

8/85

Appeal No. 35 of 1984

In the Privy Council

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

WINFAT ENTERPRISE (HK) COMPANY LIMITED **Appellant**
(Plaintiff)

AND

ATTORNEY GENERAL **Respondent**
(Defendant)

CASE FOR THE APPELLANT

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Solicitors for the Appellants

whole districts known as Demarcation Districts and was drafted in common form, and came to be known as the "Block Crown Lease".

2. These proceedings arise from a purported resumption of the land by the Hong Kong Government, the validity of which is in issue in these proceedings. The circumstances were as follows.

p.69,1.12- 3. In 1977, the Appellant wanted to develop the
p.70,1.19. land for housing. It had in mind a high quality, 10
comparatively low-rise form of development for the
managerial and executive class working in the nearby
new towns of Tuen Mun and Yuen Long. The Government
refused to permit the development of the land on the
grounds that the land was not allocated for housing,
that it should remain in agricultural use and that
basic services were not available. After more than
one attempt to get approval, the Appellant settled
for a short term waiver of the lease for open

p.70,1.44- storage, which was granted, the level of the land was
p.71,1.6. raised at considerable expense and it was let for 20
storage. Not long after that had taken place, the
Government, without any prior notification and
without affording the Appellant any opportunity to
make representations, published a Notice of
Resumption in the Gazette on 7th October ¹⁹⁸¹ ~~1984~~ under
the Crown Lands Resumption Ordinance, Chapter 124 of
the Laws of Hong Kong.

p.71,11.27- 4. Naturally, the resumption in itself is a
35. grievance to the Appellant, but to compound matters,
having persistently refused to allow the Appellant to
develop the land for housing, the Government itself 30
resumed the land for housing. The land has now been
developed for that purpose, in fact at a greater
density than was envisaged in the plans proposed by
the Appellant.

p.73,11.2- 5. Furthermore, the compensation payable under
7. the Crown Lands Resumption Ordinance is far below
what the Appellant is advised is the true market
value of the land. The market takes into account the
possibility of obtaining, on payment of a premium, a 40
modification of the Crown Lease to allow building on
the land. Modifications are frequently applied for
by owners of land and regularly granted by the
Government and indeed account for the extensive

development which has taken place in the New Territories during the past decade. The Crown Lands Resumption Ordinance in Hong Kong originally awarded compensation on a basis which reflected such development potential. However, in 1922, it was amended, unlawfully in the Appellant's submission, (inter alia) to exclude any value attributable to the possibility of modifying the lease. Thus, since the lease is restricted to non-building use, the compensation in the Lands Tribunal is only a fraction of the market value. Hence the Appellant is aggrieved in three ways: p.110,11.23-33. p.287,11.18-29. p.317,1.15-p.318,1.1.

- 1) by the loss of its land;
- 2) by the fact that the resumption is for the very purpose for which it had been refused approval; and
- 3) by the fact that the compensation under the Crown Lands Resumption Ordinance is much less than the true market value of the land.

6. The Appellant's grievance is not an isolated case. Ever since 1922, when the Crown Lands Resumption Ordinance was amended so that market price is not paid by the Government when resuming land in the New Territories, New Territories landowners have nursed a sense of grievance which continues to the present day. In 1925, a group of landowners in the New Territories petitioned the then Secretary of State for the Colonies making, inter alia, the following points :- p.110,11.34-40

(a)" that by the terms of the said Convention, it was understood that there would be no expropriation or expulsion of the inhabitants of the New Territories, and that if land was required for public offices, fortifications or the like official purposes, it should be bought at a fair and reasonable price"; p.327,11.16-19.

(b)" that the Block Crown Lease contained a provision requiring a licence at such rent as is specified therein to build on land demised as agricultural land, and that since p.329,1.41-p.330,1.9.

there was no prior restriction as to user in the tenure held from China, it was clear that the object of such provision was to enable the Government to charge a higher rent on land which is built on, rather than preventing landowners from using their land for building";

- p.330,11.9-14. (c)" that the Government had acted against the foregoing object by refusing arbitrarily to give licences"; 10
- p.330,11.14-31. (d)" that the Crown Lands Resumption Ordinance was amended in 1922 disallowing from compensation any use not in accordance with the Crown Lease, and any expectancy or any probability of the grant or renewal or continuance by the Crown or by any person of any Licence permission or permit";
- (e)" that land resumption compensation thus fell far below true market price";
- p.330,1.40. (f)" that the foregoing together, represented expropriation in breach of the said Convention"; and 20
- p.332,11.24-26. (g)" that the whole system in addition to being unjust to individuals, inconsistent with the British Government's solemn engagements, and damaging to British prestige was, it was submitted, entirely unnecessary".
- pp.333-347. 7. The then Secretary of State for the Colonies in London thought there was substance in this complaint and recommended that an inquiry should be held in Hong Kong, but no such inquiry took place. 30
8. The 1922 Crown Lands Resumption (Amendment) Ordinance remains in the statute books and continues to present a source of grievance not only to the Appellant, but to landowners in general in the New Territories. The views of the 1925 petitioners remain valid to this day.
9. In recognition of the validity of this grievance and in an attempt to ameliorate it, the

Hong Kong Government has in recent years introduced a system of ex-gratia compensation which goes some way though not fully towards paying a true market price. The Appellant was offered such ex-gratia compensation which represented roughly two-thirds of the market value provided it handed the land back free of incumbrance. As the Government well knew at the time, the Appellant was unable to do that since it had already let the resumed land on a lease which the Government had authorised and which was registered in the Land Office.

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p.71,11.20-27.

