leave to appeal by a single order.

MR. BERNACCHI: That seems to be very appropriate. If my learned friend is not prepared to accede to my suggestion that we might just proceed on one, I would say that it is completely unnecessary to have five different records in a case like this and that since the cases have gone so far been heard together, even though not consolidated except as regards costs, it is the most appropriate order now to make under Rule 14 (15?). If my learned friend is not prepared to accept my other suggestion that there should be one record and that the appeals to the Privy Council should be consolidated and thereby have one single order granting leave to appeal, I say quite frankly that my clients, who are quite obviously small shopkeepers, they are not wealthy people, and that in either result, if your Lordships were to fix the security for instance at $5000 in each case, the net result would be that the security would be $25,000, in the limit of $5000 as laid down in the rules by a more or less technicality that there are five separate appeals, and I strongly ask your Lordships either to exercise your discretion under Rule 14 and direct a single record in a single appeal, or else, if there are to be five separate appeals, to so proportion the security that over the five appeals the sum does not exceed $5000. I submit that it is not as if the record is a bulky one or that the point to be argued is a very lengthy one, I think the argument before your Lordships took a day's hearing.

My Lords, the other matter for consideration is Rule 5 as to whether or not your Lordships should order, should direct, that the judgment should be carried into execution or that it should be suspended pending the appeal as the Court shall see just. My Lords, much argument has always been developed on this rule and I have yet to hear a final decision on it as to whether or not, when acting under Rule 5, the ordinary rules apply that a party seeking a stay should show special circumstances or whether, under Rule 5 of the Privy Council Rules, the position is that the Court treats the matter at large and decides which is the more convenient in all the circumstances.

PRESIDENT: You mean Rule 6.

MR. BERNACCHI: Rule 5 "Where the judgment appealed from . . . " unless it has a different numbering from your Lordship's. I think mine is an out of date copy.

PRESIDENT: This is Bentwich, Rule 6.

MR. BERNACCHI:

> " Where the judgment appealed from requires the appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, . . . "

and then the provision goes on that in either event the other party must put up security which I will deal with later.

Now, your Lordships will recall that there is an interesting passage —I am not going to develop this at great length—but there is an interesting passage in a case which is always cited by a judgment creditor seeking to enforce his judgment, The Annot Lyle case, because that is the famous case about a man should not be kept out of the fruits of his judgment. That is 11 P.D. p.114. There is a passage there which at least indicates that the Privy Council procedure is different because Lord Esher, M.R. at the foot of p.115 referring to the argument says:—

> " It was said that it was the practice of the Privy Council to stay execution in similar cases, but that practice must be taken to have been known to the legislature, when it transferred the jurisdiction of that tribunal in Admiralty appeals to this Court, and made such appeals a branch of the ordinary business of this Court, and subject to the same rule in this respect as all other business, viz., that an appeal shall be no stay of proceedings except the Court may so order."

There he is of course citing a rule which is to be found in our Code of Civil Procedure in reference to the ordinary rules in Hong Kong as to appeals to the Full Court, my Lord. It is 0.29 r.26:—

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 19
Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

" An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court or the Full Court may order; and no intermediate act or proceeding shall be invalidated, except so far as the court or the Full Court may direct."

Those words come from order 58 r.16 and they are the words cited by Lord Esher as being the rule in his Court viz., that an appeal shall be no stay of proceedings except as the Full Court may order. It is almost similar to 0.29, r.26, "An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court or the Full Court may direct or order". Lord Esher particularly goes out of his way to say that he recognizes that the Privy Council practice as to stay of execution is different, but he that had the legislature intended to retain the Privy Council practice when transferring these appeals to the Court of Appeal, then the legislature should have said so and, the legislature not having said so, the ordinary rule applied which is the equivalent to our 0.29 r.26. So that in the classic case of the Annot Lyle, you have Lord Esher himself recognizing that stay of execution of appeals to the Privy Council are on a totally different basis. I would respectfully myself say that Rule 5 . . .

APPEAL JUDGE: Rule 6.

MR. BERNACCHI: . . . is so framed as to leave the matter entirely open to your Lordships' discretion without any of the rules that were imposed by a phraseology that starts off by saying "an appeal shall not operate as a stay unless in effect special circumstances are shown". However, my Lords, were it necessary for me to go so far in this case as to establish special circumstances, I say it is clearly a case where there should be a stay. The claim was for two things: possession and mesne profits. I ask for no stay about mesne profits. We have paid the mesne profits and we shall continue to pay the mesne profits. The order for possession, however, my Lords, stands in a different category altogether because, not only is there any question, the inevitable question, of whether a tenant who goes out of possession will ever be able to get back in again, in this case you have had an affidavit from Mr. Ma himself that he intends to pull down the premises so that there would be no premises for us to go back into. In the simple case of a tenant against whom an order for possession is made, it may still be argued that possession is a very difficult thing. There is no guarantee that he will be able to go back again. Where you have an addition to that, the landlord actually saying on affidavit "I intend, directly I get possession, to pull these premises down", it is, I submit my Lords, that it is unarguable that the judgment, that the whole point of the appeal would become nugatory because the premises will have gone. The whole argument of the appeal will be, whether these premises are controlled under the Ordinance or not. The premises have gone, the appeals would become a mere matter of theoretical interest. Old building or new building, the buildings would have gone.

PRESIDENT: If you win your appeal, you would get an order for possession or, alternatively, damages.

MR. BERNACCHI: I have heard that said many years ago in what is known as the Henry G. Leong case which I think my learned friend is going to cite and I am going to say that, whether it was right or wrong, it is directly contrary to a later decision in this Court in the Far East Motors case. I find difficulty, with respect, in seeing that because, damages for what? A man has executed a perfectly valid judgment which is subsequently reversed, but I cannot see that he has committed a tort because he is acting under a perfectly lawful order of the Court. As far as I can see, at the very best he might be liable to an action for damages for being unable to reinstate my clients.

PRESIDENT: I don't know about that.

MR. BERNACCHI: I have heard it said before "Oh yes, but a tenant who loses his possession will still have a right to damages". When one comes down to hard rock, I am far from being certain as to what he can recover, if he can recover. Supposing there is no stay, the appellant is evicted and the Privy Council do not say—as they might well say—"This appeal has become nugatory. We decline to decide the hypothetical question", as the House of Lords have done over and over again. Supposing the Privy Council were to say "All right, we agree to on. We will decide this question about the building that once stood on that lot, whether or not it was or was not a controlled building" and come to the conclusion that it was a controlled building and that therefore my clients should not be evicted. Their order—(it is not even an order if my clients were the plaintiffs)—their order would be that the original action started in the District Court is dismissed. That would be their order, but in the interval my Lords, dismissed or not dismissed, my clients would be out and the property would be down and they say "All right, we bring an action for damages". If I were on the other side, I would feel happy saying "What I did, I did under a perfectly good order of the Court". Can a man pay damages for acting under a lawful order of the Court merely because the order is subsequently reversed? That, in my respectful submission, does raise a very considerable doubt as to whether it can be said that damages would lie to compensate a tenant in those circumstances. Certainly he would not have the fruits of the result of the Privy Council decision in his favour, in any way in a form that is of much use to him. He would have lost his business, he would have closed down, he would be out and he would not be able to get in again. There would be no obligation to let him back into a brand new building that is standing there or which is on its way of going up.

PRESIDENT: Yes, that is a matter of considerable doubt. I think Mr. Potter made the suggestion very strongly in the first place. That was the position. Speaking personally, I have never been satisfied what the position would be.

MR. BERNACCHI: I am going to say that in the later case of the Far East Motors, an order was made staying execution.

PRESIDENT: As far as your business is concerned, if the premises go that is the end of it.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19
Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

MR. BERNACCHI: Yes.

PRESIDENT: Compensation or damages only come in . . .

MR. BERNACCHI: That is precisely my case that to all intent and purposes, if the judgment is carried into execution, the appeal would be nugatory to my clients. Their premises and business would have gone. That being so, even on the rules relating to stay where you have to show special circumstances, that has always been regarded as a special circumstances. Wilson v. Church, 12 Ch. p.454. I won't trouble your Lordships with more than the headnote:—

> " Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory."

Of course he goes on to say that there may be special cases where the appeal is not bona fide etc. but that doesn't arise here. My Lords, that position was mentioned rather more recently by, I think it was in the Court of Appeal, in (1941) 1 A.E.R. in the case of The Metropolitan Real and General Property Trust, Ltd. v. Slaters and Bodega, Ltd. At p.310:

> " Judgment was given against the defendant for the recovery of a sum of money and leave was given to the plaintiff to proceed to execution. The defendant thereupon obtained leave to appeal against the latter order, but no stay of execution was directed:—
>
> HELD: in such a case, a stay of execution ought to be granted automatically, since, if the debtor is compelled to pay the sum recovered, the basis of the appeal is destroyed."

The facts, my Lords, appealed by the defendants from orders of Wrottesley, J. in para. F:—

> " The claim in the action was for £200 for rent due in respect of premises occupied by the defendants, and used for their business of caterers and restaurant proprietors. That business had been adversely affected by the war, and the defendants found difficulty in paying all their debts out of the immediate profits of the business. They were, however, the owners of property worth about £1,000,000 and mortgaged for about £450,000. There was, therefore, ample security for any debts not immediately paid. In these circumstances, when judgment under R.S.C., Ord. 14 was signed against the defendants, they applied for relief under the Courts (Emergency Powers) Act, 1939. The master granted relief upon certain terms. The plaintiffs appealed, and Wrottesley, J., reversing the order of the master, gave the plaintiffs leave to proceed to execution. He also granted the defendants leave to appeal, but gave no order as to a stay of execution. Before this appeal was heard, the defendants paid all sums due under the judgment."

Your Lordships will see that what we are dealing with was a decision not to give them relief under the Court (Emergency Powers) Act, 1939 but, if they paid the judgment, there would not be any question of relief arising. Sir Wilfrid Greene, M.R. in his judgment said:—

" The fact that payment has been made destroys the whole basis of this appeal, and the result is that the appeal must be dismissed with the usual consequences. Generally, I would say with regard to applications under the Courts (Emergency Powers) Act, 1939, that, in the case of a judgment for money—I say nothing about other cases —where leave to appeal is given to the debtor, it should follow as a matter of course, and it should be expressly stated in the order, that there should be a stay of execution pending the appeal. If that course is not taken, the debtor is under a compulsion to pay. As soon as he pays, the judgment is satisfied, and the substratum of the case is irretrievably destroyed. Therefore, it follows that, where leave to appeal is given to a debtor, the debtor should have a stay of execution in order that his appeal may be determined".

And Lord Justice Clauson agreed and Lord Justice Goddard agreed.

PRESIDENT: That is not strictly in point is it?

MR. BERNACCHI: It is because of the destruction, it is a question of the destruction of the substratum of the case, to use those words. It was an appeal against the refusal to give relief as I understand it.

PRESIDENT: There was no dispute but the money under the judgment which was a proper and effective judgment is what they wanted to stay under certain emergency powers.

MR. BERNACCHI: They owed the money. They had a discretionary right to relief as to immediate payment of money under the Courts (Emergency Powers) Act. They were granted that relief by the master. The learned judge reversed the master's decision and ordered payment without the relief. He gave leave to appeal from his decision but refused a stay of execution which resulted in them paying the judgment and not having the advantage of relief. The Court of Appeal then said that the substratum is gone because the appeal is gone by the refusal to grant relief. I only cited it on principle because it is a case where the Court referred to the substratum being irretrievably destroyed. The substratum here are my premises which Mr. Ma Kam Chan says in his affidavit he is going to pull down. As another example of what I was saying just now, I cite as an example one of many cases where the House of Lords has refused even to entertain an appeal where there is no living issue. It is the Sun Life Assurance Co. of Canada v. Jervis, (1944) 1 A.E.R. 469:—

" In allowing leave to appeal to the House of Lords the Court of Appeal granted leave on condition that the defendants undertook to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by the order:—

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

HELD: the effect of the order was to make it a matter of complete indifference to the respondent whether the appellant won or lost and there was no live issue to be tried in the appeal. It is an essential quality of an appeal fit to be disposed of by the House of Lords that there exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

I submit that if this is the principle of the House of Lords, it must equally apply to the Privy Council, that the highest body of appeal cannot, and does not, and declines to be asked to decide matters which are not living issues, and I seriously wonder, if Mr. Ma pulls down the premises, whether the Privy Council would entertain what would have ceased to be a living issue. The case I referred to just now was the Henry G. Leong case where a stay was refused but the appeal was abandoned because, I presume, with their premises gone, they didn't go on with it. I am not going to cite the Henry G. Leong case because I know my learned friend is anxiously waiting to cite it, but I will cite a later case which is appeal No. 8 of 1950, commonly known as the Far East Motors case. Actually, there were two plaintiffs, Far East Aviation Co. Ltd. and Far East Motors Ltd. v. Soares and others. If I might just read from the Court file and then hand it up to your Lordships, it is appeal No. 8 of 1950, and that was a tenancy case, a tenancy dispute. The tenancy tribunal had made an eviction order under one of the subparagraphs of section 18 of the Ordinance. There had been an appeal to one judge, an appeal to the Full Court, both appeals failing, the tenancy tribunal being upheld in both cases. And then my Lords, Far East Motors sought leave and obtained leave to appeal to the Privy Council and they filed affidavits along the line that the Companies would have to wind up, the plaintiff companies would have to wind up if a stay wasn't granted and, in that case—and in this—it was the avowed intention of the landlords to pull down the existing premises. In fact, it was their avowed intention to enter into some agreement, it was not of sale, it was part sale, and there was going to be a very large building put there in its place; and the Far East Motors succeeded in obtaining the stay under this Privy Council Rule 5. I submit that if there is any conflict between the Far East. . .

PRESIDENT: Just a minute. Is there a judgment there? Would you read the judgment? The judgment on the stay. I want to be sure that that was contested. I am not sure, but I think it was contested.

MR. BERNACCHI: Oh yes, it was hotly contested by Mr. Soares himself, a solicitor of this Court who was very keen on getting his judgment executed. In fact I see that the Henry G. Leong case was so fully cited to the Court that the decision in the case is attached to the file. I cannot see any written judgment at all on this file. There appears to be nothing on the file more than the affidavits and then the order granting provisional leave for the stay of execution and I see from the index no indication that there is a written judgment. It appears that after argument the Court simply exercised its discretion under Rule 5, but the Henry G. Leong case was cited. There are certain features in that case which now distinguishes it, but which I shall not deal with at this stage. My Lords,

there might be a difference in standard in that the Far East Motors were a much bigger concern, the site was a more important site, the issues on both sides, the amounts involved on both sides were very much more, but there is of course no difference there because $10,000 to my clients means as much as $100,000 to Far East Motors; the principles are identical. Far East Motors were a big garage. They say if there is not a stay, the companies would be wound up. There is no difference at all from here at all, and it is not contradicted that we are poor shopkeepers who say that their business will have to close down and that it would be or that it will be an irrevocable damage to them if they are successful in their appeal.

PRESIDENT: Mr. Bernacchi, we had better adjourn now. We have this small matter at 2.30 p.m. so we will sit again at 2.45 this afternoon.

(Court adjourns at 1 p.m.)

3 p.m. Court resumes. Appearances as before.

PRESIDENT: Yes Mr. Bernacchi.

MR. BERNACCHI: My Lord, I think I have dealt with the Far East Motors and, I was saying my Lords, that although one is dealing with much bigger issues on both sides, a much more valuable site, much bigger property, both sides standing to win or lose much more on the result of the case, that cannot make a difference. The principle is the same and you have here exactly the same position that the loss of their business to these little men is just as serious as the loss to the Far East Motors business is to them. They said in their affidavits they would have to wind up which is precisely similar to the situation here. My Lords, having said therefore that in my submission a case of this sort is par excellence a case where in your Lordships' discretion you would direct that the execution be suspended pending the appeal, the question of course arises that there are certain mandatory provisions on the Court in the second part of Rule 6. The second part of Rule 6, my Lords, clearly directs that in case a judgment should be carried into execution, there shall be security to the satisfaction of the Court for the due performance of such order as His Majesty in Council may think fit to make thereon. It goes on:

> "and in case the Court shall direct that the execution of the said judgment shall be suspended pending the appeal the Appellant shall enter into security to the satisfaction of the Court to the same and like effect as aforesaid."

The only point my Lords is this, that it is necessary to see exactly what it is that is being secured. It is security for the due performance of such order as His Majesty in Council shall think fit to make thereon. That is the security that has to be put up. I see Mr. Ma Kam Chan has filed an affidavit about how he wants to get along and pull these houses down and build something else on them etc. We are not concerned with that, we are concerned with what he claims in the action because obviously he cannot get more than he claims. He claims in these actions

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

two things (a) possession, (b) mesne profits. Now, my Lords, I cannot with respect see that there can be any question of security vis-a-vis the possession issue because, if my clients were to refuse to obey the order for possession if given against them by the Privy Council, it of course would be executed by the bailiffs of this honourable Court. On the other hand, as regards mesne profits, my Lords, we are not even asking for a stay here. I ask for no stay about mesne profits. Mesne profits to date have been paid. It is not a case of there being an arrears of mesne profits.

APPEAL JUDGE: In other words, Mr. Bernacchi, you are quite prepared to pay your rental, is that it?

MR. BERNACCHI: Yes, my Lord. And my clients will continue to pay and are quite prepared to accept the suspension of execution on condition that they do pay the mesne profits. My learned friend likes to call it rent; but of course, it is mesne profits if the appeal is successful. They are quite prepared to accept a stay conditional on their paying it as and when it becomes due, that is, month by month; and, if they don't pay, then the stay should immediately go off and they should be evictable. I submit that reading these words in their natural sense "security for the due performance of such order as His Majesty in Council shall think fit to make thereon", that, when applied to a case like this, one order for possession, well, when the order is given of course, if it is not complied with there is a process which enforces compliance. The other one, as I have said, my clients have paid and will pay and, if they don't pay, they are prepared to accept the consequences of the execution of judgment against them for possession. I therefore ask that in a case of this nature that in giving leave to appeal that your Lordships should suspend the execution of the judgment, and I shall ask your Lordships, as my learned friend is not prepared to agree to the alternative suggestion, that your Lordships exercise the powers under Rule 14 and direct that from hereon these appeals be consolidated. The only reason why your Lordships refused the consolidation before the Full Court was that it was not applied for early enough and there had by then been separate briefs to counsel and separate documents filed in Court. Now this is, in fact, the first opportunity, and they are obviously fit cases to be consolidated. If my learned friend will not agree to having one taken and the rest depending upon that, then I ask your Lordships for an order under that rule 14.

