HIST 5505A Land Administration and Practice in Hong Kong
(2020-2021 Term 2)
Final Paper

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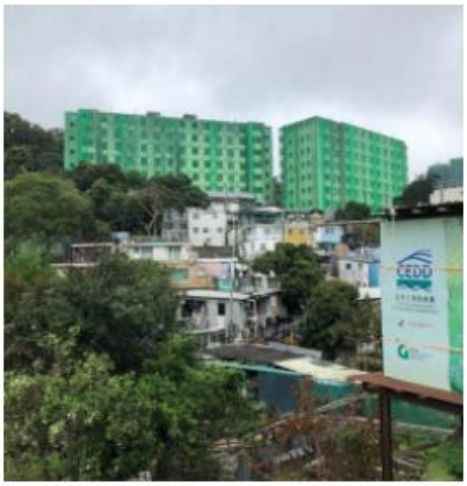
The Landholding Controversy in Pok Fu Lam Village and Its Influence: A case study of HCMP 2423/2017

Pok Fu Lam village, one of the oldest settlement in Hong Kong, is located in the southwestern of Hong Kong Island. The village is featured with innumerable squatter structures stretching across the mountainside. The owners of the squatter structures are considered as the unlawfully trespassers of the government land. Generally speaking, the existence of the squatter structures is tolerated by the government temporarily and they will be demolished one day in the future. Since more than one-third of the architectures in the village are classified as squatter structures, the village has been kept away from further development. The huge obstruct brought by its squatter status not only lay a burden to the villagers' living conditions, but cause troubles to the surrounding private properties as well. The case of HCMP 2423/2017 gives people a glimpse of the conflict between squatters and urban development. Based on this case, this thesis aims to trace back the historical cause of the lawsuit between the plaintiff Dairy Farm Company and the defendant The Director of Lands. Then to analyze the influence laid by the landholding controversy on this case.

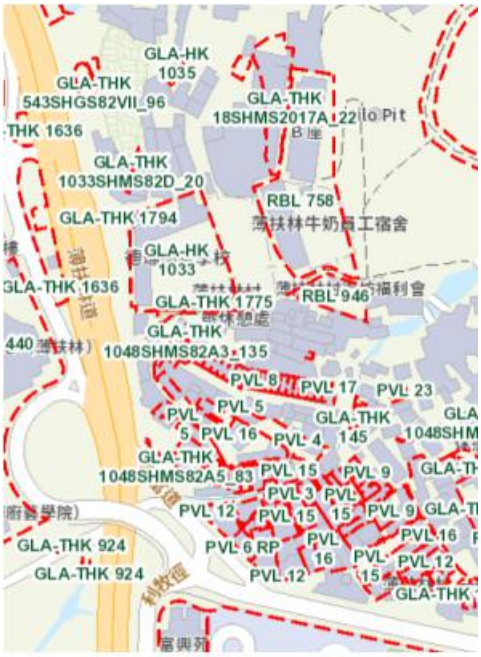
1. Case Introduction

The Dairy Farm Company eventually won a lawsuit against the Director of Lands for nearly twenty years. This controversy was taken place in Pok Fu Lam village, one of the oldest and the last village in Hong Kong Island. Since 1910 the Dairy Farm Company, the plaintiff, has been granted a farm lot on the hill behind the village under the crown lease. Around 1956, Dairy Farm Company sought for an extended building area to build its staff quarters, as a result, the company exchanged a portion of its old lot for a smaller rural building lot under the government's approval. Among the land grant terms stipulated that time, there is a Special Conditions 20 (SC 20) suggests that "a right-of-way" from Pokfulam Road to the new lot should be given. However, due to the



1.The two buildings covered in the green net are the former staff quarters. Obviously, they are land-locked by the surrounding squatter structures. The photo was shot by the author in 2021.