Historical Background

10. Most land (other than land used for public purposes) was in late nineteenth century China held on what is called "common tenure". Such land was an interest in perpetuity with no limitations on use, but was subject to land tax. This was the situation in the New Territories when Britain assumed jurisdiction over the territory on the 8th April 1899.

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p.102,1.37-
p.103,1.2.

11. Sovereignty and dominion over the New Territories was vested in Britain by virtue of the Convention of Peking signed on the 9th June 1898 and subsequently ratified. The material part of the Convention is as follows :

"Whereas it has for many years past been recognized that an extension of Hong Kong territory is necessary for the proper defence and protection of the Colony, it has now been agreed between the governments of Great Britain and China that the limits of British territory shall be enlarged under lease to the extent indicated generally on the annexed map. The exact boundaries shall be hereafter fixed when proper surveys have been made by officials appointed by the two governments. The term of this lease shall be 99 years..... It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension and that if land is required for public offices,

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p.113,11.5-27.

fortifications or the like official purposes it shall be bought at a fair price."

12. By an Order-in-Council, made on the 20th October 1898 reciting inter alia that by the said Convention the limits of the Colony of Hong Kong were to be extended in the manner therein described, it was ordered inter alia as follows :

p.11,11.2-6.
p.37,11.29-32.

"1. The territories within the limits and for the term described in the said Convention shall be and the same are hereby declared to be part and parcel of Her Majesty's Colony of Hongkong in like manner and for all intents and purposes as if they had originally formed part of the said Colony.

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p.11,11.7-10.
p.37,11.33-35.

2. It shall be competent for the Governor of Hongkong, by and with the advice and consent of the Legislative Council of the said Colony, to make laws for the peace, order and good government of the said territories as part of the Colony.

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p.11,11.11-16.
p.37,1.36-
p.38,1.3.

3. From a date to be fixed by proclamation of the Governor of Hong Kong all laws and ordinances, which shall at such date be in force in the Colony of Hongkong, shall take effect in the said territories and shall remain in force therein until the same shall have been altered or repealed by Her Majesty or by the Governor of Hongkong, by and with the advice or consent of the Legislative Council."

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13. The Imperial Chinese Viceroy of the Two Kwongs and the Governor of Kwangtung Province on the 4th April 1899 issued a Proclamation [(which was subsequently published in the Hongkong Government Gazette and laid on the table in the Legislative Council by the then Colonial Secretary)] addressed in particular to the inhabitants of San On County (by which name the New Territories was then known) to the effect that it had been agreed with British Officials that :

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p.147,1.33. (1) The people (of the New Territories) are to be treated with exceptional kindness.

- (2) There can be no forced sale of houses and lands. p.147,l.34.
- (3) The graves in the leased territories are never to be removed. p.148,l.1.
- (4) Local customs and habits are to remain unchanged according to the wishes of the inhabitants. p.148,ll.2-3.

10 14. On the 8th April 1899, the Governor, expressly pursuant to the terms of the Order-in-Council of the 20th October 1898, made a proclamation in English under the public seal of the Colony fixing the 17th April following as the day when all of Hong Kong's laws and ordinances should take effect in the New Territories. pp.129-130.

20 15. On the 9th April 1898, the Governor made a Proclamation in Chinese under his Seal and addressed to the inhabitants of the New Territories, wherein he proclaimed inter alia that "(You) must know that all land situated within San On County is land which has been leased by Her Majesty the Queen of Great Britain from His Imperial Majesty the Emperor of China as an extension of the boundary for future commerce, mutual trade, mutual enjoyment and enduring peace. All landed property which is truly yours will continue to be yours and managed by you. Such of your good customs which are beneficial to the people will continue as before and will not be changed If land is required by the country (government) it may be acquired and its full value given to you." p.363,ll.25-32+ll.45-47.

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16. On the 12th July 1899, the governor made a further Proclamation in Chinese under his Seal and addressed to the inhabitants of the New Territories in which he referred to a survey of landholdings in the territory and proclaimed, inter alia, that "when the survey has been completed, permanent certificates of title will be issued." p.140,ll.19-20.

40 17. A Bill entitled "The New Territories Land Court Bill" was gazetted on the 25th November 1899. Among the "Objects and Reasons", it was stated :

"The chief aim of this Bill is to provide p.156,ll.18-27.

owners and occupiers of land in the New Territories with a tribunal to which they can appeal, without incurring the expense of resorting to the Supreme Court, and to arrange amicably questions of disputed title and land and rent disputes generally.

It is proposed by this Bill to substitute a certificate of title for a Crown Lease, because it has been ascertained that the ordinary holding of land in the New Territories is a tenancy in perpetuity, and this government could not, under the terms of the Convention with China, grant a lease for more than 99 years from the date of the Convention." 10

18. The Bill contained, among others, the following clauses :

p.155,11.5-31.

"10. The Court may allow or disallow any claim to land or allow the same as to part of the claim or subject to such conditions as it may think fit.

11. In cases where the Court allows the claim or part of the claim a title or certificate of title in such terms as the Court shall order shall be admitted or granted by the Governor within such time as may be convenient. 20

12. After the passing of this Ordinance occupation by any person without licence, or certificate of title, or without any grant of any estate or interest from the Crown, of land a certificate of title for which has been disallowed by the Court or for which no claim has been made under this Ordinance shall be deemed to be a trespass, and the person so occupying without having such licence, certificate of title or grant as aforesaid may be dealt with as a trespasser accordingly. 30

14. Certificates of title to be granted under this Ordinance shall be in such form or forms as may from time to time be directed by the Court, and shall be signed by the Registrar and countersigned by the Governor. " 40

19. In the Legislative Council debate on the New Territories Land Court Bill, the Attorney-General said, inter alia, that :

"It must be clearly understood that I, as Attorney-General of this colony, maintain, in spite of any suggestions which may be made by any other people, that the whole of the land in the New Territories belongs without a doubt to Her Majesty, subject to the terms of the Convention. It belongs to Her Majesty during the term of 99 years mentioned in the Convention, and during that term she has sole jurisdiction in the New Territories. It is so stipulated in the Convention. Sole jurisdiction means that nobody also has any jurisdiction - Emperor of China or anybody else. Consequently during that 99 years there can be no title held except from the Crown. If a person had a title from the Emperor of China at the time the territory was taken over, the Land Court would recognise that title and recommend that a suitable title by Her Majesty should be given. The kind of title would be for your Excellency to decide."

p.165,l.49-
p.166,l.10.

