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Appellants to provide in the building not less than 400 spaces for public car parking, to serve the area as a whole, at the expense of what would otherwise be commercial floor space. The issue in the appeal is whether the Agreement and Conditions of Grant also contain provisions the effect of which is to compensate the Appellants for this loss. The Appellants say that they are entitled to additional floor space, equivalent to about three stories of the building on account of the setting back of the building at ground level to provide a pedestrian right of way on all sides of the building. The Appellants are required to set back the building and provide the pedestrian right of way by the Agreement and Conditions of Grant, and the Appellants say that this brings into operation Regulation 22(1) of the Building (Planning) Regulations which provides compensatory floor space in a building for an owner who sets the building back from the site boundary at ground level so as to provide a public right of way.

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3. The Appellants purchased the said land from the Crown at auction on 13th September 1978, for a term of 75 years with an option for a further 75 years, paying therefor a premium of HK \$ 415,000,000. The terms of the purchase are contained in the Agreement and Conditions of Grant, to which the Appellants will refer for their full terms and effect. The Special Condition of Grant provided (inter alia) that the purchaser should develop the portion of the lot shown coloured pink and pink cross-hatched black on the plan attached to the document by the erection of a building complying with the Special Conditions and in all respects in accordance with the provisions of all Ordinances, By-Laws and Regulations relating to building and sanitation in force in Hong Kong (S.C.5). The requirement that the building should comply with the Buildings Ordinance and any regulations made thereunder is re-iterated in S.C. 8(a).

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4. Various requirements for the building are set out in the Special Conditions. In particular, S.C. 11 requires the erection over the areas shown coloured pink cross-hatched black and purple on the plan at a stated height above Principal Datum of a podium. S.C. 12 requires that the deck of the podium on the pink cross-hatched black area shall be kept free of any building for a height of not less than 3.66 metres. S.C. 13(a) requires that there shall be no building or structure other than the podium and certain ancillary items on the area coloured

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purple on the plan, which is defined as "the passage area". The effect of these provisions is shown on the Sketch Section of the proposed building, and in the photographs of the model of the building.

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10 5. S.C. 13(b) deals with the purple or "passage area". It is entitled "Right of Way", and it provides (inter alia) that the purchaser shall permit all members of the public at all times and for all lawful purposes freely and without payment of any nature whatsoever to pass and repass on foot over and along the said passage area at ground level as if the said passage area were part of a public street. There is also a right of way provided over the podium.

20 6. By S.C. 20 the purchaser is required to provide adequate parking spaces for members of the public for the parking of not less than 400 motor vehicles. This public parking space is to serve not just this building but the area as a whole; adjoining buildings have no such requirement. The normal rule is that parking space for motor vehicles is not taken into account in determining the permitted gross floor area of a building (see Building (Planning) Regulation 23(3)). However, contrary to the normal rule, S.C. 20 provides that the public parking space shall be taken into account in the calculation of gross floor area for the purposes of Regulations 20, 21, 22 or 23(3) of the Building (Planning) Regulations. Regulation 20 provides for permitted site coverage; Regulation 21 provides for permitted plot ratio; and Regulation 22 provides compensatory floor space where a building is set back from the boundary of the lot so as to provide a public right of passage.

30 Mr. Anthony Lo Hong-Sui, a Director of the Appellant, Moon Yik Co. Ltd., and an experienced property developer, states in his affidavit that the requirements of S.C. 20 are most unusual in Hong Kong, that it is a severe restriction, and that it involves the loss of about three floors of valuable floor space in the building. His testimony is confirmed by Mr. Walter Kwok Ping Sheung, a director of the other Appellant, Xipho Development Co. Ltd., and also an experienced property developer. Both witnesses state that they regarded the reference in S.C. 20 to Regulation 22 as indicating that the building would qualify for the compensatory or 'bonus' plot ratio provided by Regulation 22, and say that if they had thought otherwise they would not have bid so much for the site at the auction. Neither witness was

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50 cross-examined.