complicated terrain condition there, there is only an existed and extremely narrow footpath communicate the staff quarters with the outside road.That is to say, a vehicular access between the new lot and Pokfulam Road has never emerged. With the expanding squatter huts on the nearby hillsides, the staff quarters built in the new lot has become land-locked by the surrounding squatter structures. Without an effective traffic road, it is more and more difficult for the two buildings to get proper maintenance. The two building finally ceased to use in 2005. Between 2000 and 2005, the Dairy Farm Company began to write to the District Land Office to request approval for the construction of a vehicular right of way in accordance with the SC 20. However, the office stated that the company has already have an available footpath which is a "right-of way" in their understandings and refused the company's application. In fact, the District Land Office's unwillingness to grant a vehicular road to the company is originated from its reluctance to clear the surrounding squatters, which is standing on the government land, to make way for the new road. The office believes the clearance action will definitely arose resistance from the residents in Pok Fu Lam village. In 2017, the Dairy Farm Company filed a lawsuit to straight its right to have a vehicular road. The judge settled that the defendant's refusal was a violation of land grant terms, and therefore ordered the department to approve the plaintiff's application.



2.Pok Fu Lam village is very densely built. More than one-third of the architectures there are classified as squatter structures.

Although the Dairy Farm Company won the support of the court, the reality does not go as smoothly as one can expect. Nowadays, the situation of the two buildings and the squatters in the village still remains the same, at least the promised vehicular road has not yet emerged before March 2021. Located in the Pok Fu Lam village, the fate of the two staff quarters are tightly bonded with the surrounding environment. Without a proper and thorough disposal of the squatter issues, neither party can get the benefit.

2. Historical Throwback on the Landholding Situation of Pok Fu Lam Village

Pok Fu Lam village is a part of Hong Kong Island, the first part occupied by British colonists in Hong Kong. Therefore, tracing back the history of the land administration in Hong Kong Island from the very beginning can be helpful to gain a better understanding of the condition of this case.

2.1 Landholding in Hong Kong Island

Hong Kong Island officially become a part of British Colony in 1842, after the issue of the Treaty of Nanking. As a result, all the land in Hong Kong Island has become the property of the British Crown. In order to gain a full control over the

newly colonized area, the British government intended to exclude the former governor's influence out of the local society.

On the one hand, the British colonists ban the natives from paying tax to their former landowners. As we know, Hong Kong Island was just a remote and barren island located in the southern part of Xin'an County with relatively few population. According to Welsh, there were only 4,350 people living in the island, and nearly 2,000 fishermen living in their boats in 1841.[1] Most of the natives were tenant farmers who had to pay the rent to their landlords. However, British governors only regarded the native people who physically lived on the land as the owner of it. As a result, the former landlord like the Jintian Deng, who owned a large area of land on the Hong Kong Island but live far away from there, were considered as absentee landlord and deprived of the ownership of the land. Besides, the landholding deed in China are categorized into two types, "red deed" and "white deed". The former one indicates the ownership of the land had been registered and approved by the local government, while the latter one can only prove the private transactions. After the Kowloon Peninsula had become a new part of British colony in the 1860s, British governor intended to protect the right of the "red deed" holders by purchasing from or re-granting land to them. In contrast, the white deed holders and people who could not present any deeds were considered as squatters. In 1864, the squatters was formalized by paying the government to obtain a license and renewing it every year.

On the other hand, early in 1841, even before the formal occupation of Hong Kong Island, Captain Elliot set out to sell land on behalf of the future colonial government. However, he sold the land in the status of freehold, which was opposed by British home government. The British Crown insisted all the land in Hong Kong should be hold under the lease from Her Majesty the Queen. In fact, this approach was the same as in China, in which all the land belongs to the emperor namely. Besides, it was ruled that all the Crown land must be sold through public auction in the Colony.

As to the condition in Hong Kong Island, since the former landlords who were more likely to hold the "red deed" had been excluded out, it was inevitable for the natives to be regarded as squatters. It is speculated that most of the natives were tenants. They can not present the "red deed" and did not have enough money to legalize their ownership of the land through public auction. In consequence, most Chinese residents in Hong Kong Island were illegal trespassers or annual registered squatters.[2]

2.2 Pok Fu Lam Village: Native Land Owners? or Squatters?

In sharp contrast with the countless skyscrapers of Hong Kong, Pok Fu Lam village is featured with a high-density area of squatter structures. As the survey conducted by the Land Department of Hong Kong in 2017, there were a total of 4,425 registered squatter structures in Hong Kong Island. And 1,753 of them were located in