PRESIDENT: Yes, Mr. Yu?

MR. YU: May it please your Lordships, the first point I would like to draw your Lordships' attention to is this question of consolidation. Your Lordships must be fully aware of rule 15 . . .

MR. BERNACCHI: I said rule 14, I meant 15. My numbers are all different.

MR. YU: . . . which of course gives your Lordships full discretion to consolidate.

PRESIDENT: I understand 14 is correct, of the Hong Kong Ordinance.

MR. YU: 14, in that case.

MR. BERNACCHI: Then the other one is 5, not 6.

MR. YU: . . . gives your Lordships full discretion to consolidate all these applications—many of them arise out of the same matter—so that any submission we make must be subject to your Lordships' discretion. I would like to mention this fact because it is rather interesting how my learned friend says that the only reason why this action or these actions have not been consolidated was because it was not applied for. Your Lordships will remember that my learned friend objected to consolidation because of the question of costs. He was expecting to get 6 separate sets of costs against my client. It is very interesting, if your Lordships will read the affidavit of Mr. Ma, the respondent, in the second exhibit which is a letter from the solicitors for the appellants in this case:—

> " With reference to your letter of the 22nd inst., we note that your client requires the sum of $5,123, being taxed costs herein, to be paid to you by 12 noon on Monday, the 26th inst.
>
> In reply, we are instructed to request an extension of time within which to pay the said sum upon the understanding that if the same is not paid before noon on Friday next, the 30th inst., our clients will not pursue the appeal herein and the same will be deemed to have been abandoned."

It is true, my Lords, before this hearing took place, the said sum was in fact paid over to my instructing solicitors but that letter makes it quite clear that, at some stage at any rate, the appellants had difficulty in paying even this sum of $5000 and yet, when the appeal was actually heard, they opposed the consolidation in the hope of getting 6 separate sets of costs against my client. I hope your Lordships will bear in mind the question of whether or not to consolidate the appeals. As I have said, your Lordships will remember that even after we succeeded in our appeal, we still, as an act of grace, asked your Lordships to treat it as not having been consolidated. In any event, I entirely agree with my learned friend that section 14 gives your Lordships a complete free hand whether or not to consolidate. I think it is best left to your Lordships in the circumstances.

As to the question of stay, I think the principle has been quite clearly laid down in quite a number of authorities that there should be no stay of execution unless there are special circumstances, and the principle is, because a successful litigant should not be deprived of the fruits of his litigation. If I may just briefly refer your Lordships to 14 Hailsham p.32, the last five lines, as to the authority, my Lords, the classic authority as already quoted by my learned friend, 12 Ch. p.454, the case of Wilson v. Church. That was a case where a stay was granted because the sum in question would most likely not be repaid in the event of a successful appeal. I would like to draw your Lordships' attention first of all to the headline there, about Wilson & Church, 12 Ch. p.454:—

> " But the Court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances."

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

And, your Lordships, that is mentioned again in the judgment of Lord Justice Brett. My Lords, I ask your Lordships to consider that again when coming to consider whether or not there are special circumstances in this case to justify an intervention. Again, in our own reports, 14 H.K.L.R. p.55—I don't think I need trouble your Lordships with the details—in the case of the Attorney General v. Toong Yue, there again it is quite clear that special circumstances are required to justify a stay . . .

APPEAL JUDGE: What would you describe as special circumstances?

MR. YU: Yes my Lord, I was coming to that. Before I gave an example of what are special circumstances, I say it is certainly, to say the least, peculiar that there is not one single English authority as far as I know —I don't pretend that my researches have been necessarily exhaustive— but as far as I am aware, there is not one single English authority that says that where the subject matter of an action is a tenancy, then it would be a special circumstances, that such would be a special circumstances. There is not one single authority. If my learned friend is aware of any, I would be glad to hear of it. Most of the authorities deal with payments of sums of money and again I don't pretend that my researches are exhaustive but, as far as I am aware, in all the cases where stay was granted—in the English cases—it was because there was danger of non-payment in the event of a successful appeal. My Lords, what other special circumstances would there be, for example? I have the case of Emerson v. Ind, Coope & Co. (1886) 55 L.J. Ch. p.905. I am afraid I have the library copy. There my Lords, it is a case where a dispute arose but, eventually, the point that went on appeal is this, that whether or not one party should discover certain documents, the other side gave him privilege and the Court, on the trial of first instance, judgment was given that these documents should be discovered and the party went on appeal and, pending appeal, applied for a stay and it was held that they should be stayed in that instance because once you discovered the documents, a successful appeal would nevertheless be nugatory and rendered void. There your Lordships will see that that would be a special circumstance. I mean, the very idea of the appeal is to prevent the other side from discovering the documents and, once discovered before appeal, would render any successful appeal nugatory. I don't think I need trouble to read out the rather lengthy judgment there. As I was saying, it is certainly peculiar, to say the least, that throughout all these years in the United Kingdom, there is not one single authority where an execution has to be stayed because the subject matter is a tenancy. If that alone is a special circumstance, it would mean that every appeal from a tenancy dispute, in every appeal there should be a stay of execution because otherwise any successful appeal would be nugatory. And yet, my Lords, I repeat, there is not one single authority of which I am aware which says a tenancy dispute, where the subject matter of the appeal is a tenancy, that is a sufficient circumstance which justifies stay of execution. In this case yes, because in every case—let alone what the premises recovered are used for—my client intends to pull the buildings down. But, supposing he lets it out and doesn't pull down. Supposing another instance, a landlord recovers premises and lets out to another person; still

a tenancy, if successful, would be deprived of the fruits of his successful appeal. Would that be a special circumstance? My Lords, if that had been considered as a special circumstance by the courts at Home, one would expect at least to find some cases on the point but yet, I repeat, there is not one single authority saying that where the subject matter of the action is a tenancy, that alone is a special circumstance which would justify a stay of execution.

My Lords, I was going to refer your Lordships to these appeals Nos. 3, 4, and 5 of 1948, the Henry G. Leong case, but I don't cite it as an authority, so to say. I don't say that your Lordships are bound by that authority or any other authority. The principle is clear, your Lordships have a complete discretion. First, under our 0.29, r.26:—(or even under the English Code).

" An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court or the Full Court may order;"

And 0.58 r.16, words of similar effect:—

" An appeal shall not operate as a stay of execution or proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order".

And, my Lords, if I may cite to your Lordships an authority saying that this is certainly no binding practice on any court, whether or not to stay.

PRESIDENT: We are now going under Rule 5, not under 0.29.

MR. YU: Yes my Lord but, nevertheless, I am submitting to your Lordships that where the word "may" appears, your Lordships have a complete discretion. Under Rule 5 your Lordships "may" again. Under rule 5 it says "Where a judgment appealed from . . . etc. . . . the Court shall have power as to the Court may seem just". There again your Lordships, as your Lordships shall see just. Your Lordships again there, as in the case of where the word "may" is used, your Lordships have a complete discretion. And the case I was going to cite to your Lordships is 24 Q.B. p.57, The Attorney General v. Emerson. My Lords, Lord Esher deals with the actual question whether or not leave should be given for a stay until the solicitors give an undertaking to repay costs, but if your Lordships would turn over to p.58 about ten lines from the top:—

" The real question is, what is the construction of this rule? It says: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.' In all the rules the word 'may' has been held to mean 'may or may not.' It has been held to give a discretion, which is called a judicial discretion, but is still a discretion. If the practice contended for be established, in my opinion it alters the effect of the rule. It takes away the discretion to refuse

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

a stay of execution, by imposing a particular term as a condition of the refusal in all cases. The courts have no power to alter the effect of the rule; no authority to establish any practice in conflict with the rule, and no power to say that it shall be binding upon the Courts. I decline to take any other view than that the Court has a discretion in each case."

I submit to your Lordships that where the words "shall seem just" are used, that even gives your Lordships a wider discretion than the word "may". Certainly when it says that the Court shall have power whether or not to grant, and even then as to such terms as to the Court shall seem just, that certainly confers upon your Lordships a complete unrestricted discretion. Therefore, any case cited to your Lordships, whether Hong Kong or English, can only be a matter of interest. Your Lordships must judge each individual case as to its merits. The merits of this case, my Lords; on the one hand, it is all right for my friend, it is easy for him to say "Yes, what if the appellants succeed?" "If they succeed, back they come, the tenancy is gone, the premises are gone and they are ruined". He thinks only of his clients but, your Lordships will have to take into consideration in exercising your discretion the plight of the respondent as well in the event of execution not being stayed and the appeal not being successful. My Lords, here is a scheme to develop this piece of land obviously beneficial to the community as well as to the respondents. On the other hand, it has already been held up more than 6 months, 7 full months to say the least. If in fact—your Lordships will see from the affidavit of Mr. Ma Kam Chan the respondent—if negotiations had been successful, probably these buildings would have already been built even before, a long time before, this action was brought and there was actually an offer of accommodation in the new buildings if and when they had come into existence. It is true that those negotiations fell through but, nevertheless, there was this offer from the respondent to the appellants for alternative accommodation at a reasonable sum in the sums: construction, $5000 and rent $500. Whether that price is considered reasonable is a matter of opinion but, nevertheless, there was this offer to them of alternative accommodation and it is unfortunate that negotiations fell through and the building scheme has been held up for at least 7 months, and one doesn't know, it is difficult to predict, how many more months would have to elapse before the eventual outcome of this appeal would be known. And your Lordships will see from the affidavit of the respondent that erection of the new buildings can be completed in 4 to 6 months from the date of recovery of the premises. On the one hand it is true, my Lords, that if the appellants were to be successful in their appeal and to find that this building had been demolished, indeed they would have been deprived of the fruits of their appeal in the event of it being successful. Yet if your Lordships were to grant a stay, in the first place these or this building scheme which is beneficial to the whole community will be held up for I don't know how many more months. In the event of the appeal proving not successful, the respondent would have been deprived of the fruit of litigation for so many months and it would be difficult to assess the amount of damage suffered by the respondent. I do strongly urge your Lordships to take

that into consideration as well as the fact that in the event of a successful appeal that the appellants would be deprived of the fruits of their appeal, so to say. There remains the question, can we compensate the appellants in the event of the appeal and the execution not being stayed? I entirely agree with my Lord the President in that at this stage I find it difficult to visualize how to compensate them in monetary terms but, if I may suggest—as my Lord the President has suggested—can they bring an action for damages? I don't know my Lords or, perhaps, can they, while pending the appeal, obtain a tenancy so to say in the new buildings as ordinary tenants and then claim damages while remaining as tenants of the new buildings? I don't know. I haven't worked out any feasible scheme whereby they can be compensated, but there is this possibility of their being compensated in monetary terms, my Lords. So my Lords, I ask your Lordships to take all these factors into consideration in exercising your judicial discretion whether or not to grant a stay. My learned friend has cited this appeal No. 8 of 1950. I have cited these appeals Nos. 3, 4, 5 of 1948. Those two decisions seem to conflict. We are left in doubt as to what was the actual ratio decidendi in each case, but it is interesting to note that Williams J. said in each appeal that while he granted the one, he refused the other. We are left in doubt, as I say, as to what was the ratio decidendi which led him to refuse the one and allow the other. In any event, I submit to your Lordships that those are only useful guides and your Lordships are not bound by either the one or the other. You have a completely unrestricted discretion whether or not to grant a stay of execution, and I would urge your Lordships to take into consideration all those factors affecting not only the appellants, but also the respondent, and the development scheme which I strongly emphasize is beneficial to the community before granting or refusing stay of execution. My Lord, just one other point. I think I would like to ask your Lordships for costs of this application in any event.

(Relieved by Mr. Remedios—Court Reporter).

MR. YU: I think there are authorities—Wilson v. Church's case in the first place, Vol. 12 Chancery Division at p.459, the end of the judgment of Cotton, L.J.:—

> " But then, of course, in staying the payment out of this money, we must put the Appellants on terms that they shall have the question, so far as in them lies, decided at the earliest possible opportunity by the House of Lords, and they must pay the costs of this application."

PRESIDENT: What was the application?

MR. YU: The application was for a stay, a stay of execution.

PRESIDENT: That distinguishes it from this, in that this is an application for provisional leave to appeal—

MR. YU: Which we do not oppose.

PRESIDENT: Which includes a stay.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

MR. YU: My learned friend has asked for two things: provisional leave to appeal—which we do not oppose, and stay of execution—which we do oppose.

And the other case is 8 Chancery Appeal Cases at p.206, the case of Merry v. Nickalls. After having made an order to stay proceedings — there again, my Lords, where danger of non-repayment was the ground for a stay — the very last paragraph:—

> " Their Lordships thought that there must have been some special circumstances in that case. The Defendant came here to ask a favour, and must pay the costs of his application."

So, my Lords, whether or not we oppose, whether or not we succeed in our position opposing this application for a stay, I ask your Lordships for costs in any event.

PRESIDENT: Have you got the reference to the Henry G. Leong case?

MR. YU: Yes: appeals 3, 4 and 5 of 1948.

I'm afraid I only have the notes of all the cases cited. I have been fortunate enough to be provided with a copy of the notes made by his Lordship Mr. Justice Williams, and Mr. Justice Reynolds.

MR. BERNACCHI: A copy of the judgment actually appears in the files of the Far East Motors.

MR. YU: According to the notes, the application was for a stay of execution.

MR. BERNACCHI: There is one point which possibly I should mention. I don't want to take my learned friend by surprise, but it is a point which I hadn't noticed myself until I studied the judgment.

There is a certain amount of confusion because there were two applications for stay in that case: There was an application for a stay to the Full Court pending an appeal before the Full Court—which was refused—which is the substantive refusal of the stay. There was then a further application for leave to appeal to the Privy Council and including, of course, a question of stay.

The judgment there, the question of stay is only obiter because—I hadn't appreciated myself, I must confess, before—the Court ruled that the matter was interlocutory, not final, in that particular case, and that since it was interlocutory the appeal did not lie as of right; that the Court did not consider the point was substantial enough to justify an appeal to the Privy Council and the Court refused leave to appeal, adding, "Anyhow, if we had given leave to appeal, we don't think we would have granted a stay": so in fact it is only an obiter position pending an appeal to the Privy Council.

PRESIDENT: Didn't they ask for leave to appeal to the Privy Council?

MR. BERNACCHI: That's right.

PRESIDENT: As against the Court's refusal to grant a stay, in one of those cases?

MR. BERNACCHI: Yes. It was the refusal to grant a stay which they were appealing from. And the Court said: (1) "This is an interlocutory matter, not a final;" (2) "Even if we were to grant you leave—which we are not inclined to do—nevertheless we don't think that we would give you what you are seeking by the back door by giving you a stay pending appeal to the Privy Council, when the very appeal is against our refusal to grant you a stay."

So, in the first place, it was very peculiar circumstances of its own; in the second place, it was only an obiter, because they didn't grant leave to appeal to the Privy Council. If my friend is relying on the substantive decision refusing a stay, then that wasn't pending appeal to the Privy Council, that was pending appeal to the Full Court.

MR. YU: No, it is not pending appeal to the Full Court. It was after my Lord the President at that time granted 14 days for appeal and we came before the Full Court and asked them for an extension of stay, and the extension was argued, thrashed out.

MR. BERNACCHI: Your Lordships will see in the penultimate paragraph of the decision, of the application for leave to appeal to the Privy Council, which the Far East Motors has got it in.

PRESIDENT: Do you wish to reply?

MR. BERNACCHI: My Lords, I will deal with this case since your Lordships have been reading it. I think I am right in saying that in that case it was held to be an interlocutory appeal, therefore not as of right; the leave to appeal was refused; and as regards the stay pending appeal to the Privy Council, any comments on that were purely obiter. I don't think the comments really go further than to say that "to have granted a stay would have been to have defeated the very refusal to grant a stay which we have already made pending an appeal to us."

PRESIDENT: Isn't the penultimate paragraph possibly in point:

> " Even assuming that the Court were disposed to grant leave to appeal (which it is not) the only order under rule 5 which would benefit the appellants in any way would be one which would be in effect a review of the decision of this Court already given that no special circumstances have been shown to justify a stay of execution"?

It sounds that under rule 5 the Court then considered the special circumstances.

MR. BERNACCHI: That is true, my Lord. It is, of course, only an obiter, and I have argued my case on both grounds, saying, first, that special circumstances are not necessary on appeal to the Privy Council; secondly, that if they are necessary, that a case like this is par excellence a case

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

of special circumstance. But I wonder, my Lord—I don't think your Lordships will find in the notes there a point taken, at all, that rule 5 is in totally different terms to Order 29 rule 26.

PRESIDENT: That is my impression. I cannot remember it being argued —it was a long time ago—that there was any distinction.

MR. BERNACCHI: Which, I submit, it clearly is, not only on the face of the words used, but also when one considers the meaning of the words of Lord Esher in the Annot Lyle case, where he clearly seems to agree with the argument that the Privy Council rules are different from the rules that he was dealing with and which are identical in words to our Order 29 rule 26. But he goes on to say, "But since the legislature has transferred these appeals from the Privy Council to us, we now apply the equivalent to our Order 29 rule 26." So it does seem that Lord Esher, certainly in the Annot Lyle case, regards that there was a considerable difference between the two.

But even if there have to be special circumstances, I say that a case like this is par excellence one of special circumstance.