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7. Regulation 22(1) of the Building (Planning) Regulations provide (so far as material), "Where, between ground level and a height of not less than 5 m. above ground level, a building is set back from a boundary of the lot on which it is erected, being a boundary that abuts on a street, and, with the consent of the Government, the part of the lot that is thereby not built upon is dedicated to the public for the purposes of passage" an increase in site coverage and plot ratio is permitted. The precise calculation of the increased site coverage and plot ratio is not in issue. It amounts to about 3 stories of the building. The Appellants say that on compliance with S.C. 13(a) and (b) the building on the site is set back from the boundaries of the lot and that the part of the lot which is thereby not built upon is with the consent of the Government dedicated to the public for the purposes of passage, and that the site therefore qualifies for the 'bonus' floor space provided by the Regulation. 10 20

8. The action was heard in the High Court by Zimmern, J., on 17th and 18th October 1979, and judgment was given on 26th October 1979. The Crown submitted two arguments why the declarations should not be granted, as follows:-

"(a) There is no set back from the boundary of the lot by reason that the Plaintiffs have a right under S.C. 11(a) to build supports for the podium on the area coloured purple and the said Regulation expressly states "the part of the lot is thereby not built upon". 30

(b) The language used in S.C. 13(b) amounts to no more than a contractual term to grant to the public a licence for a term of years to use the passage and cannot be construed as amounting to a dedication of the parts mentioned with the consent of the Government as a highway which is a requirement of Regulation 22." 40

9. The learned judge rejected argument (a), on the ground that if the Director of Public Works approved supports for the podium on the purple area it showed his intention to secure the substance of a set back to create the footpath, and that supports or columns do not affect that intention. He rejected a literal construction of the Regulation, and said that columns for support did not affect the purpose which the way was intended to serve. 50

10. The learned judge also rejected argument (b). He referred to the words of S.C. 13(b) "as if the said podium and the said passage area were part or parts of a public street." He said, "I think the answer to this is to be found in the words of Lord Asquith of Bishopstone in East End Dwelling Co. Ltd. v. Finsbury Borough Council (1952) A.C. 109, 132 wherein he said:-

10 "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs has in fact existed, must inevitably have flowed from or accompanied it."

20 Surely then upon performance of the obligations under the contract the consequences and incidents of the podium and passage area being part or parts of a public street could only have flowed from dedication. Accordingly I find and hold in favour of the Plaintiffs."

11. The learned judge found it unnecessary to consider an alternative argument of the Plaintiffs based on estoppel. He held the Plaintiffs entitled to the two declarations sought with costs.

30 12. During the High Court hearing the Plaintiffs, with leave of the Court, added an alternative declaration 2(a) to their Summons. This declaration is appropriate if the building is supported at ground level over the purple or passage area by cantilever supports instead of columns, which is physically possible, although at the stage which the building has now reached it would require some additional work to the foundations.

40 13. The Respondent appealed to the Court of Appeal (Huggins, J. McMullin, J.A. and Yang, J.), which heard the case on 6th and 7th February 1980, and gave judgment on 14th March 1980. Huggins, J.A., said that three questions arose:

- "(i) Will the planned building be set back from the boundaries, having regard to the proposed line of columns standing on the purple area?
- (ii) If not, is it open to the Respondents to redesign the podium in such a way as to omit the line of columns and thus ensure

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that the building will be set back within the meaning of the regulation?

(iii) Does the contract provide that the part of the lot not built upon by reason of the planned set back shall be dedicated to the public for the purposes of passage?"

14. As regards question (i), Huggins, J.A., said that he had considerable hesitation but was not prepared to say that the High Court Judge was wrong. He agreed that the support columns were de minimis having regard to the fact that interference with the passage of pedestrians was negligible. 10

15. As regards question (ii), Huggins, J.A., said that redesign was no answer because the Director of Public Works had power under the Special Conditions to require columns on the purple area.