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20. The Land Court (New Territories) Ordinance was enacted as Ordinance No.8 of 1900 on the 28th March 1900. The three most relevant Sections are :

"13. The Court may allow or disallow any claim in relation to land or allow the same as to part thereof, or for such period or at such rent and on such other conditions as may appear to the Court to be equitable and just."

p.174,11.1-
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14. In cases where the Court allows the claim or part of the claim, such claim and its allowance shall be reported by the Registrar to the Governor in due course in order that a title appropriate to the case may be granted. If, however, in any particular instance, the Governor deems it inexpedient, having regard to the public interests of the Colony, that such title should be granted, the matter shall be referred back to the Court to decide what compensation shall be

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paid to the claimant or claimants, and the amount awarded by the Court shall be paid by the Government to such person or persons as the Court may direct. The decision of the Court as to the amount of compensation shall be final.

15. All land in the New Territories is hereby declared to be the property of the Crown, during the term specified in the Convention of the 9th day of June, 1898, hereinbefore referred to, and all persons in occupation of any such land, after such date as may be fixed by the Governor by notification in the Gazette, either generally or in respect to any specified place, village, or district, shall be deemed trespassers as against the Crown, unless such occupation is authorized by grant from the Crown or by other title allowed by the Court under this Ordinance, or by license from the Governor or from some Government officer having authority to grant such license, or unless a claim to be entitled to such occupation has been duly presented to the Court and has not been withdrawn or heard and disallowed.

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17. Titles to be granted under this Ordinance shall be in such form or forms as may from time to time be directed by the Governor. "

21. The then Attorney-General in his report to the Secretary of State gave his opinion that Ordinance No.8 of 1900 was not contrary to the Governor's Instructions. In the "Objects and Reasons" part of the Report, he made the following, among other, points:

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p.201,11.1-
14.

(1) "It was understood by the Convention that there would be no expropriation or expulsion of the inhabitants and it, therefore, became necessary to be constituted some tribunal which should have authority to deal with the numerous claims in relation to the land in the new territories which were certain to be made on behalf of those inhabitants, as well as by others. It seems clear that for the term mentioned in the Convention, namely 99 years, (from I presume the 1st July 1898, when the Convention came into force) the

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land in the New Territories belongs to the Crown, subject to the allowance of bona fide titles existing when the new Convention came into force."

(2) "Section 13 will give an opportunity of dealing fairly with people who have squatted on land without any title and improved it and are willing to pay a small rent." p.203,11.9-12.

10 (3) "Section 14. I think it important that all the inhabitants should feel that during the 99 years, they are holding from the Crown and not from the Emperor of China or the Chinese Authorities, but this clause leaves the Governor to settle the appropriate form of title. p.203,1.13-p.204,1.10.

20 Some Chinese may claim perpetual titles but I have grave doubts whether these titles would have been recognised in China as lasting any longer than during such time as the rent was duly paid and the land cultivated or occupied. [Note by Appellants. It is common ground in these proceedings that this last comment (i.e. "the land cultivated or occupied ") was incorrect.]

30 The latter part of Section 14 (compare with section 12 of the Squatters Ordinance) is intended to meet such cases as for instance, a man producing a sort of title from the Sun On Magistrate giving him vague fishery and foreshore rights for which his grand-father, as he alleges, paid some trifling sum. The use he makes of his claim is to "squeeze" the poor fishermen if they fish near his preserves and "squeeze" them again if they dry their nets on what he would call his foreshore. He alleges that his rights go to the top of the hill and I noticed that, in December 1899, he appears to have sold his rights to two Europeans in Hongkong. Of course this will develop shortly into a claim to land and also large and valuable foreshore rights put forward by Europeans. 40 The man in question not long ago let out his

right for \$9 a year. It would certainly be to the public interest to clear the foreshore and waters of claims of this kind even if trifling compensation had to be given."

p.204,11.11-
16.

- (4) "Section 15. When, in any District the Land Court has got in and decided on all claims, persons occupying without any title may fairly be treated as trespassers from such date as may be notified by the Governor. Section 16 gives a right of appeal when the value of the claim is over \$5,000."

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22. A member of the Legislative Council, the Honourable Mr. T. H. Whitehead, protested against this Ordinance and sent a Petition to the Secretary of State for the Colonies in which he made the following among other points :

p.206,11.1-
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- (a) "The original Bill was framed for the purpose of enabling existing titles to be verified and authenticated by certificate from the Crown, and for preventing occupation of land after refusal of such certificate without a fresh grant from the Crown . (See section 12.) The amended Bill by section 15 confiscates to the Crown all the land in the New Territories, disregards all former titles, however old or well founded, and declares all occupants of land in the New Territories trespassers from a date to be hereafter defined by the Governor unless they obtain fresh titles from the Crown.

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p.206,11.11-
16.

- (b) "The original Bill was in accordance with the provisions of Article 6 of the Convention of the 9th June, 1898, for the cession of the New Territories. The amended Bill disregards and sets aside the provision of the said Convention against expropriation or expulsion of the inhabitants of the district included in the cession and declares the whole soil to be the property of the Crown."