And in the Henry G. Leong case, with the greatest respect to the arguments of one of the greatest lawyers that I have known, not only in Hong Kong but in England, the late Mr. Eldon Potter, I do submit that when in that case he said they could be compensated in damages, that possibly the question of how was not fully considered. With the greatest respect to that statement of his, I fail to see in fact how there could be any question of compensation in damages, and, indeed, my learned friend Mr. Yu really seems to agree with me there, because—I noted his words down—he says, "I have not been able to work out a feasible scheme for their compensation." And I respectfully submit that when one really considers it, there can be no question of damages for acting on an order which was perfectly lawful at the time. I cannot see how damages can arise. Otherwise in all these cases where they talk about irretrievable damage, the answer is that damages would lie; in all these cases where money was paid over, you can recover damages for the inconvenience of having to pay the plaintiff where we find you needn't have to pay it. A man might have to raise money on loans and realise goods on security, and if it were true that he can be compensated in damages, then it is a little surprising that none of these cases have indicated that point of view.

PRESIDENT: If it were a case of an action for possession of a chattel, and it went as far as the Privy Council, the Privy Council can order a re-delivery of the chattel or its value. I don't see why they could not order a re-delivery and order that the original action be dismissed. But surely it would be within the jurisdiction of the Privy Council, on being apprised of the fact that execution had been levied and they had been dispossessed of the property, to re-order—it would be the unsuccessful respondent—to order him to re-deliver the property or so much of its value. I think that was the basis Mr. Potter put his argument on. I must confess I have never seen it done.

MR. BERNACCHI: I respectfully agree:—a) it has never been done; b) I must confess to have considerable doubt that there would be jurisdiction to go that far, to actually order one side to pay compensation to the other side, because they are now unable to re-possess. I won't commit myself to saying it cannot be done, but I must confess there must be considerable doubt as to whether there is jurisdiction.

PRESIDENT: I agree.

MR. BERNACCHI: That is why I submit that when it comes to a question of choosing between, shall we say, these two recent authorities, that the Far East Motors is indeed the type of case, my Lords, which is the most similar here, although, of course, it was on a very much bigger scale; the amounts involved were very much more than here.

PRESIDENT: Which was the building in the Henry G. Leong Estates case? Which building was it? Premises described as 661 Nathan Road.

MR. BERNACCHI: My Lord, I understand that they are on the site of the present Broadway Cinema in Kowloon. My friend Mr. Zimmern tells me—I am not certain but I certainly expect it from him—that it was the old Hong Kong Bank building.

My Lords, as regards—if I might take my friend's arguments very briefly as he developed them—as regards the question my friend raised as to the fact that I had earlier objected to consolidation, your Lordships recall that, it is all very well to talk of wanting six sets of costs: what I did say was that it was far too late to raise it on that appeal because a number of costs had been incurred which would not have been incurred if they had been consolidated and which on an order for consolidation might be lost. That was my point. And your Lordships in giving your decision said simply that it was then too late to consolidate. In this case, my Lords, I submit that it is a case par excellence for consolidation at this stage, which is the beginning of the proposed appeal.

My Lords, I don't quite follow my friend's relying upon Wilson v. Church, which is so clearly in my favour. He read on from where I stopped. It is wrong to say I stopped because I mentioned it myself that there was a reference to an exception in the case of an appeal that was not bona fide. My Lords, maybe the Henry G. Leong case might put, might be put on that basis in the sense of not being bona fide, in the sense that the Court, the Full Court and the Court below, considered that the point raised was entirely without substance. And I can only think that my friend read that quotation himself with the suggestion that it might be applicable here.

MR. YU: No, it isn't. I don't suggest that it is not bona fide.

MR. BERNACCHI: Because obviously it is clearly bona fide, and in fact my clients did obtain a decision in their favour in the first instance, so there can be no question that it is not a substantive point. It is a point of very considerable importance, my Lords, and one on which there has been a difference of judicial opinion.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

And then my learned friend read from Hong Kong Law Reports case, which was, once again, a straightforward case under Order 29 rule 26, where it was held that special circumstances must be shown, and it was not shown there.

Then my learned friend digressed to say that there was no authority for saying that in tenancy cases the Court grants a stay. My Lords, I would quite honestly go so far as to say that it is normally considered by the parties as so inevitable that they agree to it. I challenge my learned friend to produce a single Rent Restriction appeal in England where on the hearing before the Court of Appeal the tenant has already been dispossessed in the court below as the result of a judgment in the court below, and here in Hong Kong the appeals from the Tenancy Tribunal against an eviction order. I would, with respect, say, my Lords, that only about one in fifty does the landlord insist that the tenant formally applies to the Court for a stay of execution. And I think, my Lords, I have only known it refused in one case, and that was, in itself, again, a case of very special circumstances. So when my friend says there is no authority, I go so far as to say that in tenancy cases it is seldom, if ever, made a matter of a substantive application, because landlords normally regard it as more or less inevitable that their tenant will have to stay there pending his appeal.

I don't think any argument can be developed on the ground that there isn't a direct English authority on the point. What there are direct English authorities on the point is that a stay will usually be granted where it would otherwise be nugatory, and I submit that those are the authorities that apply. In fact, my friend goes straight on to cite an authority which, with respect to him, seems to be dead against him. He cited a case from the Law Journals in which there was a question of an order for discovery and the Court of Appeal grant a stay because they say, "If we didn't grant a stay, then he gets discovery, which is the very thing he is appealing against and it would therefore be nugatory."

Of course, my Lords, I entirely agree with Emerson's case. It merely says that there is no binding rule on the Court in these matters. There again, Emerson's case might be an answer to Henry G. Leong, bearing in mind the fact that the court regarded the plaintiff's case, as it was there—Henry G. Leong endeavouring to obtain an injunction to restrain the landlord from acting upon a Government Order in Council exempting the premises—that the Court considered that the plaintiff's case was unsubstantial, and that acting under the Emerson's principle alone, that there was no binding rule on them; that that in itself might be a special explanation of the case.

Then my friend went, to some extent, into what I might call comparative hardship, and talked about the benefit to the community if his client is allowed to build a little earlier. I submit, my Lords, it is not in fact relevant. It is a very small matter to the community around that area. It is not a big site. And the question of that sort of delay, against the obvious terrible hardships to my clients, is one which I submit bears no comparison at all. Indeed, in any event on Mr. Ma's own affidavit,

this building permit of his is more than six months old and therefore, I presume, has expired under the terms of the Buildings Ordinance, and he will have to get a new one.

My Lords, as regards the question of costs, there is, I know, a difference of opinion between my Lord the President and the Honourable the Chief Justice, Sir Gerard Howe, in this matter, because in the Full Court in the so-called A.P.L. case, he took the view that this Full Court sitting under the Privy Council rules is purely a sitting in delegated authority of the Privy Council, and that all costs should be left to the discretion of the Privy Council; this Court has no power to bind the Privy Council by making any order as to costs at this stage. On the other hand, I know that my Lord the President took a contrary view to that in the same case, when, after repeated applications for extension, an order was made for costs against the appellant in any event, because he hadn't expedited the record as fast as he could and should have done. But I say only, my Lords, if your Lordships have a discretion to make an order for costs at this stage rather than leaving it to be in the course to the Privy Council, I say, my Lords, that this is in fact an application for leave to appeal, upon which your Lordships must inevitably consider section 5 of the rules; that it is therefore different, totally different, from an application for stay under Order 29 rule 26; and that on the order for leave to appeal, your Lordships give consequential directions—of which this is one; and that the order should in any event be costs in the cause. I submit, my Lords, that this appeal would be utterly nugatory unless your Lordships made an order directing that the execution be suspended, and I ask your Lordships in giving me leave to appeal to include such order.

PRESIDENT: Mr. Yu, it is a little out of order, but you did not forecast any order which we should make. You did not deal with the question of the adequacy of Mr. Bernacchi's suggestion about security in the event of our giving or ordering a stay. Mr. Bernacchi suggested that the stay would apply only to the order for possession, and would be conditional upon the mesne profits being paid: from month to month, I presume.

MR. YU: Yes.

PRESIDENT: And if the mesne profits were not paid, then the order for possession should be carried out.

MR. YU: Yes.

PRESIDENT: In those circumstances, he argued that no further security was necessary, although under the rule 6, really 5—it has been referred to as 6, it says that if there is a stay—

> " the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as Her Majesty in Council may think fit to make thereon."

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

I don't know whether you have any observations to make to the Court on that.

MR. YU: Well, my Lord, we do ask certainly—It is apparent from this affidavit filed by Mr. Ma Kam Chan, and admitted by my learned friend, that the appellants are poor people, so to say, and it is doubtful—first of all, my Lords, it is difficult to assess what amount of damage that we would suffer in this case.

PRESIDENT: That is the whole point. The whole point is there is no claim for damages; there is a claim for mesne profits only.

MR. YU: It is true it is a claim for mesne profits. It is true that damages which we would suffer indirectly through the holding out of the building scheme—

PRESIDENT: But would the Privy Council. . .

MR. YU: You see, again we would be drawn back into the same position: how can we sue? Whether or not the Privy Council grants us, we cannot recover any damages which we might suffer. For example, if this building were to come into existence in four months, my clients the respondents would be collecting rental thereof as from the first day after four months and, my Lords, the respondent, my client, would be suffering that much loss every month, in the event of the appeal failing, of course. And I certainly doubt very much the appellants can give any security for such damages, which would most probably be suffered by my client in the event of the appeal failing.

PRESIDENT: You might not have any legal right to such damages unless it was made a condition of the stay that they agree to pay it.

MR. YU: Yes, my Lord; exactly, my Lord. I would ask your Lordships to make that a condition if necessary, because otherwise we cannot even sue for it because they would be staying on as the result of an order made by your Lordships for stay of execution. In the same way, it is part of my learned friend's argument—they can't sue us, so we can't sue them, unless it is made a condition of the stay. Of course we are only speculating as to the eventual outcome of this appeal.

PRESIDENT: One difficulty is there is no way of assessing the amount of such possible damages.

MR. YU: My Lords, I think it would probably be easier for us to assess this damage. We could probably speculate on the rentals to be recovered from the premises—and of course the number of months is a consideration: for example, how long will this appeal take before we know the actual outcome. It may take six months, one year; it may take two years. And in any case it is certainly doubtful if the appellants can give any security, since the appellants have difficulty in paying $5,000 worth of costs.

PRESIDENT: Well, that doesn't matter. If we impose the conditions, they must fulfil them, otherwise they wouldn't get their stay. The question is, should we impose any conditions.

MR. YU: I must ask your Lordships if I may consult my instructing solicitor on that.

My Lords, I have been instructed to draw your Lordships' attention to the fact that the plan of our client was, and is, to erect nine four-storey buildings on the present site in the event of possession being recovered. In other words, if this plan is carried into execution, we will be having 36 tenants instead of 9, as from the date of completion, that is. In other words, whereas if execution is stayed, we would be having nine tenants from whom to collect rent.

PRESIDENT: My brother Gregg, J. has called my attention to the rule, which says that we can only impose conditions as to security "for the due performance of such order as Her Majesty in Council may think fit to make thereon," and if that is limited to the decision of the appeal, I cannot see how we can even require them to submit to conditions of this sort.

MR. YU: My Lord, actually it is not on my copy. Mine is only a type-written copy. It doesn't mention "Her Majesty in Council". I did not catch your Lordship's remark very clearly—the last bit.

PRESIDENT: Your rule 5.

MR. YU: My rule 5 is:—

> " The appellant shall enter into security to the satisfaction of the Court as aforesaid."

PRESIDENT:

> " To the satisfaction of the Court, for the due performance of such order as Her Majesty in Council may think fit to make thereon."

MR. YU: Oh yes! my Lord. Yes, certainly. Reading together with the earlier part, certainly my Lord, the question is more complex. It is difficult to see how the respondent could be compensated in any event. And if I may say, my Lords, whereas the respondent is a man of means —he will always be here to answer any claim put forward by the appellant in the event of a successful appeal—it is difficult to visualize how the respondents can realise can claim against the appellant, in the event of a non successful appeal, for any damage.

PRESIDENT: Apparently we have not been reading this rule with sufficient care. There seems to be nothing in rule 5 concerning conditions to be imposed if the judgment is suspended.

MR. BERNACCHI: No. Of course your Lordships haven't heard me in reply to my friend. It amounts to this, in my submission, that rule 5 is in effect the rule that gives your Lordships jurisdiction in this matter; and, I submit, my Lords, that where the rule, as here, goes into details as to what is to happen in the one event or in the other event, that it must be treated as all-embracing. The rule says quite clearly,

in my submission, that in case of one thing the Court shall do so and so; in case of the other, the Court shall do so and so. "In case the Court shall direct that the execution of the said judgment shall be suspended, the appellant shall enter into security to the satisfaction of the Court", and then going back—"for the due performance of such order as Her Majesty in Council may think fit to make thereon." That, my Lords, is the condition imposed by the Privy Council rule. Now, my Lords, I submit—

PRESIDENT: If you read that again; if you take the rule from half-way:

> " and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as Her Majesty in Council may think fit to make thereon",

there is nothing there that talks about any conditions to be fulfilled if the judgment is suspended.

MR. BERNACCHI: No, my Lord. Then it goes on:—

> " And in case the Court shall direct that the execution of the said judgment shall be suspended pending the appeal, the appellant shall enter into security to the satisfaction of the Court to the same like and effect as aforesaid."

The only thing "the same like and effect as aforesaid" could be is:

> " such order as Her Majesty in Council may think fit to make thereon."

PRESIDENT: We have got the wrong text, I'm afraid. Apparently Mr. Bentwich was quoting a different rule.

APPEAL JUDGE: The text of this rule as given in this manual that we have here is, I think, considerably different to the one you read. We haven't been looking at the Hong Kong one.

MR. BERNACCHI: Yes, my Lord. We have the rules particularly applicable to Hong Kong.

APPEAL JUDGE: We have the Hong Kong Order?

MR. BERNACCHI: With the addition in the Hong Kong law—I don't know whether your Lordships desire to hear me further.

PRESIDENT: I think that is quite right.

We will adjourn for ten minutes.

Adjourned at 4.18 p.m.

4.47 p.m.

Court resumed.

Appearances as before.

PRESIDENT: The Court, on considering the affidavits and the submissions of counsel, has come to the conclusion that there is, or there are, special grounds for the staying of execution in this case, in that in the event of the appellant being successful, if execution had been proceeded with his judgment would be nugatory and his right to damages would be doubtful.

We therefore order:—

(a) that the several appeals before the Court be consolidated;

(b) that provisional leave to appeal to the Privy Council be given, on the following terms:

(1) upon appellant giving security in the sum of $5,000 to the satisfaction of the Registrar, within 21 days from this date, for the due prosecution of the appeal and for the other matters set out in rule 4 (a) of the Hong Kong Privy Council rules; (2) preparation and dispatch of the record within 3 months from this date;

(c) it is ordered that execution of the orders for possession be stayed, provided and so long as all mesne profits, at the rate ordered in the judgment, are paid calendar monthly—I will consult counsel about this in a moment—and that should default be made in any such payment the stay shall ipso facto be determined;

(d) if the appellants fail to give security and dispatch the record in accordance with paragraphs (1) and (2) of this order, the application for leave shall stand dismissed, with costs to the respondent;

(e) costs of this application will be in the cause.

The Court has considered whether it could impose any further terms, in contemplation of the possible loss to the respondent in the event of the appeal failing, but has come to the conclusion that it is not practicable to do so.

Now, the order for payment of mesne profits: what day, or days, in the month should they be payable on?

MR. BERNACCHI: My Lord, the first of each calendar month, in advance.

PRESIDENT: The first payment being due on?

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 19 Transcript of Proceedings on the hearing before the Full Court of the Petition for leave to Appeal to the Privy Council and for a stay of Execution —(*Contd.*)

MR. BERNACCHI: The first payment would be due, I presume, on the 1st of August.

PRESIDENT: All arrears to have been paid on the 1st August, and thereafter on the first of each calendar month?

MR. BERNACCHI: Yes; if your Lordship would make it that. My Lords, I have been asked by my learned friend that it should be paid to the plaintiff's solicitor, which I am quite prepared to do.

PRESIDENT: Then that part of the order remains this way:

"Execution of the orders for possession to be stayed provided and so long as all mesne profits at the rates ordered in the judgment are paid to the plaintiff's solicitors calendar monthly on the 1st day of each calendar month (all arrears to be paid also on 1st August, 1954).

Should default be made in any such payment the stay shall ipso facto be determined."

4.53 p.m.

We certify that to the best of our knowledge and ability the above is a true transcript of our shorthand notes of the above proceedings.

F. A. Gutierrez, Court Reporter 6.8.54.

G. F. Remedios, Court Reporter 6.8.54.

No. 20 Order of the Full Court giving leave to Appeal to the Privy Council

No. 20.

ORDER OF THE FULL COURT GIVING PROVISIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL

Dated the 30th day of July 1954.

Upon the Petitions of the Petitioners (Defendants) filed herein on the 16th day of July 1954 praying for leave to appeal to Her Majesty the Queen in her Privy Council from the Judgment of the Full Court dated the 2nd day of July 1954 allowing the above Appeals and reversing the Judgments of His Honour District Judge James Wicks dated the 8th day of April 1954 in the above-mentioned Actions and upon hearing Counsel for the Petitioners and for the Respondent (Plaintiff) and upon reading the said Petition and

the Affidavit of Chan Ying Hung and the several affirmations of the Petitioners in support thereof respectively filed herein on the 16th day of July 1954 and the 26th day of July 1954 and the Affirmation of the Respondent filed herein on the 28th day of July 1954 this Court being satisfied that the value of the subject matter of the Appeals to the Privy Council is more than $5,000.00 and is a proper case in which leave to appeal should be granted DOTH ORDER that subject to the performance by the Petitioners of the Order of this Court by them to be performed hereinafter contained or hereinafter made and subject to the final Order of this Court to be made upon the due performance thereof leave to appeal to Her Majesty the Queen in her Privy Council against the said judgments of this Honourable Court allowing the aforesaid Appeals from the judgments of His Honour District Judge James Wicks be granted to the Petitioners AND THIS COURT DOTH FURTHER ORDER:

(1) That the six several appeals mentioned in the title hereof be consolidated.