16. As regards question (iii) the Appellants point out that it does not follow the terms of the declaration sought which claims that "compliance with S.C. 13 will constitute 'dedication with the consent of the Government' for the purposes of Regulation 22(1) of the Building (Planning) Regulations". On this question Huggins, J.A., accepted the submission of the Crown that the marginal note "Right of Way" and the terms of S.C. 13(b) were not consonant with a dedication of the land to the public. He also said that the Crown were right in contending that the words "as if the said passage area were part of a public street" is a clear indication of an intention not to dedicate. "If the state of affairs predicated were in fact real - as it would be if there were a dedication - there would be no need for it to be treated as if it were real." He said that it was not necessary to decide a further contention of the Crown to the effect that it was not possible for a lessee to dedicate land, as dedication must be in perpetuity. He rejected a contention of the Appellants that the Crown was estopped by the reference in S.C. 20 to Regulation 22 from denying that Regulation 22 applied; he said he was not persuaded that S.C. 20 contained the representation alleged, whether read alone or in the context of the whole document. 20 30 40

17. McMullin, J.A. upheld the High Court Judge on the question of set back. Although he considered that the support columns could not be dismissed as de minimis, he held that there was nothing in the Regulations which would impede the Director of Public Works from achieving the substance of a set back by any means which seemed to him to satisfy 50

10 the requirements of Regulation 22. He said that it was unnecessary to consider the suggestion of redesign by cantilever, but in any event he agreed with the Crown that the Director of Public Works could require the erection of supports on the passage area. He said that the real question was the intention of the parties to the contract. He said that the law as to whether a lessee could dedicate for the period of his term was not well settled, but even if such dedication was possible, it must be in the nature of a joint dedication by the owner of the fee i.e. the Hong Kong Government. He said that such an intention to dedicate need not be express, it could be presumed. He said that the words of S.C. 13(b) were not ambiguous and indicated prima facie an intention to reserve the passage area for public user for so long only as the grantee continued to enjoy the grant. He said that the words of Lord Asquith of Bishopstone in East End Dwellings Co. Ltd. v. Finsbury Borough Council relied on by the High Court Judge were not apt to apply to the present case. He said that the question was whether the parties intended a restricted right of way for public user (i.e. restricted to the period of the lease) or a street dedicated to the public. These were two distinct kinds of right either of which might have been in view. "A right of way is certainly intended. What is the precise nature of that right? it seems to me that to say that the public are to have a right to use the passage area as though it were a public street is a strong indication that the parties, by the express terms of their agreement were making a distinction between the right which might have been and that which actually was created." He therefore accepted the Crown's submission on this point. The learned judge then said that he could not accept the Appellants' argument on estoppel.

18. Yang, J. concurred with the decisions of the other two judges of the Court of Appeal.

19. The Court of Appeal therefore allowed the appeal with costs.

Contentions of the Appellants

20. The Appellants submit that on the set back question both the High Court and the Court of Appeal were right.

21. On the question of redesign by the use of cantilever supports, the Appellants say that the Court of Appeal was wrong. Whether or not the

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Director of Public Works has power to order columns to support the podium in the purple area is irrelevant. If in fact he approves support by cantilever, the requirements of Regulation 22(1) of the Building (Planning) Regulations will be met. The Appellants say they are entitled to a declaration to that effect. In the alternative the Appellants say that the Director of Public Works has no power under the Special Conditions to order support columns on the purple area.

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22. The Appellants submit that on the question of S.C. 13(b) and Regulation 22(1) the High Court was right and the Court of Appeal was wrong. The Appellants say that S.C. 13(b) requires the purchaser to grant a "Right of Way" in favour of the public over the purple or passage area. The right is to be conferred on the public, not (as per McMullin, J.A., at p.32 line 38) on the Government. Compliance with S.C. 13(b) can only result in a public right of way, i.e. a highway; a mere licence for the public to use the passage area could not be described as a "Right of Way". The words of S.C.13(b) are a precise description of all the ingredients of a highway, and coupled with the marginal note "Right of Way" show a clear intention of the parties that the public should have a right to use the passage area as a highway, not a mere licence. The said right is in perpetuity, though in the alternative the Appellants will argue that a lessee can dedicate a highway for the term of his lease. In either case the Government, as owners of the fee, expressly or impliedly consent to the conferment on the public of a right of way. The requirements of Regulation 22(1) are therefore all met, and the Appellants are entitled to the 'bonus' floor space in the building.