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23. The then Attorney-General in a Memorandum to the Secretary of State replied to the above points as follows:

"As regards (c). In Hongkong, land is held from the Crown. The Queen has sole jurisdiction for 99 years in the New Territories, which for that term "were", by the Queen's Order in Council, "declared" "to be part and parcel of Her Majesty's Colony" of Hongkong in like manner and for all intents and purposes, as if they had originally formed "part of the said Colony". (See Order. No.10 of 1899.) Now although the Land Court will not expropriate or dispossess persons having, at the time the New Territories were ceded, bona fide titles, yet they must have these titles verified, and, during the 99 years, all persons must be made to understand they hold from the Queen and not from the Chinese Government. It is to the Queen, rent must be paid, not to the Emperor of China; and my own view is that, if a person claiming to be a perpetual lessee at a rent to the Chinese Government at the time of the Convention, has his claim allowed, a Lease for the 99 years the land belongs to the Queen, would be the appropriate title. In theory, when the 99 years have expired and the land reverts to China (if it ever does) the descendants of the "so called" perpetual Lessees can fall back on the title they possessed prior to the Convention.

What Mr. Whitehead apparently would like would be a Certificate that the claimant has "a title from the Chinese Government". If not, I do not understand his meaning - Clause 16 of the Bill, as passed, appears to me in no way to disregard the Convention."

24. On the passage of Ordinance No.8 of 1900, subsequently repealed and re-enacted in substantially the same form as Ordinance No.18 of 1900, members of the Land Court were appointed and began work. The Land Court in considering claims used Chinese Law and

were therefore familiar with "common tenure" which formed the bulk of landholdings. As to the use of Chinese Law by the Land Court, see Wesley-Smith, "Unequal Treaty", p.95, and the judgment of the Supreme Court on hearing an appeal from the Land Court by Ho Lap Pun, reported in the South China Morning Post of the 5th January, 1904.

pp.247-262. 25. In 1902, the Hong Kong Government introduced the New Territories Titles Bill which was enacted as Ordinance No.47 of 1902. This provided for the titles of "customary land holders" to be put in a public register. The rights of the "customary land holder" as defined by Section 4 of the New Territories Titles Ordinance were consonant with the concept of "common tenure" in that the "customary land holder" was "deemed to have a permanent heritable and transferable right of use and occupancy in his customary land" subject only to certain responsibilities including payment of tax. It should be noted that none of these responsibilities included a limitation as to user or the need to apply for a building licence. The "Objects and Reasons" of the Bill set out the following, among other, matters. 10

p.262, ll.12-19. "It is desirable to provide a system of Land Tenure for the New Territories (exclusive of New Kowloon). In the rest of the Territories there are some quarter of a million holdings often of a very low value. The transfer of these and their transmission by inheritance is governed by custom of patriarchal origin. Society in general in the New Territories is not suited for the introduction of English Real Property Law. 20

Every original holder of land is to be treated as a customary landholder."

26. The New Territories Titles Ordinance was repealed by Ordinance No.21 of 1903. In the "Objects and Reasons" of the repeal Bill, the following explanation was given :

p.281, l.22- p.282, l.3. "The conflict with the Land Court Ordinance arises from the interpretation given in the New Territories Titles Ordinance to the 40

expression "customary landholder".

The effect of that interpretation may be to override section 14 of the Land Court Ordinance and to confer "title" in a manner never intended and impossible to permit.

10 It was never intended and cannot be permitted that title to land in the New Territories should be acquired otherwise than by grant from the Crown as in the case of land in the other parts of the Colony but it is open to question whether the effect of the interpretation clause of the New Territories Titles Ordinance is not to vest in the Land Court the power to confer title independently of grant from the Crown. It was never intended that the Land Court should have power to do more than investigate claims to land and report thereon to the Governor. It was always intended and that intention still prevails that the ultimate right to grant or to refuse a title should rest with the Governor - an intention which clearly appears in section 14 of the Land Court Ordinance, 1900.

No inconvenience will thereby be caused to anyone because no land has yet been brought under the operation of the Ordinance."

27. It may be noted that the motivation behind the repeal was the possibility of conflict between the two Ordinances and not any doubt about the rights of a "customary land holder" which was consonant with the concept of "common tenure" and which would have been the guiding principle in the determination of claims by the Land Court.

28. The Land Court completed its work in 1905, when, upon submission of their report, the Crown granted Block Crown Leases in common form to landholders whose claims had been allowed. None of the Block Crown Leases were executed by the Lessees. The Appellants submit that these Leases undoubtedly

represented a breach of the Convention in that :

(a) They did not grant the full term of 99 years.

(b) They contained restrictions as to user which were not present in "common tenure".

29. The final breach of the Convention occurred in 1922 when the Crown Lands Resumption Ordinance was amended such that compensation payable on resumption was far below market price.

Declarations sought by Appellant (Plaintiff)

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30. By an Originating Summons dated the 1st June 1982, the Appellant as Plaintiff claimed against the Respondent for ten declarations which, in their further re-amended form, read as follows:

p.2,11.9-14.

"(1) A declaration that the resumed land and the severed land (hereinafter collectively referred to as "the said lands") were prior to the Convention dated the 9th day of June 1898 between Her Majesty and His Imperial Majesty the Emperor of China, held by the Plaintiff's predecessors-in-title in perpetuity and without restrictions as to user thereof. (such rights in property shall hereinafter be referred to as "the said pre-Treaty rights").

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p.2,11.15-24.