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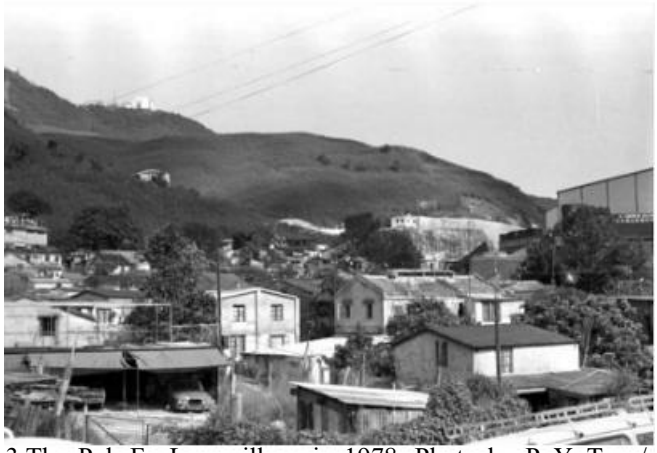
[1] Frank Welsh, *A History of Hong Kong* (London: Harper Collins Publishers, 1997), 137.

[2] Sui-Wai Cheung, "Landlords,squatters, and tenants: Fundamental concepts of land administration in early colonial Hong Kong", *Colonial Administration and Land Reform in East Asia*(London: Routledge, 2017), 21-36.

Pok Fu Lam village.[3] The squatter structures all over the Pok Fu Lam village serves as a significant element in the dispute between Dairy Farm Company and the Director of Land. Therefore, it is necessary to trace the history of Pok Fu Lam village and the reason why this village is mainly consist of squatter structures.

The existence of Pok Fu Lam village can be dated back to Jiaqing period, which means that the native people have been already lived here before the British occupied Hong Kong in 1841. As it shown in the picture 3, the whole village is stretching across the mountainside. It's said that the earliest inhabitants of the village were three families with surnames, respectively, Chan, Wong and Law. And there were only about twenty households living there in the very beginning.[4] However, different from the natives of the New Territories, who would also be colonized by the British colonists about half a century later, the people living in Hong Kong Island were not granted the right to retain their land and traditions. Without the process of public auction, the natives can not legalize their ownership of their land. As a result, though the village had been built before 1841, the residents were regarded as the land trespassers.

After the British colonization the population in Pok Fu Lam village has gradually increased with the development of the Hong Kong Island. In the 1860s, in order to support the water supply to cater the explosive growth of the population in Hong Kong Island, the valley, west to Pok Fu Lam village, was constructed into the first reservoir in Hong Kong. In addition, the Bethanie and Nazareth Press were built nearby the village later on. The establishment of these religious institutions and the improvement of surrounding infrastructures arose the public's attention towards Pok Fu Lam area. In 1886, the Dairy Farm Company chose Pok Fu Lam village to be a dairy farm. In view of the mountainous terrain and its accessibility to plenty water, it was quite suitable for the village to be served as a dairy farm. The dairy farm provided many job opportunities and attracted lots of workers to settle down around it. According to the demographics of Pok Fu Lam area, there were only 388 people living in Pok Fu Lam in 1872, while the population had grown to 602 in 1906[5].



3.The Pok Fu Lam village in 1978. Photo by P. Y. Tang/ South China Morning Post via Getty Images.

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[3] The Government of the Hong Kong Special Administrative Region. "Regulatory Control of Squatter Structures on Hong Kong Island," https://www.info.gov.hk/gia/general/201705/24/P2017052400370.htm?fontSize=1, accessed May 1, 2021.

[4] 丁新豹，〈薄扶林話舊〉，《薄扶林村：太平山下的歷史聚落-》（香港：三聯書店（香港）有限公司，2012），頁 15-21。

[5] Geoffrey Robley Sayer, *Hong Kong 1841-1862 Birth, Adolescence and Coming of Age* (Hong Kong: Hong Kong University Press, 1980).

Though, it should be noted that this data includes the entire Pok Fu Lam area, rather than Pok Fu Lam village individually, thus the actual number of the residents in the village could be lesser than this record. It is convincing that most of the residents of Pok Fu Lam village should be the people who immigrated here in the second half of the 19th century. In other word, though Pok Fu Lam village has a long history, the indigenous residents only make up a very small part.