(2) That the Petitioners do within 21 days from the date hereof furnish good and sufficient security to the satisfaction of the Registrar of this Court in the sum of $5,000.00 for the due prosecution of the Appeals as consolidated herein and the payment of all such costs as may become payable to the Respondent in the event of the Petitioners' not obtaining an order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the Petitioners to pay the Respondent's costs of the appeal (as the case may be).

(3) That the Petitioners shall prepare and despatch the Record within 3 months from the date hereof.

(4) That execution of the six several orders for possession made by the Full Court in Appeals Nos. 7 to 12 of 1954 (on Appeal from District Court Civil Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953) be stayed provided that and so long as all mesne profits at the respective rates as ordered by the Full Court in the aforesaid Appeals are paid to the Respondent's solicitors calendar monthly on the 1st day of each and every calendar month commencing from the 1st day of August 1954 and that all arrears of rent are also paid on the 1st day of August 1954. On failure by the Petitioners to pay any such payment, the stay of execution of orders for possession shall ipso facto be determined.

(5) That if the Petitioners fail to carry out any of the terms set out in (2) and (3) above, the application for leave to appeal shall stand dismissed with costs to the Respondent.

(6) That the costs of this application be costs in the course.

(L.S.)

(Sd.) C. D'Almada e Castro,
Registrar.

Exhibits.

EXHIBITS

Exhibits produced at the Hearing before the Court of First Instance

Exhibit No. A. Notice to Quit

Exhibit No. A.

NOTICE TO QUIT

F. ZIMMERN & CO.
Solicitors
Hong Kong, 19th October, 1953.

Messrs. Kai Nam (啓南號),
No. 1, Landale Street,
Hong Kong.

Dear Sirs,

Re. No. 1, Landale Street,

We are instructed by our client, Mr. Ma Kam Chan, your Landlord, to give you notice, which we hereby do, that you are required to quit and deliver up possession of the above premises which you now occupy as monthly tenants on the 30th day of November 1953 or on the last day of your tenancy which shall expire next after one month from the date of service of this notice.

Yours faithfully,
F. ZIMMERN & CO.

Exhibit No. B. Occupation Certificate

Exhibit No. B.

OCCUPATION CERTIFICATE

COPY

DOMESTIC PERMIT

Ref. No. 706 Hui 1/47 No. 92

Public Works Department,
Hong Kong, 7th Oct., 1947.

Mr. H. S. Tam Authorized Architect, having certified that the new building(s) viz:—9 temporary one-storey shops at Nos. 1-17 Landale Street on Inland Lot No. 2245, Sec. — comply in all respects with the provisions of the Buildings Ordinance, 1935, and are structurally safe, permission to occupy such buildings is hereby granted.

J. H. BOTTOMLEY
Pro Building Authority.

To Mr. Li Chok Lai
c/o Mr. H. S. Tam
Old Lot

Exhibit No. C1.

Exhibits.

Exhibit No. C1. Assignment

ASSIGNMENT

$8,000.00

Sd. W. A. Borton

Asst Collector.

STAMP OFFICE
30 Jy 46
HONG KONG

IN THE VICTORIA DISTRICT COURT

CIVIL JURISDICTION

ACTION No. 843 OF 1953

THIS INDENTURE made the Twenty ninth day of July One thousand nine hundred and forty six

BETWEEN THE HONG KONG LAND INVESTMENT AND AGENCY COMPANY LIMITED whose registered office is situate at Gloucester Building (First floor) Victoria in the Colony of Hong Kong (who and whose successors are where not inapplicable hereinafter included under the designation "the Vendors") of the one part and C. L. LI INVESTMENT COMPANY LIMITED whose registered office is situate at Bank of East Asia Building (Room 705-7th floor) Victoria aforesaid (who and whose successors and assigns are where not inapplicable hereinafter included under the designation "the Purchasers") of the other part WHEREAS by a Crown Lease dated the Tenth day of January One thousand nine hundred and eighteen and made between His late Majesty King George the Fifth of the one part and the Vendors of the other part His said Majesty demised unto the Vendors their successors and assigns ALL that piece or parcel of ground situate lying and being at Victoria aforesaid therein more particularly described and registered at the Land Office as Marine Lot No. 23 except and reserved as was therein excepted and reserved from the Ninth day of July One thousand eight hundred and forty four for the term of Nine hundred and ninety nine years at the rent and subject to the Lessees' covenants and conditions therein reserved and contained AND WHEREAS by another Crown Lease dated the Tenth day of January One thousand nine hundred and eighteen and made between His said Majesty of the one part and the Vendors of the other part His said Majesty demised unto the Vendors their successors and assigns ALL that piece or parcel of ground situate lying and being at Victoria aforesaid therein more particularly described and registered at the Land Office as Inland Lot No. 2242 except and reserved as was therein excepted and reserved from the Ninth day of July One thousand eight hundred and forty four for the term of Nine hundred and ninety nine years at the rent and subject to the Lessees' covenants and conditions therein reserved and contained AND WHEREAS by another Crown Lease dated the Tenth day of January One thousand nine hundred and eighteen and made between His said Majesty of the one part and the Vendors of the other part His said Majesty demised unto the Vendors their successors and assigns ALL that piece or parcel of ground situate lying and being at Victoria aforesaid therein more particularly

Exhibits.

Exhibit No. C1. Assignment —(*Contd.*)

described and registered at the Land Office as Inland Lot No. 2244 except and reserved as was therein excepted and reserved from the Ninth day of July One thousand eight hundred and forty four for the term of Nine hundred and ninety nine years at the rent and subject to the Lessees' covenants and conditions therein reserved and contained AND WHEREAS by another Crown Lease dated the Tenth day of January One thousand nine hundred and eighteen and made between His said Majesty of the one part and the Vendors of the other part His said Majesty demised unto the Vendors their successors and assigns ALL that piece or parcel of ground situate lying and being at Victoria aforesaid therein more particularly described and registered at the Land Office as Inland Lot No. 2245 except and reserved as was therein excepted and reserved from the Ninth day of July One thousand eight hundred and forty four for the term of Nine hundred and ninety nine years at the rent and subject to the Lessees' covenants and conditions therein reserved and contained AND WHEREAS the Vendors have agreed with the Purchasers for the sale to them of the said premises for the price of Eight hundred thousand dollars NOW THIS INDENTURE WITNESSETH that in pursuance of such Agreement and in consideration of EIGHT HUNDRED THOUSAND DOLLARS to the Vendors paid by the Purchasers on or before the execution of these presents (the receipt whereof the Vendors do hereby acknowledge) They the Vendors do hereby assign unto the Purchaser FIRST ALL THAT the said piece or parcel of ground registered at the Land Office as MARINE LOT No. 23 Together with the messuages erections and buildings thereon known at the date hereof as Nos. 24, 26, 28, 30, 32 and 34 Hennessy Road Victoria aforesaid And all rights of way (if any) and other rights and all privileges easements and appurtenances thereto belonging or appertaining or therewith at any time used held occupied or enjoyed And all the estate right title interest property claim and demand of the Vendors in and to the said premises hereby first assigned and every part thereof except and reserved as in the said Crown Lease of the said Marine Lot No. 23 is excepted and reserved TO HOLD the said premises hereby first assigned or expressed so to be unto the Purchasers for all the residue now to come and unexpired of the said term of Nine hundred and ninety nine years SUBJECT nevertheless to the existing lettings and tenancies (if any) thereof and to the payment of the rent and the performance of the Lessees' covenants and conditions in the said Crown Lease of the said Marine Lot No. 23 reserved and contained SECONDLY ALL THAT the said piece or parcel of ground registered at the Land Office as INLAND LOT No. 2242 Together with the messuages erections and buildings thereon known at the date hereof as Nos. 46, 48, 50, 52, 54 and 56 Queen's Road East Victoria aforesaid And all rights of way (if any) and other rights and all privileges easements and appurtenances thereto belonging or appertaining or therewith at any time used held occupied or enjoyed And all the estate right title interest property claim and demand of the Vendors in and to the said premises hereby secondly assigned and every part thereof except and reserved as in the said Crown Lease of the said Inland Lot No. 2242 is excepted and reserved TO HOLD the said premises hereby secondly assigned or expressed so to be unto the Purchasers for all the residue now to come and unexpired of the said term of Nine hundred and Ninety nine years SUBJECT nevertheless to the existing lettings and tenancies (if any) thereof

and to the payment of the rent and the performance of the Lessees' covenants and conditions in the said Crown Lease of the said Inland Lot No. 2242 reserved and contained THIRDLY ALL THAT the said piece or parcel of ground registered at the Land Office as INLAND LOT No. 2244 Together with the messuages erections and buildings thereon known at the date hereof as Nos. 2, 4, 6, 8, 10, 12, 14, 16 and 18 Anton Street Victoria aforesaid And all rights of way (if any) and other rights and all privileges easements and appurtenances thereto belonging or appertaining or therewith at any time used held occupied or enjoyed And all the estate right title interest property claim and demand of the Vendors in and to the said premises hereby thirdly assigned and every part thereof except and reserved as in the said Crown Lease of the said Inland Lot No. 2244 is excepted and reserved TO HOLD the said premises hereby thirdly assigned or expressed so to be unto the Purchasers for all the residue now to come and unexpired of the said term of Nine hundred and ninety nine years SUBJECT nevertheless to the existing lettings and tenancies (if any) thereof and to the payment of the rent and the performance of the Lessees' covenants and conditions in the said Crown Lease of the said Inland Lot No. 2244 reserved and contained AND FOURTHLY ALL THAT the said piece or parcel of ground registered at the Land Office as INLAND LOT No. 2245 Together with all the messuages erections and buildings (if any) thereon And all rights of way (if any) and other rights and all privileges easements and appurtenances thereto belonging or appertaining or therewith at any time used held occupied or enjoyed And all the estate right title interest property claim and demand of the Vendors in and to the said premises hereby fourthly assigned and every part thereof except and reserved as in the said Crown Lease of the said Inland Lot No. 2245 is excepted and reserved TO HOLD the said premises hereby fourthly assigned or expressed so to be unto the Purchasers for all the residue now to come and unexpired of the said term of Nine hundred and ninety nine years SUBJECT nevertheless to the existing lettings and tenancies (if any) thereof and to the payment of the rent and the performance of the Lessees' covenants and conditions in the said Crown Lease of the said Inland Lot No. 2245 reserved and contained AND the Vendors hereby covenant with the Purchasers that notwithstanding any act deed or thing by the Vendors done or executed or knowingly suffered to the contrary the said Crown Leases are now valid and subsisting and not in anywise forfeited surrendered or become void or voidable and that the rents reserved by and covenants by the Lessees and conditions contained in the said Crown Leases respectively have been paid observed and performed up to the date of these presents AND that the Vendors now have good right to assign the said premises hereby first secondly thirdly and fourthly assigned or expressed so to be in manner aforesaid free from incumbrances AND that all the said premises may be quietly entered into and during the respective residues of the said terms of Nine hundred and ninety nine years Nine hundred and ninety nine years Nine hundred and ninety nine years and Nine hundred and ninety nine years held and enjoyed without any interruption by the Vendors or any person or persons claiming through or in trust for the Vendors AND that the Vendors and all other persons lawfully or equitably claiming any estate or interest in the said premises or any part thereof from under or in trust for them the Vendors shall and will from time to time

Exhibits.

Exhibit No. C1. Assignment —(*Contd.*)

and at all times hereafter during the respective residues of the said terms of Nine hundred and ninety nine years Nine hundred and ninety nine years Nine hundred and ninety nine years and Nine hundred and ninety nine years at the request and cost of the Purchasers do and execute or cause to be done and executed all such acts deeds and things whatsoever for further and more perfectly assuring the said premises and every part thereof unto the Purchasers for the respective unexpired residues of the said terms of Nine hundred and ninety nine years Nine hundred and ninety nine years Nine hundred and ninety nine years and Nine hundred and ninety nine years in manner aforesaid as shall or may be reasonably required AND the Purchasers do hereby covenant with the Vendors that they the Purchasers will at all times hereafter during the respective residues of the said terms of Nine hundred and ninety nine years Nine hundred and ninety nine years Nine hundred and ninety nine years and Nine hundred and ninety nine years pay the rents respectively reserved by the said Crown Leases and observe and perform the covenants and conditions in the said Crown Leases respectively contained and will at all times hereafter keep indemnified the Vendors and their successors and their estates and effects from and against the non-payment of the said rents and the non-observance and non-performance of the said covenants and conditions and from and against all actions claims and demands whatsoever for or on account of the same or in anywise relating thereto IN WITNESS whereof the said parties to these presents have hereunto caused their respective Common Seals to be affixed the day and year first abovewritten.

SEALED with the Common Seal of the Vendors and SIGNED by A. H. Compton and M. K. Lo (Directors) and B. C. Field (Secretary), in the presence of :

Sd. A. H. Compton
Sd. M. K. Lo
Sd. B. C. Field.

Sd. P. C. Woo,
Solicitor,
Hong Kong.

Common Seal of
Hong Kong Land Investment and
Agency Company Limited.

SEALED with the Common Seal of the Purchasers and SIGNED by Li Chok Lai one of their Permanent Directors in the presence of :

Sd. Li Chok Lai

Sd. P. C. Woo,
Solicitor,
Hong Kong.

Common Seal of
C. L. Li Investment Co Ltd

RECEIVED the day and year first above written of and from the abovenamed Purchasers the sum of EIGHT HUNDRED THOUSAND DOLLARS being the consideration money above expressed to be paid by them to us. } $800,000.00

Exhibits.

Exhibit No. C1. Assignment —(*Contd.*)

WITNESS :

Sd. P. C. Woo.

Sd. A. H. Compton

Sd. M. K. Lo

Sd. B. C. Field.

Common Seal of
Hong Kong Land Investment and
Agency Company Limited.

Exhibit No. C2.

Exhibit No. C2. Declaration of Trust

DECLARATION OF TRUST

Stamp duty	Stamp duty	Adjudication
HK$ 20.00	HK$ 5.00	fee $5.00 paid
18-NO-47.	18-NO-47.	18-11-47
		Sd. (Illegible)
		Asst. Collector.

TO ALL TO WHOM these presents shall come MA KAM CHAN (馬錦燦) of No. 195 Wing Lok Street Victoria in the Colony of Hong Kong Merchant (hereinafter called "the Trustee") SEND GREETING : WHEREAS by nine several assignments set out in the Schedule hereto All Those pieces or parcels of ground set out in the said Schedule (hereinafter referred to as "the said premises") were assigned unto the Trustee in consideration of the respective sums herein set out AND WHEREAS the said premises were in fact purchased by the Trustee for and on behalf of himself and his four brothers Ma Kam Ming (馬錦明) of No. 15 Yuk Sau Street Victoria aforesaid Ma Kam Woon (馬錦煥) of Canton in the Republic of China Ma Kam Chiu (馬錦釗) of Shanghai in the said Republic of China and Ma Kam Li (馬錦里) of Shanghai aforesaid and the said respective sums were provided by the Trustee and his four brothers in equal shares NOW THESE PRESENTS WITNESS that the Trustee HEREBY DECLARES that the Trustee has held and now holds and stands possessed of the said premises and the rents and profits thereof and the proceeds of sale thereof in case all or any of the said premises shall be sold or disposed of IN TRUST for himself and his said brothers Ma Kam Ming, Ma Kam Woon, Ma Kam Chiu and Ma Kam Li and their representive executors administrators and assigns in equal shares And the Trustee hereby agrees to assign to his said brothers their respective shares at their requests and costs at such time or times as they shall direct.

Exhibits.

THE SCHEDULE ABOVE REFERRED TO.

Exhibit No. C2. Declaration of Trust —(*Contd.*)

Date of Assignment	Vendor	Purchaser	Property	Consideration
14th May 1947	Chung Sau (or Shau) Fung	Ma Kam Chan	All That piece or parcel of ground registered in the Land Office as The Remaining Portion of Inland Lot No. 1026 Together with the messuage thereon known as No. 36 Bonham Strand West.	$120,000.00
	Shiu Shau Man	Ma Kam Chan	The benefit of an offer of a new Crown Lease of All that piece or parcel of ground registered in the Land Office as The Remaining Portion of Inland Lot No. 2625 and of the messuages thereon known as Nos. 269 and 271 Hennessy Road.	$150,000.00
	C. L. Li Investment Co. Ltd.	Ma Kam Chan	All those pieces or parcels of ground respectively registered in the Land Office as Marine Lot No. 23, Inland Lot No. 2242 Inland Lot No. 2244 and Inland Lot No. 2245 Together with the messuages thereon respectively known as Nos. 24, 26, 28, 30, 32 and 34 Hennessy Road Nos. 46, 48, 50, 52, 54 and 56 Queen's Road East, Nos. 2, 4, 6, 8, 10, 12, 14, 16 and 18 Anton Street and Nos. 1, 3, 5, 7, 9, 11, 13, 15 and 17 Landale Street.	$900,000.00
	Li Chok Lai	Ma Kam Chan	All That piece or parcel of ground registered in the Land Office as Marine Lot No. 531 Together with the messuages thereon Known as No. 110 Connaught Road West and No. 117 Des Voeux Road West.	$140,000.00
	Lam Yee Cho and Lam Cher Ming	Ma Kam Chan	All that piece or parcel of ground registered in the Land Office as The Remaining Portion of Inland Lot No. 1072 Together with the messuages thereon known as No. 7 Bonham Strand West and No. 171 Wing Lok Street.	$230,000.00
	Chan Fuk Chuen	Ma Kam Chan	All That piece or parcel of ground registered in the Land Office as Marine Lot No. 489 Together with the messuage thereon known as No. 82 Connaught Road West.	$ 97,000.00

Date of Assignment	Vendor	Purchaser	Property	Consideration
14th May 1947	Siu Sau Man	Ma Kam Chan	All That piece or parcel of ground registered in the Land Office as The Remaining Portion of Sec. A of Inland Lot No. 2343 Together with the messuage thereon known as No. 10 Shan Kwong Road.	$ 80,000.00
	Tsang Chu Shi	Ma Kam Chan	All That piece or parcel of ground registered in the Land Office as Inland Lot No. 1955 Together with the messuages thereon known as Nos. 119 and 121 Queen's Road Central.	$500,000.00
	Li Chok Lai "Vendor" Shiu Chau Man "Confirmor"	Ma Kam Chan	All That piece or parcel of ground then intended to be registered in the Land Office as Sec. B of Inland Lot No. 744 Together with the messuages thereon known as Nos. 14A 15 and 15A Canal Road West.	$120,000.00

IN WITNESS whereof the Trustee hath hereunto set his hand and seal this day of One thousand nine hundred and forty seven.

