Privy Council Appeal No. 7 of 1955

Kai Nam (a firm) - - - - - - - - - *Appellants*

v.

Ma Kam Chan - - - - - - - - - - *Respondent*

and connected Appeals (consolidated)

FROM

THE COURT OF APPEAL HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1956

Present at the Hearing:

LORD OAKSEY
LORD TUCKER
LORD COHEN
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA

[*Delivered by* LORD COHEN]

The appellants were respectively tenants of premises known as No. 1, No. 5, No. 7, No. 13, No. 15 and No. 17 Landale Street, Victoria in the Colony of Hong Kong. The respondent was the landlord of such premises. On the 19th October, 1953, the respondent gave notice to each of the appellants terminating his contractual monthly tenancy then subsisting. On the 16th December, 1953, the respondent commenced proceedings against each of the appellants claiming possession and mesne profits from the 1st December, 1953. The six actions were heard together by District Judge Wicks on the 24th December, 1953. The appellants relied on the provisions of the Landlord and Tenant Ordinance (No. 25 of 1947) (hereinafter referred to as "the Ordinance"). The respondent contended that each of the premises occupied by the appellants was excluded from the operation of the Ordinance as being "an entirely new building" within the meaning of section 3 (1) (*a*) of the Ordinance. The appellants argued that it was not open to the respondent to advance this contention since he was estopped from doing so by serving notices of increase of rent under the Ordinance on which the appellants had acted. The District Judge rejected this argument, but he also rejected the respondent's contention that each of the buildings was "an entirely new building". Accordingly he dismissed each of the actions with costs.

The respondent appealed to the Supreme Court of Hong Kong. The appeals were heard together and on the 2nd July, 1954, judgment was delivered allowing the appeal, the Court holding that each of the buildings was "an entirely new building" within the meaning of section 3 (1) (*a*) of the Ordinance. Gould, Acting C.J., who delivered the leading judgment did not deal expressly with the issue of estoppel, but assuming it to have been raised before the Supreme Court, they must be taken to have rejected it since they would not otherwise have allowed the appeal.

From this decision the appellants appealed to this Board, the appeals being consolidated. Both questions which were discussed by the District Judge were ventilated before their Lordships. It will be convenient first to dispose of the question of estoppel.

On this point their Lordships agree with the Hong Kong Courts that the respondent is not estopped by having served notices of increase of rent purporting to be made under the Ordinance and receiving such increased rent. It is sufficient to observe that if the documents relied on can be regarded as containing representations, such representations are representations of law, not of fact, and cannot found an estoppel. See *Territorial & Auxiliary Forces Association of the County of London* v. *Nichols* [1949] 1 K.B. 35.

Their Lordships therefore turn to the more difficult question whether the premises occupied by the appellants can properly be held to be entirely new buildings within the meaning of section 3 (1) (*a*) of the Ordinance. That section provides as follows :—

> " This Ordinance shall not apply to—
>
> (*a*) any entirely new building in respect of which the written permit of the building authority to occupy the same shall have been granted under the provisions of Section 137 of the Building Ordinance after 16th day of August, 1945 ; . . ."

It will be convenient at this point to refer to certain other provisions of the Ordinance to which reference was made in one or other of the Judgments in the Hong Kong Courts.

Section 3 (1) (*b*) exempts from the provisions of the Landlord and Tenant Ordinance premises continuously untenanted since the 16th August, 1945, which have been rendered habitable at the expense of the landlord since the 23rd May, 1947, by repairs " wholly necessary for rendering the premises reasonably habitable " and at a cost of not less than seven times the standard rent for one year.

Section 3 (1) (*c*) exempts from the operation of the Ordinance business premises let for a term of not less than 5 years.

Section 13 saves the validity of new agreements to vacate premises and section 18 enables a tenancy tribunal established pursuant to the Ordinance to give effect to agreements the validity of which is saved under section 13.

Section 31 empowers the Governor in Council by order to exclude any premises or class of premises from the operation of the Ordinace.