(2) A declaration that Section 15 of the Land Court (New Territories) Ordinance 1900 (Ordinance No.8 of 1900), Section 15 of the New Territories Land Court Ordinance 1900 (Ordinance No.18 of 1900), Section 14 of the New Territories Regulation Ordinance 1910 and Section 8 of the New Territories Ordinance, Chapter 97, Laws of Hong Kong are void as being repugnant to and/or ultra vires of Her Majesty's Order-in-Council providing for the administration of the New Territories dated the 20th October 1898 and/or the Letters Patent and/or the Royal Instructions, insofar as such Ordinances purported to vest the said pre-Treaty rights in the Crown in perpetuity

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or at all.

(3) Accordingly, a declaration that the Plaintiff is vested with the said pre-Treaty rights and is entitled to the possession of the said Lands. p.2,11.25-26.

10 (4) Further, a declaration that the purported Lease granted by the Crown to the Plaintiff's predecessors-in-title on 24th January 1905 is void save and except, and only to the extent, that such Lease evidences the ownership of the said lands by the Plaintiff's predecessors-in-title on or before 24th January 1905. p.2,11.27-31.

(5) Further, a declaration: p.2,11.32-39.

(a) That the Crown Lands Resumption Ordinance, Chapter 124, Laws of Hong Kong, has no application to the said lands.

20 (b) That Government Notice No.3080 dated 7th October 1981 and the decision of the Governor-in-Council referred to therein purporting to resume the said lands, are void and of no effect.

(c) That the occupation of the said lands by the Crown and/or its agents, licencees or tenants, is unlawful.

30 (6) Further and in the alternative to (1) to (5) above, Section 12(b) and 12(c) of the Crown Lands Resumption Ordinance Chapter 124 Laws of Hong Kong are void as being repugnant to and/or ultra vires of Her Majesty's Order-in-Council providing for the administration of the New Territories dated 20th October 1898 and/or the Letters Patent and/or the Royal Instructions. p.2,1.40-p.3,1.2.

(7) Alternatively to (1) to (6) above, by a true and proper construction of Sections 13 and 14 of the Land Court (New Territories) Ordinance 1900 (Ordinance No.8 of 1900) and Sections 13 and 14 of the New Territories Land Court Ordinance 1900 (Ordinance No.18 of 1900) and by two Proclamations of the Governor dated 9th April and p.3,11.3-18.

12th July 1899, a declaration:

(a) That the Land Court, in allowing claims under Section 13 of the aforesaid Ordinances had no power to impose restrictions as to user of the said lands or grant a term of less than 99 years.

(b) That the Crown in granting a title under Section 14 of the aforesaid Ordinances had no power to impose restrictions as to user of the said lands or grant a term of less than 99 years.

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(c) That accordingly, the Lease granted by the Crown to the Plaintiff's predecessors-in-title on 24th January 1905 is void insofar as it purported to restrict user of the said lands and grant a term of less than 99 years.

p.3,11.19-28.

(8) Further and in the alternative to (7) above, a declaration that Section 8 of the New Territories Ordinance, Chapter 97 Laws of Hong Kong, is valid only to the extent of 99 years from the 1st day of July 1898, and accordingly:

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(a) The Plaintiff is entitled to possession of the said lands on the expiry of 99 years from the 1st day of July 1898, and

(b) Section 5 of the Crown Lands Resumption Ordinance, Chapter 124, Laws of Hong Kong is of no effect insofar as it purports to extinguish the rights of the Plaintiff beyond the period of 99 years from the 1st day of July 1898.

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p.3,11.29-31.

(9) Alternatively to (1) to (8) above, a declaration that the said lands were not expressed to be demised as agricultural or garden ground by the said Lease on 24th June 1905.

p.3,11.32-35.

(10) Alternatively to (9) above, if which is

denied the said lands were demised as agricultural or garden ground, the Plaintiff may use the said lands for any use other than building purposes and in particular for the open storage of motor vehicles."

Proceedings in High Court

31. The Originating Summons came on for hearing before Kempster J. on the 14th, 15th, 16th, 17th, 18th, 21st and 22nd March 1983.

10 32. At the hearing, the Appellant, in support of Declaration 1, argued on the unchallenged affidavit evidence of Anthony Richard Dicks that, prior to the lease of the New Territories to Britain from China, the Appellant's predecessors-in-title had a title to the land which was both perpetual and unrestricted as to user thereof. This Declaration was granted by the Court. p.9,l.21-
p.10,l.9.

20 33. In support of Declarations 2 to 6, the Appellant sought to show that the Hong Kong Government had expropriated the Appellant's land in breach of the Convention of Peking 1898 by which the New Territories were so leased. The said Convention contains a provision, Article 6, which reads as follows: p.10,11.32
-35.

30 Expropriation of natives - it is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension, and that if land is required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price."

34. The Appellant conceded, though at the same time reserving the point for possible argument in the higher courts, that the Convention of Peking, being an Act of State, was not directly enforceable in the municipal courts, but argued that the substance of Article 6 had been incorporated into the municipal law of Hong Kong and as such took precedence over any p.18,l.30-
p.19,l.9.

Hong Kong Ordinance to the contrary. The clause had been incorporated in one or all of three ways:-

p.19,11.20
-28.

1) The Governor made two proclamations on the 9th April and 12th July 1898 respectively which contained assurances that the property rights of the inhabitants of the New Territories would be respected. The Appellant submitted that these proclamations had the force of law, having been made in exercise of the Royal Prerogative to legislate for a conquered or ceded territory. As such they imported into the municipal law of Hong Kong overriding provisions that there should be no expropriation of the inhabitants of the New Territories and that any land required for public purposes should be paid for at a fair, meaning full, market price.

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p.19,11.28
-35.