In 1890, in order to suspend the irregular occupation of crown land, the Squatters Ordinance was launched by the British governor. The Squatters Ordinance sort all the land-occupiers who did not have any grant of any lease or interest from the Crown into three types: the native residents and their descendants who have occupied the land before the date of the establishment of Colony, the trespassers who occupied the land since or after the establishment of the Colony and people who occupied the land under the squatters licenses.[6]

Based on the Squatters Ordinance, a Block Crown Lease was lifted to Pok Fu Lam village for the better management by the government in 1893. In the light of this Block Crown Lease, the first category of people, the natives, were granted the land lease of 999 years, while the other two kinds were considered as squatters and should renew their license annually. Besides, a map showing the details of the layout plan and the land use was attached to the appendix of the Block Crown Lease.

However, because of the improper storage, this map has been lost which leads to the difficulties in the future development of this area. Due to the loss of the original map, it was hard for the residents to seek for the advanced development of their structures or change of the land use.[7] Since the government can not recognize the detailed partition of the parcels and plots in Pok Fu Lam village without the map. As a result, the government enacted the Crown Lease (Pok Fu Lam) Ordinance in 1966. They hope to re-map a new layout plan and to replace the original one. Yet, due to the complicated registration procedures, some villages may not be able to re-register their land. Eventually, some private lands were turned into government land. Additionally, the wars and a series of political movements that took place in mainland China caused the population of Hong Kong increased dramatically. The flood of refugees and the unclear landholding situation led to the existence of more and more squatter structures in Pok Fu Lam village.

In 1982, the government introduced the Squatter Control Policy, which aimed at reducing the squatters. Under the instruction of this policy, a survey was conducted to record all the existing squatter structures. The owners of the surveyed squatter structures were not conferred any legal title to the land. Besides, theoretically, the existence of squatter structures is

4.Sitting on the hillside, Pok Fu Lam village is in sharp contrast with the surrounding highly urbanized area. Photo extracted from the Encyclopedia of Bus Transport in Hong Kong.

[6] Squatters Ordinance, No. 5 of 1890.

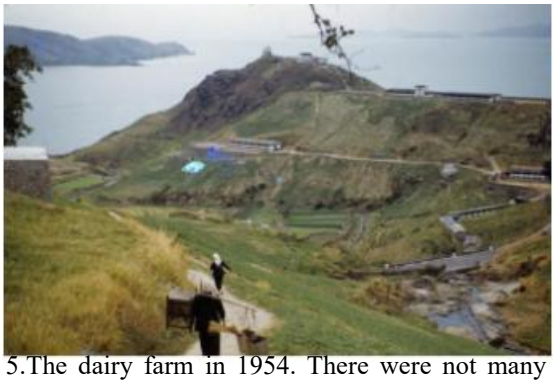
[7] Crown Lease (Pok Fu Lam) Ordinance, Cap. 118, 1997.

just for a temporary period. And these surveyed squatter structures can not be rebuilt, expanded or purchased.[8] Therefore, the development of Pok Fu Lam village has entered a state of stagnation. Actually, the village even has not be armed with a modern sewage system until now.

All in all, though the villagers of Pok Fu Lam village claim that their village has a long history, which is even longer than that of Hong Kong, few of them hold the identity of native. Thus, most residents can not legalize their ownership of the land. Besides, the loss of the original layout plan and the explosive population growth has left the village lacking reasonable planning. The 1982 Squatter Control Policy has completely closed the village into a stagnant state, which also work as a hindrance to the Dairy Farm Company's will to build the vehicular road.