SIGNED SEALED and DELIVERED
by the Trustee in the presence of:—

Sd. M. W. Lo,
Solicitor,
Hong Kong.

INTERPRETED by:—Sd. Ng Fook Ling
Clerk to Messrs. Lo and Lo,
Solicitors &c., Hong Kong.

Exhibit No. C3.

ASSIGNMENT

Exhibit No. C3. Assignment

ADJUDICATED	1% Ad Valorem	$5.- paid
$3,804.-	Duty paid	pending
29-12-47	$9,000.	Adjudication
	18-11-47	18-11-47

THIS INDENTURE made the Fifteenth day of November One thousand nine hundred and forty seven BETWEEN C. L. LI INVESTMENT COMPANY LIMITED whose registered office is situate at Bank of East Asia Building (Room No. 705, 7th floor) Victoria in the Colony of Hong Kong (which Company and its successors are where not inapplicable hereinafter included under the designation "the Vendor") of the one part

Exhibits.

Exhibit No. C3. Assignment —(*Contd.*)

MA KAM CHAN (馬錦燦) of No. 195 Wing Lok Street Victoria aforesaid Banker (who and whose executors administrators and assigns are where not inapplicable hereinafter included under the designation "the Purchaser") of the other part WHEREAS by four several Crown Leases all dated the 10th day of January 1918 and all made between His late Majesty King George V of the one part and The Hong Kong Land Investment and Agency Company Limited of the other part His said Majesty demised unto the said The Hong Kong Land Investment and Agency Company Limited their successors and assigns all Those pieces or parcels of ground situate lying and being at Victoria aforesaid more particularly and respectively described in the now reciting Leases and respectively registered in the Land Office of Victoria aforesaid as Marine Lot No. 23 and Inland Lot Nos. 2242, 2244 and 2245 Except and reserved as was therein respectively excepted and reserved from the 9th day of July 1844 for the respective terms of 999 years, 999 years 999 years and 999 years subject to the rents and covenants therein respectively reserved and contained AND WHEREAS the said premises are now vested for the residues of the said respective terms of 999 years, 999 years, 999 years and 999 years in the Vendor who hath agreed with the Purchaser for the sale of the said premises to him for the price of $900,000.00 NOW THIS INDENTURE WITNESSETH that in pursuance of such agreement and in consideration of DOLLARS NINE HUNDRED THOUSAND ($900,000.00) to the Vendor now paid by the Purchaser (the receipt whereof the Vendor doth hereby acknowledge) the Vendor DOTH hereby assign unto the Purchaser ALL THOSE the said pieces or parcels of ground respectively registered as aforesaid as MARINE LOT NO. 23, INLAND LOT NO. 2242, INLAND LOT NO. 2244 and INLAND LOT NO. 2245 TOGETHER with the messuages erections and buildings thereon respectively known at the date hereof as NOS. 24, 26, 28, 30, 32 and 34 HENNESSY ROAD Victoria aforesaid NOS. 46, 48, 50, 52, 54 and 56 QUEEN'S ROAD EAST Victoria aforesaid NOS. 2, 4, 6, 8, 10, 12, 14, 16 and 18 ANTON STREET Victoria aforesaid and NOS. 1, 3, 5, 7, 9, 11, 13, 15 and 17 LANDALE STREET Victoria aforesaid (if any) and all rights, rights of way (if any) privileges easements and appurtenances thereto belonging or appertaining AND all the estate right title interest property claim and demand whatsoever of the Vendor therein and thereto except and reserved as in the said Crown Leases is respectively excepted and reserved TO HOLD the premises hereby assigned unto the Purchaser for the residues now to come and unexpired of the said respective terms of Nine hundred and Ninety nine years, Nine hundred and ninety nine years, Nine hundred and ninety nine years, Nine hundred and ninety nine years SUBJECT to the existing lettings and tenancies thereof (if any) and to the payment of the rents and the performance of the several covenants by the Lessee and conditions in and by the said Crown Leases respectively reserved and contained AND the Vendor hereby covenants with the Purchaser that notwithstanding any act deed matter or thing by the Vendor done or knowingly omitted or suffered the rents respectively reserved by and the Lessees covenants and conditions respectively contained in the said Crown Leases have been paid performed and observed up to the date of these presents and that the said Crown Leases are now good valid and subsisting AND that the Vendor now hath good right and full power to assign the said premises as aforesaid free from incumbrances AND that the said premises may be quietly entered into and during the residues of the said respective terms of Nine hundred and ninety nine years, Nine hundred and ninety nine years,

Nine hundred and ninety nine years and Nine hundred and ninety nine years held and enjoyed without any interruption by the Vendor or any person or persons claiming through under or in trust for the Vendor AND that the Vendor and all persons claiming under or in trust for the Vendor shall during the residues of the said respective terms of Nine hundred and ninety nine years, Nine hundred and ninety nine years, Nine hundred and ninety nine years and Nine hundred and ninety nine years at the request cost and charges of the Purchaser do all acts and execute and sign all such assurances and things as may be reasonably required for further or better assuring all or any of the said premises unto the Purchaser AND the Purchaser hereby covenants with the Vendor that the Purchaser will during the residues of the said respective terms of Nine hundred and ninety nine years, Nine hundred and ninety nine years, Nine hundred and ninety nine years and Nine hundred and ninety nine years pay the rents and perform the covenants and conditions by and in the said Crown Leases respectively reserved and contained and indemnify the Vendor against all actions suits expenses claims and demands on account of or in respect of the non-payment of the said rents or the non-performance of the said covenants and conditions or any of them IN WITNESS whereof the Vendor hath caused its Common Seal to be hereunto affixed and the Purchaser hath hereunto set his hand and seal the day and year first above written.

SEALED with the Common Seal of the Vendor and SIGNED by Li Chok Lai one of its Permanent Directors in the presence of:— Sd. Li Chok Lai L.S.

Sd. M. W. Lo
Solicitor,
Hong Kong.

SIGNED SEALED AND DELIVERED by the Purchaser in the presence of:—

Sd. M. W. Lo
Solicitor,
Hong Kong.

INTERPRETED by: Illegible
Clerk to Messrs. Lo and Lo,
Solicitors, &c., Hong Kong.

RECEIVED on the day and year first above written of and from the Purchaser the sum of DOLLARS NINE HUNDRED THOUSAND being the consideration money above expressed to be paid by him to the Vendor. $900,000.00.

WITNESS:—

Sd. M. W. Lo

Sd. Li Chok Lai
(Common Seal)

Exhibits.

Exhibit No. C4.
Lease

Exhibit No. C4.

LEASE

THIS INDENTURE, made the Tenth day of January One thousand Nine hundred and Eighteen BETWEEN Our Sovereign Lord GEORGE V by the Grace of GOD King of the United Kingdom of GREAT BRITAIN and IRELAND and the BRITISH Dominions beyond the Seas, Defender of the Faith, Emperor of INDIA, of the one part, and THE HONG KONG LAND INVESTMENT AND AGENCY COMPANY LIMITED whose registered Office is situate at Victoria in the Colony of Hongkong (hereinafter referred to as "the said Lessees") of the other part, WHEREAS Sir Francis Henry May Knight Commander of the Most Distinguished Order of Saint Michael and Saint George Doctor of Laws is now the duly constituted and appointed Governor and Commander-in-Chief of the said Colony of Hongkong and its Dependencies; and is authorised to enter into these presents in the name and on behalf of His said Majesty NOW THIS INDENTURE WITNESSETH, that in consideration of the yearly rent, covenants and stipulations hereinafter reserved and contained, by and on the part and behalf of the said Lessees their Successors and Assigns, to be paid, done and performed; His said Majesty KING GEORGE DOTH hereby grant and demise, unto the said Lessees their Successors and Assigns, ALL that piece or parcel of Ground situate, lying and being at Victoria in the Colony of Hongkong abutting on the North East side thereof on Marine Lot No. 23 and measuring thereon Forty six feet and three inches on the South West side thereof on Inland Lot No. 2242 and measuring thereon Forty seven feet and four inches on the North West side thereof on Inland Lot No. 2244 and measuring thereon One hundred and forty eight feet and on the South East side thereof on Landale Street and measuring thereon One hundred and forty eight feet which said piece or parcel of ground expressed to be hereby demised contains in the whole by admeasurement Six thousand and nine hundred and seventeen Square feet and is more particularly delineated on the plan annexed hereto and thereon coloured Red and is registered in the Land Office as INLAND LOT NO. 2245 And all the easements and appurtenances whatsoever to the said demised belonging, or in any-wise appertaining. EXCEPT AND RESERVED unto His said Majesty, His Heirs, Successors and Assigns, all Mines, Minerals and Quarries of Stone in, under and upon the said premises, and all such Earth, Soil, Marl Clay, Chalk, Brick-earth, Gravel, Sand, Stone and Stones, and other Earths or Materials, which now are or hereafter during the continuance of this demise shall be under or upon the said premises, or any part or parts thereof, as His said Majesty, His Heirs, Successors and Assigns may require for the Roads, Public Buildings, or other Public Purposes of the said Colony of Hongkong; with full liberty of Ingress, Egress and Regress, to and for His said Majesty, His Heirs, Successors and Assigns, and His and their Agents, servants and workmen, at reasonable times in the day during the continuance of this demise, with or without horses, carts, carriages and all other necessary things into, upon, from and out of all or any part or parts of the premises hereby expressed to be demised, to view, dig for, convert, and carry away, the said excepted Minerals, Stone, Earth and other things respectively, or any part or parts thereof respectively, thereby doing as little damage as possible to the said Lessees their Successors or Assigns; AND ALSO SAVE AND EXCEPT full power to His said Majesty, His Heirs,

Successors and Assigns, to make and conduct in, through and under the said premises, all and any public or common sewers, drains or water-courses. TO HAVE AND TO HOLD the said piece or parcel of ground and premises hereby expressed to be demised, with their and every of their appurtenances, unto the said Lessees their Successors and Assigns, from the Ninth day of July One thousand eight hundred and Forty four for and during and unto the full end and term of Nine hundred and ninety nine Years from thence next ensuing and fully to be complete and ended: YIELDING AND PAYING therefor yearly and every year the sum of One hundred and twelve dollars in Current Money of the said Colony of Hongkong, by equal half-yearly payments, on the Twenty-fourth day of June and the Twenty-fifth day of December, in every Year, free and clear and from all Taxes, Rates, Charges, Assessments and Deductions whatsoever, charged upon or in respect of the said premises or any part thereof; the first half-yearly payment of the said Rent becoming due and to be made on the Twenty fourth day of June One thousand nine hundred and Eighteen, AND the said Lessees for themselves their Successors and Assigns do hereby covenant with His said Majesty, His Heirs, Successors and Assigns by these presents, in manner following, that is to say that they the said Lessees their Successors or Assigns shall and will yearly, and every year during the said term hereby granted, well and truly pay or cause to be paid to His said Majesty, His Heirs, Successors and Assigns, the said yearly Rent of One hundred and twelve dollars clear of all deductions as aforesaid on the several days and times and in the manner hereinbefore reserved and made payable; AND ALSO that they the said Lessees their successors and Assigns shall and will during all the said term hereby granted, bear, pay and discharge all taxes, rates, charges and assessments whatsoever, which now are or shall be hereafter assessed or charged upon, or in respect of the said premises hereby expressed to be demised or any part thereof. AND ALSO that the said Lessees their Successors and Assigns, shall and will, from time to time, and at all times hereafter when, where, and as often as need or occasion shall be and require, at his and their own proper costs and charges, well and sufficiently Repair, Uphold, Support, Maintain, Pave, Purge, Scour, Cleanse, Empty, Amend and keep the messuage or tenement, messuages or tenements, and all other erections and buildings, now or at any time hereafter standing upon the said piece or parcel of ground hereby expressed to be demised, and all the Walls, Banks, Cuttings, Hedges, Ditches, Rails, Lights, Pavements, Privies, Sinks, Drains and Watercourses thereunto belonging, and which shall in any-wise belong or appertain unto the same, in, by and with all and all manner of needful and necessary reparations, cleansings and amendments whatsoever, the whole to be done to the satisfaction of the Surveyor of His Majesty, His Heirs, Successors or Assigns (now the Director of Public Works); AND THE SAID messuage or tenement, messuages or tenements, erections, buildings and premises, so being well and sufficiently repaired, sustained and amended, at the end, or sooner determination of the said term hereby granted, shall and will peaceably and quietly deliver up to His said Majesty, His Heirs, Successors or Assigns; AND ALSO that the said Lessees their Successors and Assigns shall and will during the term hereby granted, as often as need shall require, bear, pay and allow a reasonable share and proportion for and towards the costs and charges of making, building, repairing, and amending, all or any roads, pavements, channels, fences and party-walls, draughts, private or public sewers and drains, requisite for, or

Exhibits.

Exhibit No. C4. Lease —(*Contd.*)

in, or belonging to the said premises hereby expressed to be demised or any part thereof, in common with other premises near or adjoining thereto, and that such proportion shall be fixed and ascertained by the Surveyor of His said Majesty, His Heirs, Successors, or Assigns, and shall be recoverable in the nature of rent in arrear; AND FURTHER that it shall and may be lawful to and for His said Majesty, His Heirs, Successors or Assigns, by His or their Surveyor, or other person deputed to act for Him or them, twice or oftener in every year during the said term, at all reasonable times in the day, to enter and come into and upon the said premises hereby expressed to be demised, to view, search and see the condition of the same, and of all decays, defects and wants of reparation and amendment, which upon every such view or views shall be found, to give or leave notice or warning in writing, at or upon the said premises, or some part thereof, unto or for the said Lessees their Successors or Assigns, to repair and amend the same within Three Calendar Months then next following, within which said time or space of Three Calendar Months, after every such notice or warning shall be so given, or left as aforesaid, the said Lessees their Successors or Assigns will repair and amend the same accordingly; AND FURTHER that the said Lessees their Successors or Assigns, or any other person or persons, shall not nor will, during the continuance of this demise, use, exercise or follow, in or upon the said premises or any part thereof, the trade or business of a Brazier, Slaughterman, Soap-maker, Sugar-baker, Fellmonger, Melter of tallow, Oilman, Butcher, Distiller, Victualler, or Tavern-keeper, Blacksmith, Nightman, Scavenger, or any other noisy, noisome or offensive trade or business whatever, without the previous licence of His said Majesty, His Heirs, Successors, or Assigns, signified in writing by the Governor of the said Colony of Hongkong, or other person duly authorised in that behalf; AND ALSO that they the said Lessees their Successors or Assigns, shall not nor will, let, underlet, mortgage, assign or otherwise part with all or any part of the said premises hereby expressed to be demised, for all or any part of the said term of Nine hundred and ninety nine years, without at the same time registering such alienation in the Land Office, or in such other Office as may hereafter be instituted for the purposes of Registration in the said Colony of Hongkong, and paying all reasonable fees and other expenses thereon. PROVIDED ALWAYS, and it is hereby agreed and declared, that in case the said yearly rent of One hundred and twelve dollars hereinbefore reserved, or any part thereof, shall be in arrear and unpaid by the space of twenty-one days next over, or after any or either of the said days whereon the same ought to be paid as aforesaid, (whether lawfully demanded or not), or in case of the breach or non-performance of any or either of the covenants and conditions herein contained, and by or on the part and behalf of the said Lessees their Successors or Assigns, to be kept, done and performed, then, and in either of the said cases, it shall and may be lawful to and for His said Majesty, His Heirs, Successors or Assigns, by the Governor of Hongkong, or other person duly authorised in that behalf, into and upon the said premises, hereby expressed to be demised, or any part thereof, in the name of the whole, to re-enter, and the same to have again, retain, repossess and enjoy, as in His or their first or former estate, as if these presents had not been made; and the said Lessees their Successors and Assigns, and all other occupiers of the said premises thereout and thence utterly to expel, put out and amove, this Indenture or anything contained herein to the contrary notwithstanding. PROVIDED also, and it is hereby further agreed and

declared that His said Majesty, His Heirs, Successors and Assigns, shall have full power to resume, enter into, and re-take possession of all or any part of the premises hereby expressed to be demised, if required for the improvement of the said Colony of Hongkong, or for any other public purpose whatsoever, Three Calendar Months' notice being given to the said Lessees their Successors and Assigns of its being so required, and a full and fair Compensation for the said Land and the Buildings thereon, being paid to the said Lessees their Successors or Assigns, at a valuation, to be fairly and impartially made by the Surveyor of His said Majesty, His Heirs, Successors or Assigns, and upon the exercise of such power the term and estate hereby created shall respectively cease, determine and be void. IN WITNESS whereof the said Sir Francis Henry May duly authorized by His said Majesty as aforesaid, hath executed these Presents, and hereunto set the Public Seal of the Colony of Hongkong aforesaid, in the Name and on the behalf of His Majesty, the day and year first above written.

Sd. F. H. May,
Governor,

The Public Seal of
the Colony of Hong Kong.
Registered,

Sd. (Illegible),
Land Officer.

Examined and Certified to be correct,
Sd. (Illegible),
Land Officer.

Exhibit No. C5.