2) The Hong Kong legislature derives its legislative powers from the New Territories Order-in-Council 1898 which provides that it may make laws for the "peace, order and good government" of the New Territories as part of the Colony. The Appellant submitted that these words were ambiguous and/or uncertain in extent and/or lacking in clarity and should be construed to be consistent with the preamble to the Order-in-Council, which makes it clear that its purpose is to implement the Convention and/or with international law, which holds that treaties are binding.

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p.19,1.41
-p.20,1.15.

3) Article XXII(7) of the Royal Instructions provides that the Governor shall not assent to a bill which is contrary to a treaty obligation of the Crown. The Appellant submitted that the Hong Kong legislature is thus prevented from enacting laws contrary to the Convention. S. 4 of the Colonial Laws Validity Act 1865, which provides that no colonial legislation shall be void or inoperative by reason only of failure to comply with Royal Instructions, is applicable only where specific instructions relating to antecedent laws are contravened and is therefore incapable of validating laws passed contrary to Article XXVII (6) which applied to international obligations generally.

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35. The Appellant then argued that, if the non-expropriation clause of the Convention had been so incorporated, it was clear that it had been breached in three ways:

p.19,11.36
-40.

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1) At and before the time of the Convention, the title of the then owner of the land was a perpetual one. However, the Block Crown Lease which was issued to the owner by the Hong Kong Government shortly thereafter is for a period terminating three days short of the end of the New Territories Lease in 1997. The three-day shortfall means in effect that the land will not revert to the owner at the end of the British administration of the New Territories.

2) At and before the time of the Convention, the title of the then owner of the land was unrestricted as to user thereof. The Block Crown Lease contains a prohibition on the use of the land for building.

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3) The compensation payable under the Crown Lands Resumption Ordinance, Cap. 124, does not take into account the possibility of development value.

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36. In support of Declaration 7, the Appellant submitted that, even if the Ordinances impugned in Declarations 2 to 6 were to be held valid, the Governor, in granting a title under the New Territories Land Court Ordinance, No.18 of 1900, to the Appellant's predecessor-in-title, had exceeded the powers conferred upon him by the said Ordinance. Under s.14 thereof, "In cases where the Court allows the claim....., such claim and its allowance shall be reported by the Registrar to the Governor in due course in order that a title appropriate to the case may be granted." The Appellant argued that "title appropriate to the case clearly meant "title appropriate to the claim allowed by the Court" and since, as had been established on unchallenged affidavit evidence, the Appellant's predecessors-in-title had, at and before the time of the Convention, an interest which was both perpetual and unrestricted as to user, the Block Crown Lease, being for a term

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which is three days short of 99 years and containing a restriction as to user, is invalid to the extent of the shortfall of 3 days and the restriction.

p.24,11.13 37. Declaration 8 was not argued in detail
-17. though it was not abandoned.

p.24,11.19 38. As to Declaration 9, the Appellant conceded
-21. that it was precluded from arguing in support thereof
by virtue of the judgment of the Hong Kong Court of
Appeal in Watford Construction Co. Ltd. v. Secretary
for the New Territories [1978] HKLR 410. The
Appellant reserved the right to argue this point in
the higher courts. 10

p.24,11.22 49. In support of Declaration 10, the Appellant
-29. relied upon the judgment of the Hong Kong Court of
Appeal in Attorney-General v. Melhado Investment
Ltd., Civil Appeal 79/82, delivered on the 13th March
1983 and this argument was unopposed by the
Respondent. Declaration 10 was granted by the Court.

Judgment of Kempster J.

p.5-p.9, 40. Kempster J. gave judgment on the 29th April 20
1.19. 1983. He first set out the circumstances giving rise
p.9,1.20 to the proceedings. The learned Judge then proceeded
-p.18,1.27. to outline the relevant history of the New
Territories starting with the system of land tenure
prevailing in the summer of 1898 and then moving on
to cover the legislative and administrative
background to the period. Turning to the Appellant's
arguments, the learned Judge found as follows:

p.10,11.18 1) The Appellant's land was prior to the
-22. Convention of Peking held by the Appellant's
predecessor-in-title in perpetuity and without
restrictions as to user thereof, subject to payment
of land taxes. 30

p.20,1.19 2) The two proclamations made by the Governor on
-p.21,1.26. the 9th April and 12th July 1899 respectively
promising that the property rights of the inhabitants
of the New Territories would be respected did not
have the force of law. The Governor is not a Viceroy

and has no delegated power to legislate of his own motion.

- 3) The words "peace, order and good government" in the New Territories Order-in-Council 1898 confer the utmost discretion of enactment on the legislature, including the power to make laws contrary to the Convention of Peking or otherwise in breach of international law. p.21,l.27
-p.22,l.12.
- 10 4) Article XXII(7) of the Royal Instructions does not restrict the power of the Hong Kong legislature to make laws contrary to treaty obligations of the Crown, including the Convention of Peking 1898. p.19,l.41
-p.20,l.18.
- 5) The ordinances complained of were in any event ratified by non-disallowance by the Crown amounting in law to express authorisation. p.22,ll.13
-38.
- 6) The Governor acted intra vires in granting Block Crown Leases which were shorter in time than the Crown's interest and subject to restrictions. p.24,ll.2
-6.
- 20 7) The severed land may be and prior to resumption the resumed land might lawfully have been used for open storage of motor vehicles or any other purpose apart from building purposes inconsistent with the proper occupation of the said lands as agricultural or garden ground or from any noisy, noisome or offensive trade or business. p.24,ll.22
-29.
41. Accordingly, Declarations 1 and 10 were granted and Declarations 2, 3, 4, 5, 6, 7, 8 and 9 were refused.