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23. In support of the argument that a lessee can dedicate a highway for the term of his lease the Appellants point out that the Buildings Ordinance and the Building (Planning) Regulations apply in the New Territories of Hong Kong, which revert to China on 1st July 1997. In the New Territories Regulation 22(1) of the Building (Planning) Regulations must refer to "dedication to the public for the purpose of passage" for the period of the lease of the New Territories held by the British Government. The Appellants will argue that whatever the law may be in England as to the period for dedication of a highway, in Hong Kong there is statutory recognition of a rule of law that dedication can be for the term of a lease.

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24. The Appellants will say that if there is any ambiguity or doubt about the construction of

S.C. 13(b), it should be resolved in favour of the Appellants, as grantees, in accordance with the maxim "verba fortius accipiuntur contra proferentem". The Appellants say that this maxim has especial force where, as have, the sale was by auction.

10 25. The Appellants submit that both Huggins, J.A., and McMullin, J.A. were wrong in accepting the contention of the Crown that the term "Right of Way" in S.C. 13(b) could be satisfied by something less than a highway. Anything less would be a mere licence, which is not aptly described as a "right of Way". McMullin, J.A., was wrong to conclude that the Appellants had conceded that "there are two quite distinct kinds of right either of which might have been in view" (p.36, lines 1-4); the Appellants are not aware of having made any such concession. In the alternative, if the learned judge was correct that either of such 'rights' might have been in view, he should have said that there was an ambiguity which should be resolved in favour of the Appellants pursuant to the "contra proferentem" principle. The Appellants will say that both learned judges were wrong not to appreciate that compliance with S.C. 13(b) could only result in a public right of way i.e. a highway, and that the parties to the contract must be taken to have intended that result.

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30 26. The phrase "dedicated to the public for the purposes of passage" also occurs in Regulation 23(2)(b) of the Building (Planning) Regulations. Regulation 23(2) defines the area of the site on which a building is erected for the purposes of Regulation 20 (site coverage) Regulation 21 (plot ratio) and Regulation 22. It is provided that there shall be included in the site "any area dedicated to the public for the purposes of passage". The Appellants say that the reference to such dedicated area is specifically intended to refer to areas which are set back from the boundary of the site and dedicated within Regulation 22. The Appellants will point out that the purple or passage area is included in the site as defined by the Agreement and Conditions of Grant (see the definition of site on p.44 of the Record and the plan of the site on pp.54 and 55 of the Record), and that the building plans approved under the Buildings Ordinance in respect of the building now in course of erection include the purple or passage area as part of the site, upon which (inter alia) the site coverage and plot ratio have been calculated. The Appellants will crave leave to refer to the approved building plans if necessary.

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AND THE APPELLANTS HUMBLY SUBMIT THAT THE APPEAL SHOULD BE ALLOWED FOR THE FOLLOWING AMONG OTHER

R E A S O N S

- (1) BECAUSE on the construction of Special Condition 13 and Regulation 22 the High Court was right and the Court of Appeal was wrong;
- (2) BECAUSE on the true construction of the Agreement and Conditions of Grant, compliance with Special Condition 13 will constitute "dedication with the consent of the Government" for the purposes of Regulation 22(1) of the Regulations; 10
- (3) BECAUSE the building to be erected on Inland Lot No. 8392 pursuant to and in accordance with the Agreement and Conditions of Grant is entitled to the increased site coverage and plot ratio provided by Regulation 22(1) of the Resolutions;
- (4) BECAUSE the Respondent is estopped by the reference in Special Condition 20 to Regulation 22 from denying that compliance with Special Condition 13 will satisfy the requirements of Regulation 22. 20

David G. Widdicombe Q.C.

Bernard Rix

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

MOON YIK COMPANY LIMITED Appellants
XIPHO DEVELOPMENT CO.LTD. (Plaintiffs)

- and -

ATTORNEY-GENERAL Respondents
(Defendants)

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