Exhibit No. C5. Building Authority Certificate

BUILDING AUTHORITY CERTIFICATE

No. 62.
Ref: No. 23338.

BUILDING AUTHORITY'S OFFICE,
HONG KONG.

3rd September 1917.

I do hereby certify that the 9 houses on the West side of Landale Street on Inland Lot 2245—1-17 Landale Street has been built in compliance with the provision of The Public Health and Buildings Ordinance 1 of 1903.

Sd. A. E. Wright
Pro Building Authority.

To The Hong Kong Land Investment & Agency Co. Ltd.

c/o Messrs. Leigh and Orange.

Exhibits.

Exhibit No. D. Notice from new landlord

Exhibit No. D.

NOTICE FROM NEW LANDLORD

(TRANSLATION)

This is to inform you that I have purchased house No. 1 Landale Street, that on the 1st day of October this year the transaction and all matters were completed, and that the ownership of the said houses property and the construction all belong to me. As to the payment of rent by you, the tenant, commencing from and after the 1st day of October this year the payment of rent each month will be received by me. Sent herewith is a specimen (signature) chop of Mr. Tse Keng Ting, the rent collector. This is specially for (your) information.

This is addressed to Mr. / Messrs. Kai Nam.

From New Landlord: (Chop of Ma Kam Tsan).

Dated the 1st day of October in the 36th year of the Republic of China. (1947).

I hereby certify the foregoing to be the true translation of the Chinese document marked A
Sd. Chan Sin Cheung
Court Translator
17-2-54

Exhibit No. E. Notice of increase of rent

Exhibit No. E.

NOTICE OF INCREASE OF RENT

(TRANSLATION)

This is to inform you that in accordance with the bill for increase in house rent formally passed at the Legislative Council of Hong Kong on (Wednesday) the 20th day of October this year, you the tenant should make an increase of 55% on the present rent with effect from the month of November this year. This is specially given as notice.

(To) Messrs. / Mr. Kai Nam.

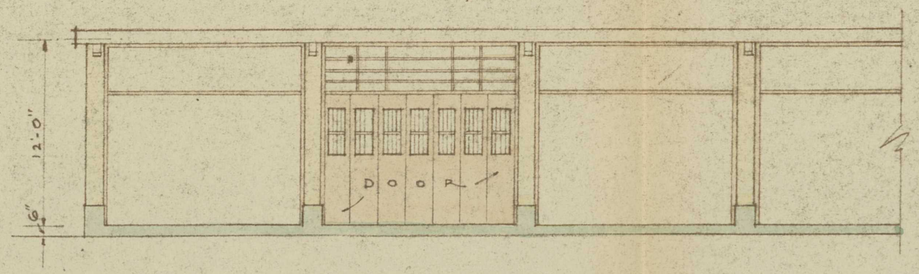
From New Landlord (Chop of Ma Kam Tsan).

Dated the 22nd day of October in the 38th year of the Republic of China. (1949).

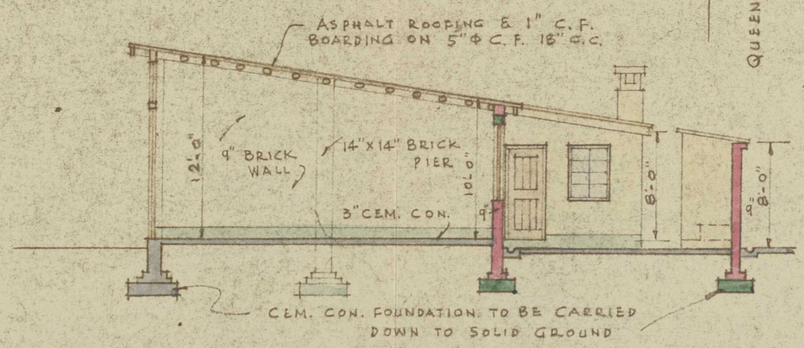
I hereby certify the foregoing to be the true translation of the Chinese document marked B
Sd. Chan Sin Cheung
Court Translator
17-2-54

B.O.O. REF. NO 706 H-1/46.

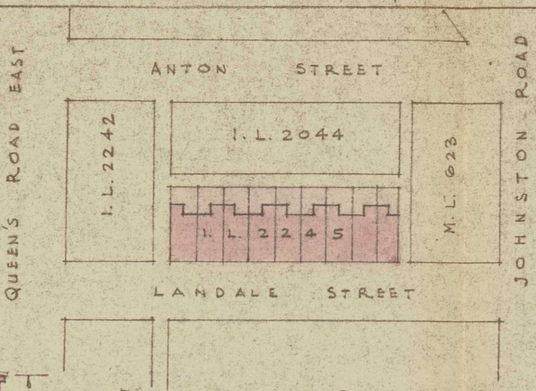
NOTES-
ALL BRICK WORK TO BE BUILT IN CEMT. MORTAR.
EX. DRAINAGE TO BE TESTED & RENEWED IF FOUND DEFECTIVE.
ALL KITCHENS & LATRINES TO HAVE 4'-0" X ½" CEMT. DADO.



ELEVATION

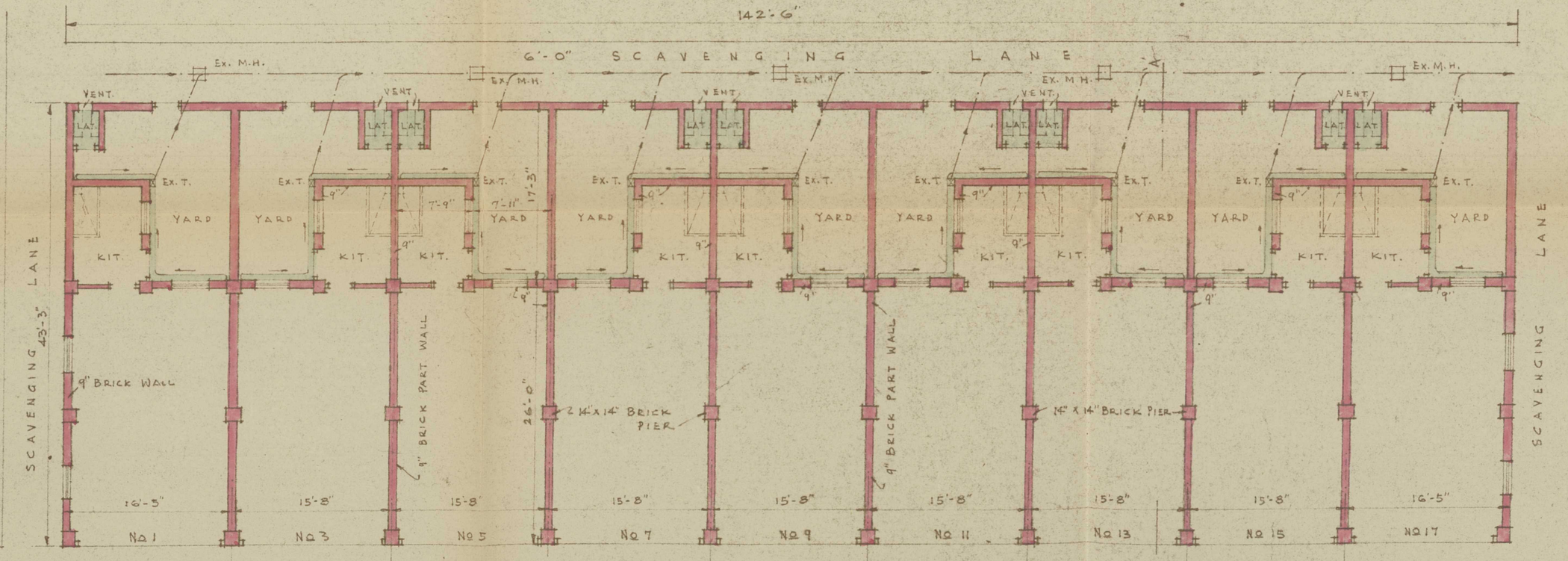


SECTION A-A.



BLOCK PLAN
SCALE: 60'-0" = 1 INCH

IN THE VICTORIA DISTRICT COURT
CIVIL JURISDICTION
ACTION NO. 843 1953
EXHIBIT NO. F



PLAN
LANDALE STREET

APPROVED
Sd. Illegible
PRO BUILDING AUTHORITY.
DATED 3. 2. 47

Sd. H. S. Tam.
Amended 28th Nov. 1946.

PROPOSED TEMPORARY SHOPS ON I. L. 2245 AT LANDALE STREET

SCALE 8'-0" = 1 INCH

Exhibit No. F.

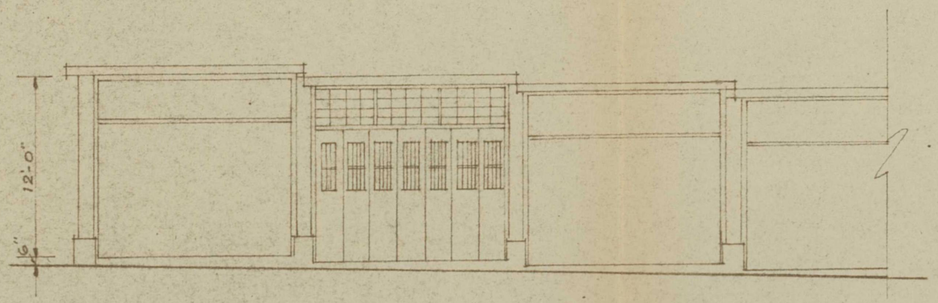
PLAN APPROVED BY BUILDING AUTHORITY

Exhibit No. G.

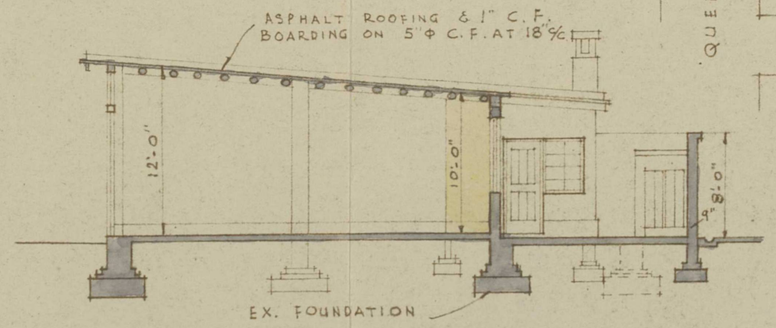
PLAN APPROVED BY BUILDING AUTHORITY

B.O.O. REF NO 706H. IN 1/46

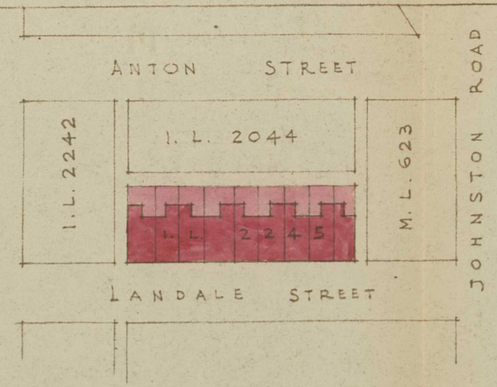
NOTE:-
ALL BRICK WORK TO BE BUILT IN CEM. MORTAR



ELEVATION

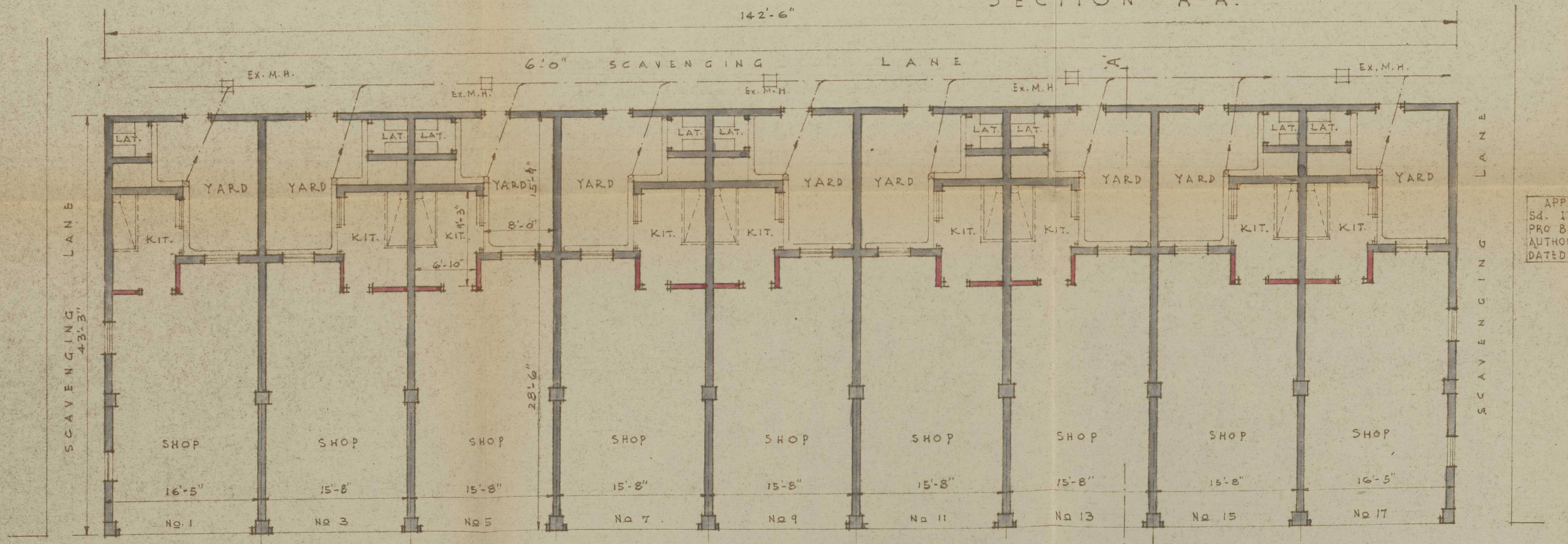


SECTION A-A.



BLOCK PLAN
SCALE: 60'-0" = 1 INCH

IN THE VICTORIA DISTRICT COURT
CIVIL JURISDICTION
ACTION NO. 843 1953
EXHIBIT NO. G



PLAN
LANDALE STREET

APPROVED
Sd. Illegible
PRO BUILDING AUTHORITY
DATED 5. 2. 47

Sd. H. S. Tam.
Amended 30th January 1947

PROPOSED TEMPORARY SHOPS ON I. L. 2245 AT LANDALE STREET (AMENDED PLAN) SCALE: 8FT = 1 INCH 6 JAN 1947

Exhibit No. 1/12.

Exhibit No.
H-1/12
12
Photographs
of Landale
Street

Exhibit: H-1

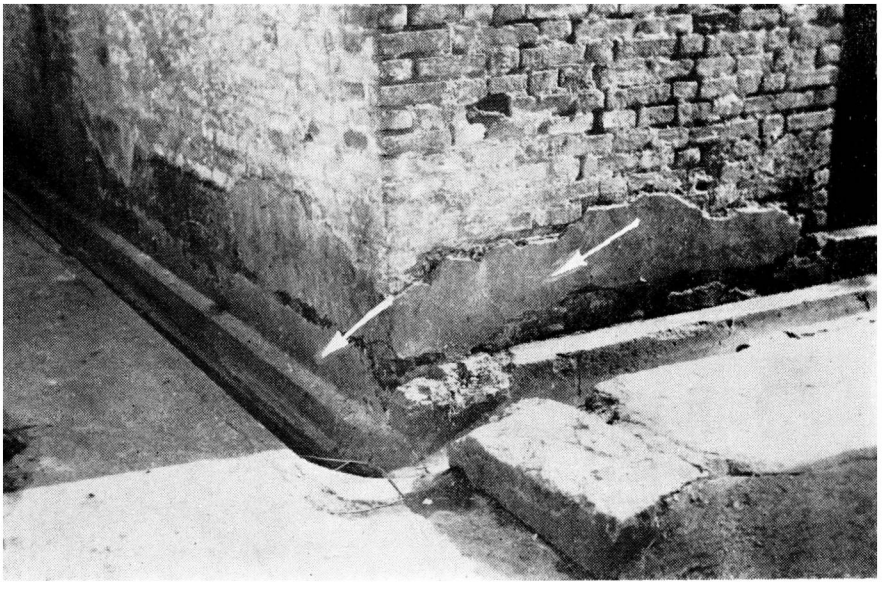


Exhibit: H-2

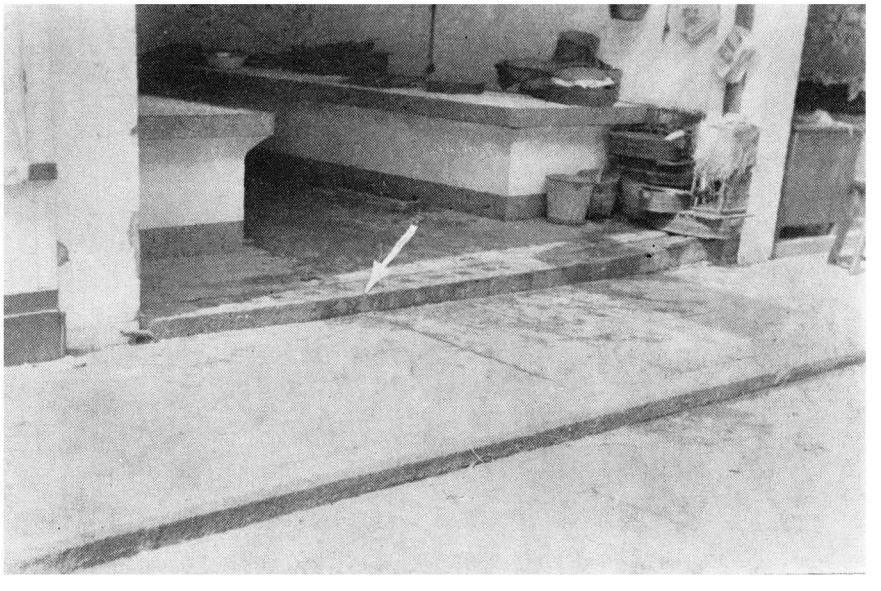


Exhibit No. H-1/12 12 Photographs of Landale Street —(*Contd.*)