Proceedings in the Court of Appeal

- 30 42. By a Notice of Appeal dated the 8th June 1983, the Appellant appealed to the Court of Appeal of Hong Kong. The appeal came on before Roberts C.J. and Cons & Fuad JJ.A. on the 10th, 11th, 14th, 15th, 16th and 17th November 1983. pp.27-29.
43. In addition to the arguments relied on at first instance, the Appellant made the following

further submissions:

1) That the two proclamations made by the Governor on the 9th April and 12th July 1899 respectively constituted, subject to investigation, recognition and acceptance of the existing rights in land in the New Territories. Such recognition was pursuant to instructions given to him by the Secretary of State for the Colonies and, as an act of the Sovereign, can be revoked or altered only by the Sovereign and not by the Hong Kong legislature; and

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2) That the Crown prerogative to legislate for the New Territories was limited by the Convention of Peking. In particular, after the Convention, the Crown had no power to authorise breaches of the non-expropriation clause of the Convention and the New Territories Order-in-Council 1898 must be construed accordingly.

44. The Respondent did not appeal against the grant of Declarations 1 and 10.

Judgment of Court of Appeal

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p.33-p.44,
1.4. 45. The judgment of the Court of Appeal was delivered by Roberts C.J. on the 14th December 1983. Their Lordships first summarised the factual background, the general legislative history and the history of legislation affecting land. Turning to the Appellant's arguments, Their Lordships found as follows:

1) The Governor's proclamations dated the 9th April and 12th July 1899 respectively promising that the property rights of the inhabitants of the New Territories would be respected do not have the force of law because :

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p.46,1.17
-p.47,1.12. a) The wording of the proclamations is inappropriate to a legislative instrument. They were meant only to give the inhabitants of the New Territories due warning of the Government's intentions; and

b) In any event, even if the Sovereign retains a prerogative power to legislate by herself outside her Privy Council, she did not purport to exercise such a power in the case of these proclamations. Further, even if it would be open to the Sovereign to authorise the Governor to exercise such a residuary prerogative power on her behalf, no such authorisation had in fact been made.

p.47,1.36
-p.48,1.9.

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2) The power to make laws for the "peace, order and good government" of the New Territories is wide enough to support the legislation complained of in this case:

a) the power is not restricted by the reference to the Convention of Peking in the preamble to the Order-in-Council. The preamble does no more than recite, by reference to the Convention, the source of jurisdiction; and

p.50,11.31
-36.

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b) the words "peace, order and good government" confer the widest law-making powers. The words are not ambiguous or uncertain in extent and therefore it is not permissible to look to the Convention of Peking to define their ambit.

p.51,1.6
-p.52,1.15.

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3) Even if the Governor breached the Royal Instructions in assenting to the ordinances concerned, the legislation is nevertheless valid. S.4 of the Colonial Laws Validity Act 1865 provides that no colonial law shall be void or inoperative by reason only of the failure of a Governor to comply with instructions. S.4 applies both to specific instructions and to the general directions contained in the Royal Instructions.

p.54,11.4
-12.

p.55,11.4
-11.

p.56,11.14
-24.
p.57,11.33
-44.

4) The restrictions imposed in the Crown lease were valid. All land in the New Territories had been vested in the Crown by statute. This had the effect of conferring on the Governor power to deal as he thought fit with New Territories land. Clear words would be necessary to take away this unrestricted power, and such words could not be found. Therefore the Governor has authority to insert in a grant of Crown land any term which he thinks appropriate to the case.

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p.55,11.19
-24.

5) Although it was not necessary for the court here to consider the Respondent's argument that the ordinances complained of had in any event been ratified by non-disallowance, Their Lordships did express the view that there must be grave objections in principle to attributing to the Crown in its prerogative guise power to give force to an otherwise invalid law by the mere act of deciding not to disallow it.

Accordingly, Their Lordships dismissed the Appeal.

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APPELLANT'S SUBMISSIONS

46. The Appellant will repeat the arguments advanced in the courts below and desires to add only the following points and comments.

10 47. The Appellant drew the attention of both the High Court and Court of Appeal to the several cases in which it has been stated, albeit obiter, that the power to legislate conferred by the Crown or Parliament on a colonial legislature was not intended to enable it to make laws contrary to international law: e.g. MacLeod's Case [1891] A.C.455; Croft v. Dunphy [1933] A.C. 156 at pp.164-5; Naim Molvan v. A.G. for Palestine [1948] A.C. 391. Although Kempster J. made a passing reference to this argument, the Court of Appeal did not refer to it.

p.22, ll.11-12.

48. Without prejudice to the Appellant's other submissions, the Appellant will seek to draw special attention to the following points (all of which were made in the courts below):

20 (a) In Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 A.C. 399, Your Lordships' Board stated:

30 "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing".

p.21, ll.38-46.

40 (b) By the Governor's proclamations of the 9th April and 12th July 1899, it was proclaimed that the landed interests of New Territories inhabitants would be respected and that once titles had been

pp.135-136.
pp.139-140.

investigated, certificates of title would be issued. At the least, these proclamations constitute official recognition and acceptance, subject to investigation, of existing titles. In Oyekan v. Adele [1957] 2 All E.R. 785 at p.788C, Lord Denning, delivering the advice of Your Lordships' Board, said:

p.18,1.41-
p.19,1.5.

"The effect of the Act of State is to give to the British Crown sovereignpower to recognise existing rights or extinguish them, or to create new ones. In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown....." The Governor's proclamations constitute, at the least, conduct by the Crown recognising existing titles in the New Territories. 10 20

(c) The provisions of the New Territories Land Court Ordinance whereby all land was vested in the Crown subject to the grant of new titles in cases where claims had been investigated and accepted by the Land Court were, on their true construction, enacted for conveyancing purposes and not with a view to altering existing titles. 30

(d) It follows that the Governor's duty under s.14 of the New Territories Land Court Ordinance to grant "a title appropriate to the case" was a duty to confirm existing titles as they were reported to him by the Land Court, i.e. in the case of land held on common tenure, to grant a lease for the full 99 years of the British Government's lease of the New Territories and without restriction of user. 40

(e) The Block Crown Lease in this present case is, therefore, void in so far as it purports to limit the full term of 99 years and to limit the user of the land. To be precise, the following parts of the Lease should be declared void: p.45,11.15-18.
p.55,11.26-32.