Their Lordships observe that the Ordinance contains no definition of " building " or of " new building " or of " entirely new building ". It contains however more than one reference to the Buildings Ordinance (No. 18 of 1935). In particular section 3 (1) (*a*) refers to section 137 of the Buildings Ordinance. Subsection (1) of that section is in the following terms :—

> " 137. (1) 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."

Section 2 of the Buildings Ordinance contains the following definitions:

> " In this Ordinance ' 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 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."

"'building' includes 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."

These are the statutory provisions which have to be considered in relation to the facts of the present case. Those facts are not in dispute and are in their Lordships' opinion accurately summed up by Gould, Acting C.J., as follows:—

"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."

The only other fact to which it is necessary to refer is that an occupation certificate in respect of the new construction was issued on the 7th October, 1947, under the provisions of section 137 of the Buildings Ordinance.

On those facts can the premises in question be said to be entirely new buildings? The District Judge answered this question in the negative. He appears to have relied to some extent on the definition of "building" in section 2 of the Buildings Ordinance, but their Lordships agree with the Supreme Court of Hong Kong that this definition is in such wide terms that it is not of any assistance in the solution of the problem. Their Lordships also agree with the Supreme Court that although an "entirely new building" for the purpose of the Ordinance must necessarily fall within the class of buildings which the Building Ordinance regards as a new building, it is obvious from the definition of new building in the Buildings Ordinance that every new building within that definition is not necessarily an entirely new building for the purposes of the Ordinance. Their Lordships agree with Gould, Acting C.J., that the word "entirely" was probably included in section 3 (1) (*a*) of the Ordinance to make it quite clear that the definition of "new building" in the Buildings Ordinance did not apply. For these reasons their Lordships consider that the meaning of the phrase "entirely new building" must be ascertained from the provisions of the Ordinance.

The District Judge held that since the existing structures included almost the whole of the foundations and concrete floors and an average of three bricks above ground level, the word " entirely " made it impossible to say that the new structure was an entirely new building. He went on to refer to sections 3 (1) (*b*), 3 (1) (*c*), 13 and 18 (1) (*c*) and 31 of the Ordinance and said that the opportunities offered by those sections afforded sufficient opportunity of protection to the respondent and made the result at which he arrived reasonable.

Their Lordships are unable to agree. Like the Supreme Court they think that bearing in mind the obvious purpose of section 3 which was to encourage new building, it would be strange if a big gap was left unfilled between rebuilding, which would bring the new structure within section 3 (1) (*a*), and extensive repairs which come within section 3 (1) (*b*). In the case of temporary structures such as those occupied by the appellants, that gap could not be satisfactorily filled by section 3 (1) (*c*).

In their Lordships' opinion the District Judge laid too much stress on the word " entirely " and paid insufficient attention to the words " new building " and to the distinction between a building and the materials of which it is composed. They agree with Gould, Acting C.J., that " where the damage has been so extensive that repair is impossible, when there is nothing left which could possibly be called a building, then surely the existence of that building as such is terminated " and 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 " as the old one.

In the course of his judgment Gould, Acting C.J., called attention to the absurdity that would arise on the construction adopted by the District Judge if all that survived of the old building was a party wall. The erection on the site of a newly built house which used the party wall could not be described as the execution of repairs and therefore could not come within section 3 (1) (*b*). Yet on the basis of the argument addressed to this Board by Lord Hailsham and accepted by the District Judge section 3 (1) (*a*) would not apply to the new house.

Their Lordships agree with the Supreme Court that the words " entirely new " in section 3 (1) (*a*) are used in relation to the building and not to the materials of which it is composed and that the correct test to be applied is whether the old building was so far beyond repair that it could no longer be said to exist as a building. This construction does not do violence to the meaning of the phrase under consideration and avoids such absurdities as their Lordships have mentioned.

The application of this test to the facts of a particular case must always involve a question of degree. On the facts of the present case their Lordships agree with the Supreme Court that the structures occupied by the appellants are entirely new buildings within the meaning of section 3 (1) (*a*) of the Ordinance.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

(39631) Wt. 8064—69 100 3/56 D.L.

In the Privy Council

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v.

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[DELIVERED BY LORD COHEN]

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