Exhibit: H-3

Exhibit: H-4

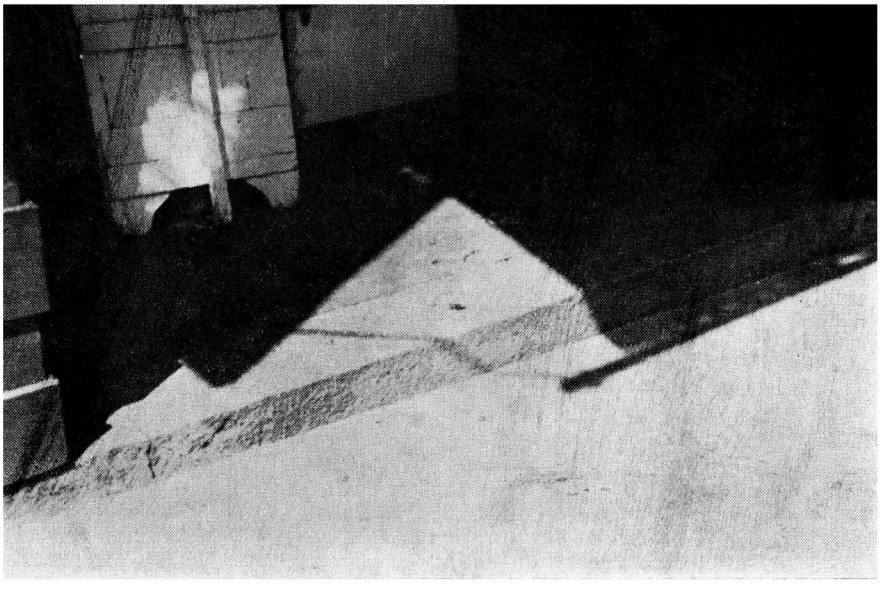


Exhibit: H-5

Exhibit No. H-1/12 12 Photographs of Landale Street —(*Contd.*)

Exhibit: H-6

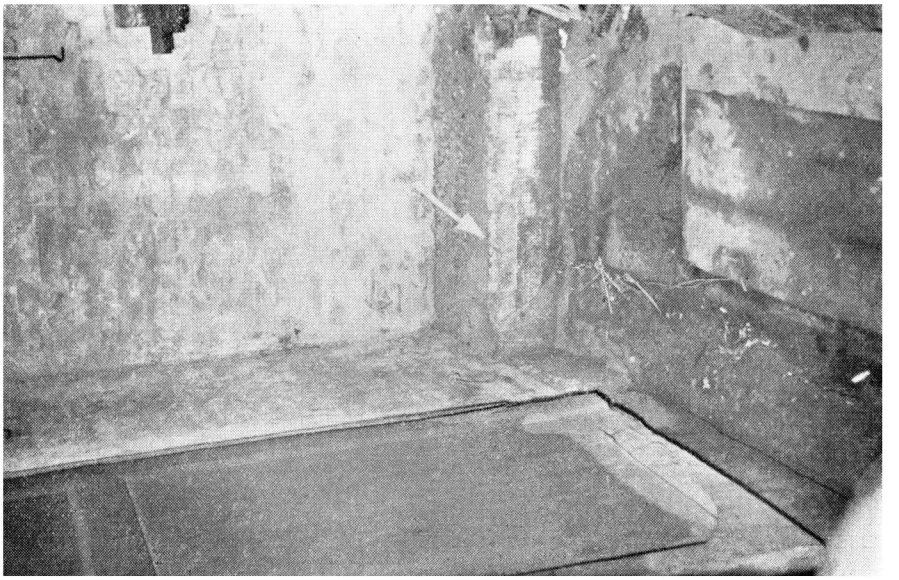


Exhibit No. H-1/12 12 Photographs of Landale Street —(*Contd.*)

Exhibit: H-7

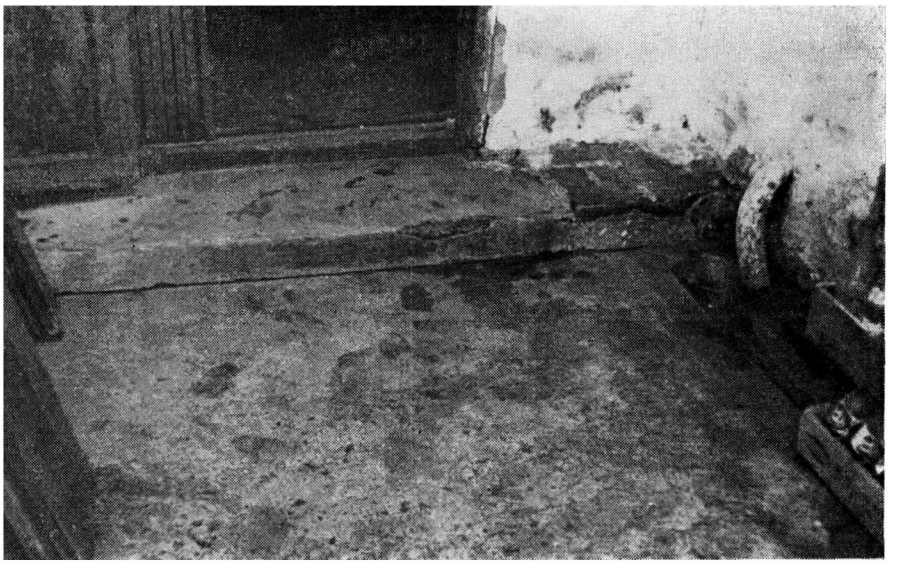


Exhibit: H-8

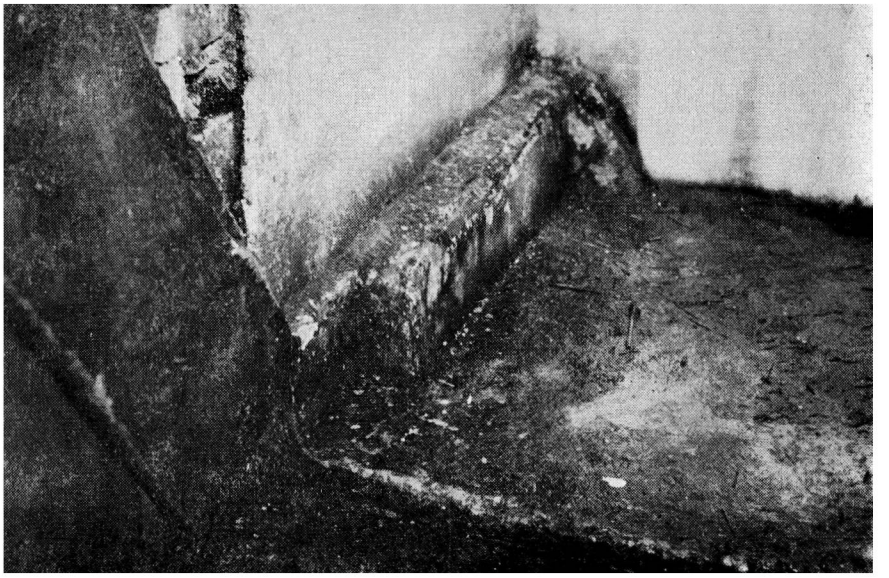


Exhibit: H-9

Exhibit No. H-1/12
12
Photographs of Landale Street
—(*Contd.*)

Exhibit: H-10

Exhibit No. H-1/12 12 Photographs of Landale Street —(*Contd.*)

Exhibit: H-11

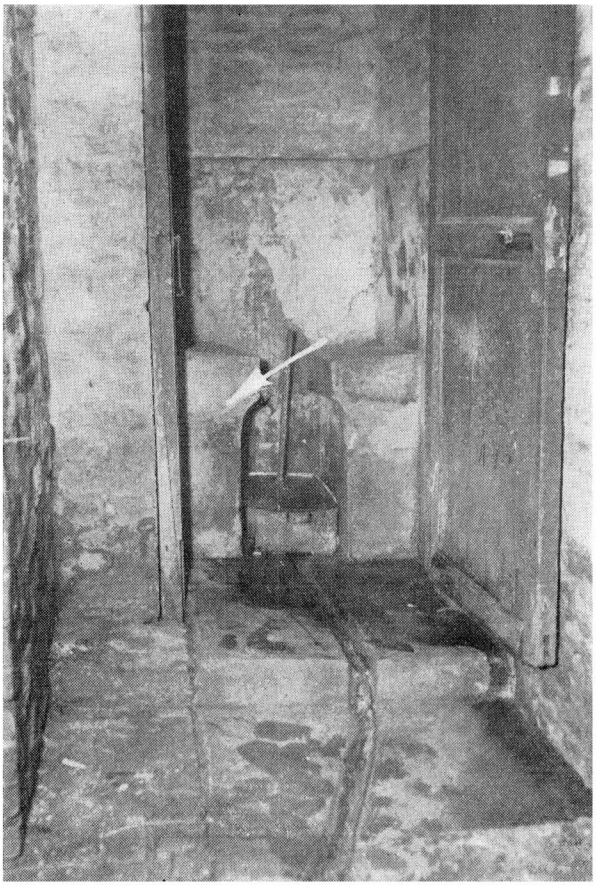
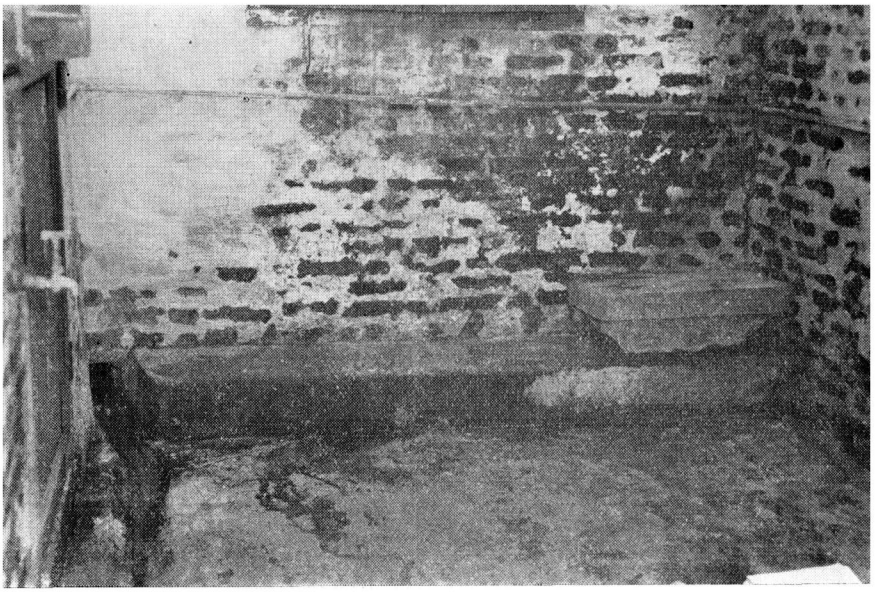


Exhibit: H-12



Exhibits.

Exhibit No. J.

LETTER FROM H. S. TAM, ARCHITECT TO B.A. STATING TO MAKE USE OF EXISTING FOUNDATION

Exhibit No. J. Letter from H. S. Tam, Architect to B.A. stating to make use of existing foundation

17th January 1947.

The Building Authority,
Public Works Department,
St. George's Building,
Hong Kong.

Sir,

I.L. 2245

REF. No. 706H in 1/46

With reference to your letter of the 10th instant I beg to re-submit herewith amended plan showing apparent enlargement to the kitchens of the shops, proposed to be built on the above premises, and to inform you that the approved plans were prepared while debris were still piling on the site, it was only when these were cleared away that the exact positions of the existing foundations were exposed. On account of the fact that these single-storey shops are of a temporary nature and which will be entirely demolished to make room for a proper re-development of the site in about six months' or one year's time, when building materials are easier to obtain and less expensive, my client intends to build all the rear walls on the existing foundations, and request me, on his behalf, to beseech you to give the matter your kind re-consideration and approval.

Yours faithfully,
Sd. H. S. Tam.

Building Ordinance Office,
Public Works Department.
18th January 1947.
Received.

Exhibit No. K1.

Exhibit No. K1. Notice of increase of rent

NOTICE OF INCREASE OF RENT

LANDLORD AND TENANT (AMDT.) ORDINANCE, 1953.

SCHEDULE A.

Form 2. [s. 28(1)

Notice of Rent Increase of Business Premises.
(by a landlord not being also a principal tenant).

To (1) .....Pang Chuen.....

TAKE NOTICE that pursuant to the provisions of sections 24, 26 and 28 of the Landlord and Tenant (Amendment) Ordinance, 1953, the rent lawfully chargeable for the premises situate at (2) ..... No. 5, Landale Street .... Ground floor ..... which you hold of me as a (3) ..... monthly ..... tenant will be increased as shown hereunder.

Exhibits.

Exhibit No. K1. Notice of increase of rent —(*Contd.*)

Rent lawfully chargeable as at the date of this notice is ..... $234.50 ..... dollars per (4) ... month ...
Standard rent is ...117.25... dollars per (4) ... month ...
Increase at 25% of the standard rent is ... $263.80 ... per (4) ..... month .....

The said increase will take effect from the (5) ..... 1st ..... day of ... September ... 1953, BUT PLEASE READ WHAT IS PRINTED ON THE BACK OF THIS NOTICE.

Dated the ..... 1st ..... day of ..... August, ... 1953.

Sd. Ma Kam Chan
Landlord.

No. 50 Bonham Strand West, H.K.

Notes.

(1) State full name of tenant.
(2) State whereabouts of premises.
(3) State whether weekly, monthly, quarterly tenant, etc.
(4) State whether per week, month, quarter, etc.
(5) This date must be the twenty-eighth day after service of this notice.

THE BACK OF THIS NOTICE

Section 25 of the Landlord and Tenant (Amendment) Ordinance, 1953, provides for one increase of rent of business premises, on the 1st March, 1954. This increase is at the rate of twenty-five per cent of the STANDARD RENT and can only be added to the RENT LAWFULLY CHARGEABLE.

The increase of which notice is given overleaf takes effect on the twenty-eighth day after service of this notice.

The increase of which notice is given only becomes payable upon demand by your landlord after he has served you with a copy of a certificate of standard rent issued by the Department of Rating and Valuation.

If you are dissatisfied with the rate of standard rent stated in the certificate, you are at liberty to apply, under section 28(4) of the Landlord and Tenant (Amendment) Ordinance, 1953, to a tenancy tribunal to determine the rate of standard rent, but you should pay the increase stated in the notice overleaf until such time as the tribunal adjudicates upon your application.

The increase of which notice is given overleaf must be adjusted in accordance with section 28(2) of the Ordinance where the standard rent certified by the Department of Rating and Valuation is different from that stated overleaf.

Exhibits.

Exhibit No. K2.

LETTER FROM RATING & VALUATION DEPT.

Exhibit No. K2. Letter from Rating & Valuation Dept.

Rating & Valuation Department,
Hong Kong, 9th October, 1953.

Ref: No.A.D.1271/47.

Sir,

Re: Nos. 1 to 17 Landale Street.

With reference to your applications for Certificates of standard rent it would seem that the Landlord & Tenant Ordinance does not apply to the above premises. According to my records the Building Authority gave his written permission to occupy these buildings on 7th October, 1947. Unless I hear from you to the contrary I shall take no further action in respect of your applications.

I am, Sir,

Your obedient servant,

sd/- F. Shanks.
(F. Shanks)
Commissioner.

Mr. Ma Kam Chan,
50, Bonham Strand West,
Hong Kong.

Exhibit No. K3.

LETTER FROM HASTINGS & CO. TO F. ZIMMERN

Exhibit No. K3. Letter from Hastings & Co. to F. Zimmern

23rd February 1954.

ESCB/TPF.
Messrs. F. Zimmern & Co.

Dear Sirs,

Re: Victoria District Case Nos. 843, 845, 846, 848, 849 and 850.

We hereby give you notice that at the adjourned hearing of the above cases on the 16th March, 1954 counsel for the Defendants will submit that 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.

Yours faithfully,

sd/- Hasting & Co.

Exhibits.

Exhibit No. L. Sketch showing old foundation and wall

Exhibit No. L.