10 (i) "nor convert any ground hereby expressed to be demised as agricultural or garden ground into use for building purposes other than for the proper occupation of the same ground as agricultural or garden ground"; and p.79,11.27-29.

(ii) "less 3 days". p.80,1.20.

49. Finally there is the point reserved for argument before Your Lordships' Board, namely that the Block Crown Lease should be construed as not being encumbered by a covenant against building. p.24,11.19-21.
p.58,11.11-17.

20 50. The relevant parts of the Lease are as follows:

30 (a) "His said Majesty KING EDWARD VII DOTH hereby grant and demise unto each Lessee ALL that piece or parcel of ground situate, lying and being in Survey District No.124 in the New Territories in the Colony of Hong Kong set out and described in the Schedule hereto opposite to the name of such Lessee AND which said piece or parcel of ground is more particularly delineated and described on the plan or plans of Survey District 124 attached hereto according to the lot number set out in the Schedule hereto opposite to the name of such Lessee and marked on the said plan....."; and p.77,11.24-31.

40 (b) "AND FURTHER that the Lessee or any other person or persons shall not..... convert any ground hereby expressed to be demised as agricultural or garden ground into use for building purposes p.79,11.32-36.

other than for the proper occupation of the same ground as agricultural or garden ground with the previous Licence of His said Majesty.....".

p.81. 51. The Appellant submits that the land the subject of the Lease was not "described as agricultural ground" so as to make the covenant against building apply. There is no express statement in the Lease that the land is described as agricultural ground. In the Schedule to the Lease in the column headed "Description of the Lot", the land is variously described as "Padi" or "Dry Cultivation". One Lot has no entry in the description column. The Appellant submits that the descriptions in the Schedule are for identification only, as is made clear by the words of demise quoted above. 10

52. The Appellant submits that the Block Crown Lease should be construed fairly according to its language and in the light of the surrounding circumstances. The grantees fell among the predominant type of owners in the New Territories at the time of grant, i.e. they were entitled to "common tenure" which carried no restriction as to user. This condition was well-known to the Administration of the time (see paras. 17 and 23 - 27 above). Under such circumstances, it must be assumed that the Governor, mindful of the solemn promises which he or his predecessor-in-office had made to the inhabitants of the New Territories, would grant a Lease which would be consistent with the condition. Therefore, the Lease should be interpreted to be free from restriction on user. The Appellant submits that the restrictive covenant set out in paragraph 50(b) above should only be made applicable to those lots where, by language in the Lease itself, it is expressly stated that such lots were demised as agricultural lots. 20 30

53. The Appellant submits that the decision of the Hong Kong Court of Appeal in Watford Construction Co. v. Secretary for the New Territories [1978] H.K.L.R. 410, which is to the contrary effect, was wrongly decided. 40

pp.63-64. 54. On the 12th January 1984, the Court of

Appeal of Hong Kong made an Order granting the Appellant Conditional Leave to Appeal to Her Majesty in Council.

55. On the 7th June 1984, the Court of Appeal of Hong Kong made an Order granting the Appellant Final Leave to Appeal to Her Majesty in Council. pp.65-66.

10 AND THE APPELLANT RESPECTFULLY SUBMITS THAT THE JUDGMENT OF THE COURT OF APPEAL OF HONG KONG WAS WRONG AND OUGHT TO BE REVERSED, AND THIS APPEAL OUGHT TO BE ALLOWED WITH COSTS, FOR THE FOLLOWING (AMONG OTHER)

REASONS

- (1) Because the vesting of all land in the New Territories in the Crown or alternatively the granting of the Block Crown Lease for a term of 3 days less than the 99 years granted to Britain and with restrictions as to user was "expropriation" in breach of Article 6 of the Peking Convention of the 9th June 1898.
- 20 (2) Because the enactment of compensation for the resumption of land at less than market value was in breach of Article 6 of the Peking Convention of the 9th June 1898.
- (3) Because the Governor's proclamations of the 9th April 1899 and 12th July 1899 incorporated the provisions of the said Article 6 into the municipal law of Hong Kong so as to take precedence over any Ordinance to the contrary.
- 30 (4) Because the Governor by and with the advice and consent of the Legislative Council had no power to legislate in breach of the said Convention.
- (5) Because the Governor had no power to assent to a Bill which is contrary to a treaty obligation of the Crown.
- (6) Because s.14 of the New Territories Land Court Ordinance required the Governor to grant a title "appropriate to the case", i.e. a lease of 99 years without restriction on user.

(7) Because the Governor's said proclamations at the least constituted recognition and acceptance of existing titles to land and the New Territories Land Court Ordinance was enacted for conveyancing purposes and not with a view to altering substantive titles already existing.

(8) Because the land the subject of the Block Crown Lease was not "demised as agricultural ground".

David G. Widdicombe

Anthony F. Neoh

In the Privy Council

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

WINFAT ENTERPRISE (HK) COMPANY LIMITED **Appellant**
(Plaintiff)

AND

ATTORNEY GENERAL **Respondent**
(Defendant)

CASE FOR THE APPELLANT

RAYMOND TANG & CO.
Solicitors for the Appellant (Plaintiff)

CROWN SOLICITOR
Solicitors for the Respondent (Defendant)