SKETCH SHOWING OLD FOUNDATION AND WALL

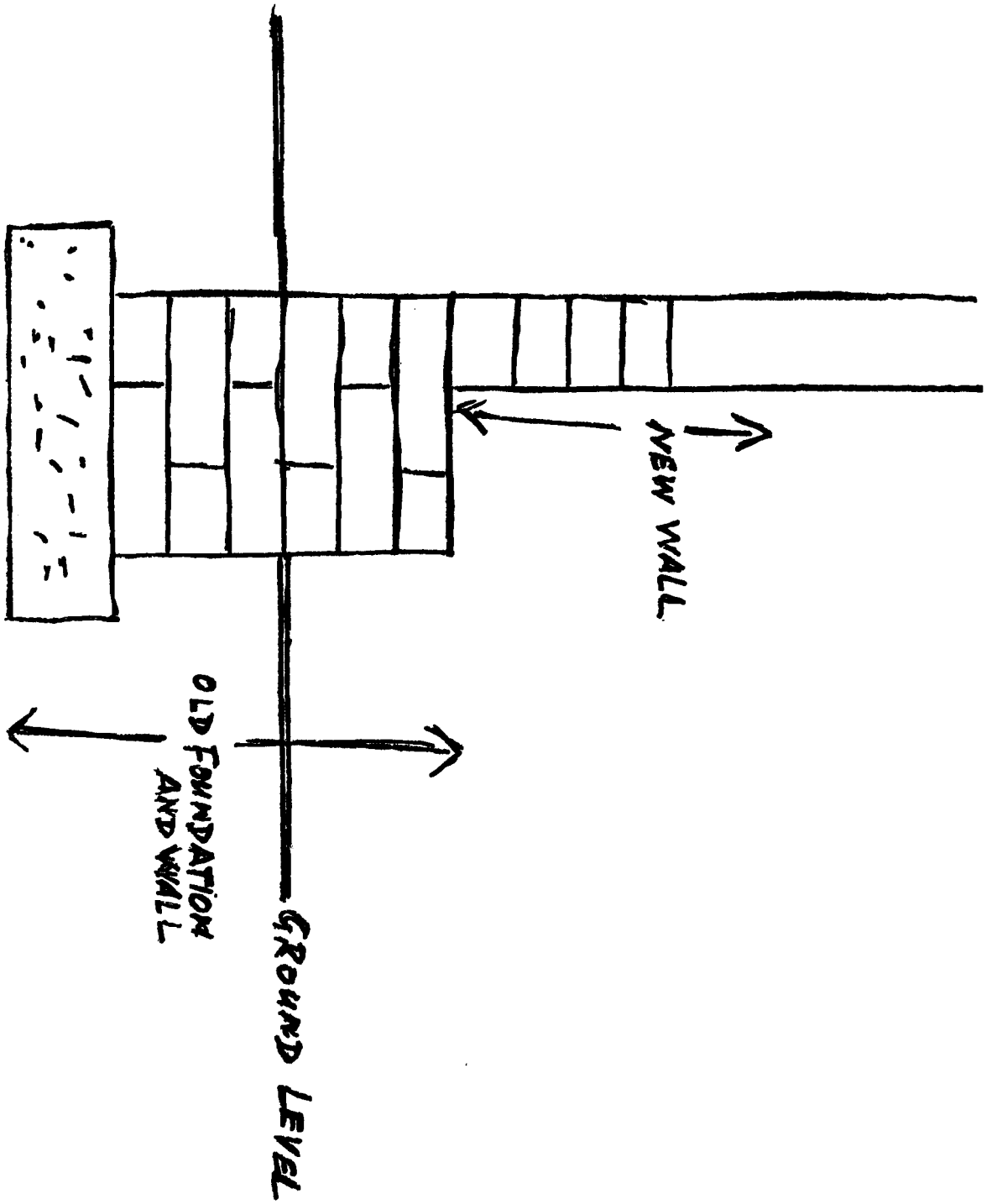


Exhibit No. M.

SALE AND PURCHASE AGREEMENT

Hong Kong Stamp Duty $1.00 3.6.46

Exhibits.

Exhibit No. M. Sale and Purchase Agreement

AGREEMENT made the third day of June 1946 BETWEEN THE HONG KONG LAND INVESTMENT AND AGENCY COMPANY LIMITED whose registered office is situate at Victoria in the Colony of Hong Kong (hereinafter called "the Vendors") of the one part and LI CHOK LAI (李作禮) of No. 4, Kennedy Terrace, Victoria aforesaid Merchant (hereinafter called "the Purchaser") of the other part WHEREBY IT IS AGREED between the parties hereto as follows:—

1. The Vendors shall sell and the Purchaser shall purchase ALL THOSE pieces or parcels of ground situate lying and being at Victoria aforesaid and registered at the Land Office as MARINE LOT No. 23, INLAND LOT NO. 2242, INLAND LOT NO. 2244 and INLAND LOT NO. 2245 Together with all messuages erections and buildings thereon known as Nos. 24, 26, 28, 30, 32 and 34 Hennessy Road, Nos. 46, 48, 50, 52, 54 and 56 Queen's Road East, Nos. 2, 4, 6, 8, 10, 12, 14, 16 and 18 Anton Street and Nos. 1, 3, 5, 7, 9, 11, 13, 15 and 17 Landale Street (these latter messuages Nos. 1, 3, 5, 7, 9, 11, 13, 15 and 17 Landale Street having been demolished) and the appurtenances thereto and all the rights title interest property claim and demand whatsoever of the Vendors therein and thereto for the respective residues of the terms of years under which the said premises are held from the Crown subject to the payment of the rents and the performance of the covenants and conditions reserved and contained in the Crown Leases thereof respectively.

2. The purchase money shall be $800,000:00 (EIGHT HUNDRED THOUSAND DOLLARS) whereof One hundred and sixty thousand dollars ($160,000:00) are this day paid as a deposit and in part payment of the purchase money.

3. The purchase shall be completed at the office of Messrs. P. C. Woo & Co., Solicitors, on or before the third day of July, 1946 when the residue of the purchase money shall be fully paid and the Vendors and all other necessary parties (if any) will execute a proper assurance of the premises sold to the Purchaser free from incumbrances and the Purchaser shall be entitled from the date of completion to the rents and profits or possession of the premises all outgoings up to that date being cleared by the Vendors and all current rents and outgoings shall if necessary be apportioned between the parties and paid on completion.

4. The Vendors shall make a good title to the said premises at their own cost.

5. All costs charges and expenses of and incidental to the preparation and execution of the assignment and the making of the plans and the inspection and examination of documents and muniments of title and of and incidental to obtaining, making and furnishing abstracts of documents and muniments of title and obtaining, making and producing all office attested and other copies of or extracts from records, registers, deeds, wills and other documents of and

Exhibits.

Exhibit No. M. Sale and Purchase Agreement —(*Contd.*)

incidental to the completion of the purchase shall be borne by the Purchaser and the Vendors shall not be required to produce or hand over any deeds other than those in their possession relating exclusively to the property purchased.

6. The property is sold subject to the existing monthly tenancies and to all easements (if any) subsisting therein and no error misstatement or misdescription shall annul the sale nor shall any compensation be allowed in respect thereof.

7. On the completion of the purchase the Purchaser shall be entitled as from the date hereof to the benefit of the existing fire insurance of the said premises hereby agreed to be sold and purchased and shall repay to the Vendors the insurance premium as from the date hereof, save that the Vendors shall be under no obligation to renew the insurance on the expiration thereof before the date of completion, but if the Vendors shall have done so the premium paid for such renewal shall on completion be repaid to the Vendors by the Purchaser.

8. If the Purchaser shall make and insist on any objection or requisition either as to title conveyance or any matter appearing on the title deeds or particulars or conditions or otherwise which the Vendors shall be unable or (on the ground of difficulty delay or expense or on any other reasonable ground) unwilling to remove or comply with or if the title of the Vendors shall be defective the Vendors shall notwithstanding any previous negotiation or obligation be at liberty to annul the sale in which case the Purchaser shall be entitled to the return of the deposit but without interest costs or compensation.

9. If from any cause (other than the default of the Vendors and except as provided by Clause 8 hereof) the sum of $640,000:00 balance of the purchase money shall not be fully paid on or before the third day of July, 1946 the said deposit of $160,000:00 shall be absolutely forfeited to the Vendors who may thereupon resell the said premises either by public auction or private contract and any deficiency in price and all the expenses attending such re-sale or any attempted resale thereof shall be borne by the Purchaser as liquidated damages and any increase at such re-sale shall belong to the Vendors and in this respect time shall be of the essence of the contract.

10. If the Vendors shall (for any cause save as herein provided) fail to complete the said sale in accordance with the terms hereof then the said deposit shall be returned to the Purchaser who shall also be entitled to recover from the Vendors such further damages (if any) over and above the said deposit as the Purchaser may sustain by reason of such failure on the part of the Vendors and it shall not be necessary for the Purchaser to tender an assignment to the Vendors.

11. Nothing in this agreement shall be so construed as to prevent either the Vendors or the Purchaser from bringing an action and obtaining a decree for specific performance either in lieu of the aforesaid damages or in addition thereto as the party bringing such action may have sustained by reason of the neglect or refusal of the other party to complete the said sale or purchase at the time and in manner aforesaid.

12. The costs of and incidental to the preparation and signing of this Agreement shall be paid by the parties in equal shares.

AS WITNESS the hands of the said parties the day and year first above written.

SIGNED by the Vendors by the hand of their Secretary Sd. B. C. Field in the presence of:

FOR THE HONG KONG LAND INVESTMENT & AGENCY COMPANY LIMITED.

Sd. B. C. Field.
Secretary.

Sd. P. C. Woo
Solicitor,
Hong Kong.

SIGNED by the Purchaser in the presence of:

Sd. Li Chok Lai

Sd. P. C. Woo
Solicitor,
Hong Kong.

INTERPRETED by:—

Interpreter to Messrs. P. C. Woo & Co.,
Solicitors, Hong Kong.

RECEIVED the day and year first above written of and from the Purchaser the sum of ONE HUNDRED AND SIXTY THOUSAND DOLLARS being the deposit money above mentioned.

$160,000:00.

WITNESS:

Sd. P. C. Woo

FOR THE HONGKONG LAND INVESTMENT & AGENCY COMPANY LTD.

Sd. B. C. Field
Secretary.

No. 21.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

ORDER OF THE FULL COURT GIVING EXTENSION OF TIME FOR THE PREPARATION AND DESPATCH OF THE RECORD OF PROCEEDINGS.

No. 21 Order of the Full Court giving extension of time for the preparation and despatch of the Record of Proceedings

Dated the 26th day of October 1954

UPON the Motion of the Petitioners and UPON reading the Affidavit of Chan Ying Hung filed herein on the 19th day of October 1954 and the Affidavit of Frederick Zimmern filed herein on the 25th day of October 1954 and UPON hearing Counsel for the Petitioners and Counsel for the Respondent IT IS ORDERED as follows:—

1. That the time for the preparation and despatch of the Record of this Action be extended for a further period of two months from the 30th day of October 1954.

2. That the Respondent's (i.e. Respondent before Privy Council) costs of this application shall follow the event of the appeal to Privy Council.

(L.S.) (Sd.) C. D'Almada e Castro
Registrar.

No. 22.

No. 22 Registrar's Certificate as to the compliance by the Petitioners of the provisions of the Order dated 30th July 1954

REGISTRAR'S CERTIFICATE AS TO THE COMPLIANCE BY THE PETITIONERS OF THE PROVISIONS OF THE ORDER DATED 30TH JULY, 1954.

APPEALS NOS. 7 TO 12 of 1954

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

(On Appeal from Victoria District Court Civil Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953)

BETWEEN: Kai Nam (a firm) and Others — Petitioners (Defendants)

and

Ma Kam Chan — Respondent (Plaintiff)

In pursuance of the Order made herein and dated the 30th day of July 1954 I have been attended by the Solicitors for the Petitioners and I find as follows:—

1. That the said Petitioners have up to the date hereof taken all necessary appointments and done all acts for the purpose of settling the printed Record

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 22 Registrar's Certificate as to the compliance by the Petitioners of the provisions of the Order dated 30th July 1954 —(*Contd.*)

of such appeal and enabling me to certify that the said printed Record has been settled and that the provisions of the said Order dated the 30th day of July 1954 on the part of the Petitioners have been complied with.

2. That the said Petitioners have paid to the Solicitors for the Respondent the taxed costs of the Respondent.

All of which I humbly certify to this Honourable Court.

Dated the 16th day of December, 1954.

(L.S.) (Sd.) C. D'Almada e Castro
Registrar.

No. 23 Certificate of Registrar and the Acting Chief Justice

No. 23.

CERTIFICATE OF REGISTRAR AND THE ACTING CHIEF JUSTICE.

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

APPEALS NOS. 7 TO 12 OF 1954

(On Appeal from Victoria District Court Civil Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953)

BETWEEN: Kai Nam (a firm) and others — Petitioners (Defendants)

and

Ma Kam Chan — Respondent (Plaintiff)

I, CHRISTOPHER PAUL D'ALMADA E CASTRO of Victoria in the Colony of Hong Kong Registrar of The Supreme Court of Hong Kong do hereby certify that the printed sheets hereunto annexed comprising 125 pages contain a true copy of the Petition for leave to appeal by the above-named Petitioners to Her Majesty in Her Privy Council from the Judgment of the Full Court dated the 2nd day of July 1954 allowing the abovementioned Appeals and reversing the Judgments of His Honour District Judge James Wicks dated the 8th day of April 1954 in the above-mentioned Actions and also a true and correct copy of all the various proceedings, decrees and orders had or made in these proceedings so far as the same have relation to the matters of the said Appeals together with a true copy of the reasons of His Honour Mr. Justice Trevor Jack Gould and His Honour Mr. Justice James Reali Gregg for the said Judgment and an index of all the papers and documents in the said proceedings (except documents of merely formal character or otherwise immaterial for the purpose of the said Appeal) transmitted to the Registrar of the Privy Council pursuant to the Judicial Committee Rules 1925.

In faith and testimony whereof I have to this sheet affixed the seal of the said Supreme Court of Hong Kong this 16th day of December 1954.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

(L.S.) (Sd.) C. D'Almada e Castro
Registrar.

No. 23
Certificate of Registrar and the Acting Chief Justice —(*Contd.*)

I, TREVOR JACK GOULD, Acting Chief Justice of the Supreme Court of Hong Kong do hereby certify that CHRISTOPHER PAUL D'ALMADA E CASTRO who has signed the Certificate above written is the Registrar of the Supreme Court of Hong Kong and that he has the custody of the records of the said Supreme Court.

In faith and testimony whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this 16th day of December 1954.

(L.S.) (Sd.) T. J. GOULD
Acting Chief Justice.

No. 24.

No. 24
Notice of Motion for final leave to Appeal to the Privy Council

NOTICE OF MOTION FOR FINAL LEAVE TO APPEAL TO THE PRIVY COUNCIL.

APPEALS NOS. 7 TO 12 OF 1954

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

(On Appeal from Victoria District Court Civil Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953)

BETWEEN: Kai Nam (a firm) and others — Petitioners (Defendants)

and

Ma Kam Chan — Respondent (Plaintiff)

NOTICE OF MOTION

TAKE NOTICE that the Full Court will be moved in Chambers at 9.30 a.m. on Thursday, the 23rd day of December 1954 or so soon thereafter as the Solicitors for the Petitioners can be heard by Messrs. Lau, Chan & Ko, Solicitors for the abovenamed Petitioners for an Order granting final leave to the Petitioners to appeal to Her Majesty in Her Privy Council from the Judgment of this Honourable Court pronounced by the Full Court on the 2nd day of July 1954 allowing the above-mentioned Appeals and reversing the Judgments of His Honour District Judge James Wicks dated the 8th day of April 1954 in the above-mentioned Actions.

Dated the 16th day of December, 1954.

(Sd.) Lau, Chan & Ko
Solicitors for the above-named Petitioners.

To the above-named Respondent and
to Messrs. F. Zimmern & Co. his Solicitors.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 25 Affidavit of Chan Ying Hung in support

No. 25.

AFFIDAVIT OF CHAN YING HUNG IN SUPPORT.

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
APPEALS NOS. 7 TO 12 OF 1954

(On Appeal from Victoria District Court Civil Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953)

BETWEEN: Kai Nam (a firm) and others — Petitioners (Defendants)

and

Ma Kam Chan — Respondent (Plaintiff)

I, CHAN YING HUNG, of First Floor, Prince's Building, Victoria in the Colony of Hong Kong, Solicitor, hereby make oath and say as follows:—

1. I am a partner of Messrs. Lau, Chan & Ko, Solicitors for the above-named Petitioners and as such I have the conduct and management of this Appeal on behalf of the Petitioners.

2. By an Order of this Honourable Court dated the 30th day of July 1954 the Petitioners named herein were granted leave to appeal to Her Majesty in Her Privy Council subject to the conditions therein mentioned.

3. One of the said conditions was that the Petitioners should prepare and despatch the Record of the above-mentioned appeals within a period of 3 months from the date of the said Order.

4. The said period of three months was extended by a further Order of this Honourable Court made on the 26th day of October 1954 for a further period of two months from the 30th day of October 1954.

5. All the said conditions have been duly performed by the Petitioners and I am informed by the Registrar of this Honourable Court and verily believe that as soon as the final Order for leave to Appeal to Her Majesty in Her Privy Council is obtained the said Record will be despatched from Hong Kong.

AND lastly the contents of this my Affidavit are true.

SWORN at the Court of Justice, Victoria, Hong Kong, this 16th day of December, 1954. } (Sd.) Chan Ying Hung

Before me,

(Sd.) C. D'Almada e Castro
A Commissioner &c.

No. 26.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 26 Order of the Full Court giving final leave to Appeal to the Privy Council

ORDER OF THE FULL COURT GIVING FINAL LEAVE TO APPEAL TO THE PRIVY COUNCIL.

APPEALS Action Nos. 7 to 12 of 1954

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

(On Appeal from Victoria District Court Civil Actions Nos. 843, 845, 846, 848, 849 and 850 of 1953)

BETWEEN: Kai Nam (a firm) & Others — Petitioners (Defendants)

and

Ma Kam Chan — Respondent (Plaintiff)

Dated the 23rd day of December 1954

UPON the Motion of the Petitioners and UPON reading the Petition of the Petitioners filed herein on the 16th day of July 1954 for leave to Appeal to Her Majesty in Her Privy Council from the Judgment of the Full Court dated the 2nd day of July 1954 allowing the above Appeals and reversing the Judgments of His Honour District Judge James Wicks dated the 8th day of April 1954 in the above-mentioned Actions and Upon reading the Order herein dated the 30th day of July 1954 made on the said Petition and the Order dated the 26th day of October 1954 extending the period of three months provided for in the said Order of the 30th day of July 1954 and the two several Certificates of the Registrar of this Court both dated the 16th day of December 1954 and Upon hearing the Solicitors for the Petitioners (the Respondent having been duly served with a Notice of Motion but not appearing) This Court Doth Order that the final leave to Appeal prayed for be granted and that the costs of this motion be costs in the Appeal.

(L.S.)

(Sd.) C. D'Almada e Castro,
Registrar.

No. ..... of 195....

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

BETWEEN

KAI NAM (a firm) AND FIVE OTHERS - - - - - *Appellants (Defendants)*

AND

MA KAM CHAN - - - - - - - - - - - - - - *Respondent (Plaintiff)*

RECORD OF PROCEEDINGS

LAU, CHAN & KO,
Solicitors for the Appellants (Defendants)

F. ZIMMERN & CO.,
Solicitors for the Respondent (Plaintiff)