2.3 The Dairy Farm in Pok Fu Lam

As it mentioned above, the establishment of the dairy farm attracted a lot of people to settle in Pok Fu Lam village. Founded in 1886, the Dairy Farm was built to meet with the British colonists' need for fresh milk. Originally, the Dairy Farm occupied a 120,000 sq ft mountainous area in Pok Fu Lam, which was officially granted to the Dairy Farm Company in 1910.[9] It was very suitable for Pok Fu Lam to be used as a dairy farm. Isolated by the surrounded mountains, Pok Fu Lam was a much quieter place than the bustling and crowded Sheung Wan, which is just four miles away from the farm. Besides, the cool breezes brought by the nearby sea made here much cooler than the other parts of Hong Kong, that provided a good environment for the living of cows. After the end of the Japanese Occupation, the public's demand for fresh milk greatly increased. Though the Europeans and Indians were still the main consumers of the dairy products, the explosive population growth of Chinese further expanded the dairy market in Hong Kong. Meanwhile, Dairy Farm Company also seek for the improvements in its business and management. In 1956, the company agreed to surrender a part of the original farm area for the grant of a rural building lot about 30,000 sq ft for a lease of 75 years. In order to settle the staff's accommodation problem, the Dairy Farm Company planed to build two buildings there to be served as staff quarters.



5.The dairy farm in 1954. There were not many houses in Pok Fu Lam Village at that time. Photo extracted from Gwulo: Old Hong Kong.

However, with the urbanization of the surrounding area and the set up of new dairy farm in Shenzhen, the dairy farming was no longer the mainstream business of Dairy Farm Company in Hong Kong since the 1980s. The company sold its former farm land to real estate developers for residential use, while the two staff quarters are

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[8] Lands Department. "Squatter Control Policy on Surveyed Squatter Structures." https://www.landsd.gov.hk/en/squatter_control/sqctrl.htm, accessed May 1, 2021.

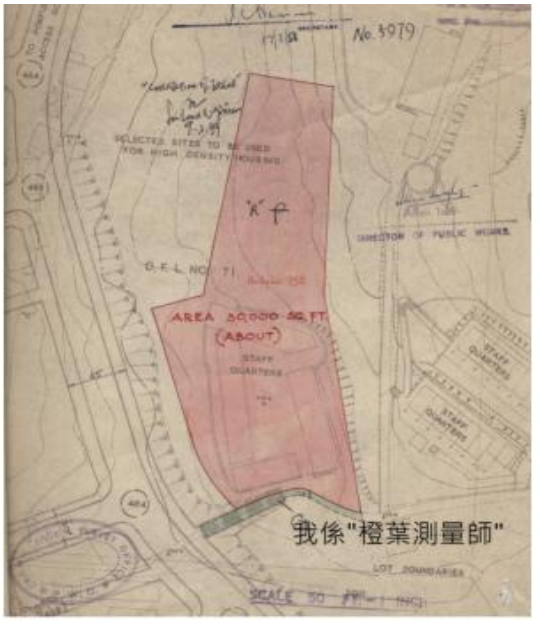
[9] The Dairy Farm Company, Limited v. The Director of Lands, HCMP 2423/2017.

still remained. On the account of the squatter problem in Pok Fu Lam village, the two staff quarters lack of appropriate maintenance and repair and were finally out of use in 2005, which triggered the lawsuit of HCMP 2423/2017.

3. Difficulties Encountered in the Reality

Though the Dairy Farm Company has won the lawsuit against the Land Director, and was conferred the right to construct a new vehicular road to communicate the staff quarters to Pok Fu Lam road. However, there still is a long way to go for the company to fulfill its wish.

One of the difficulties lies in the road construction plan is the location of the contemplated road. The layout plan No. L.H. 10/5 which was stipulated in 1956, only indicated the location of a public stepped access which was planned to be build by the government under the land grant term SC 10. Since it was not yet decided which party was going to be responsible for the construction of the private vehicular access, granted under the term SC 20, by the time of the land grant. As a result, the layout plan No. L.H. 10/5 did not present the envisaged vehicular road. Therefore, it is necessary to re-design the road if the company insist to constructing a new vehicular access. However, re-design the road is far from an easy thing. As it have been mentioned in the former paragraphs, Pok Fu Lam village has already become a much denser and larger squatter area than it used to be in 1956. A several of narrow footpaths are served as the main interchanges among the whole village. Not to mention the steep mountainous terrain of this site, it is quite hard for the company to squeeze a new vehicular road out of the village to communicate the land-locked staff quarters with Pok Fu Lam road.



6.The Conditions of Exchange No. 5979 clearly shows the planned public stepped access (green zone). Photo from HKGPSURVEYOR·測量師

What's more, even though the designers manage to re-design a possible vehicular road to support the traffic need of the Dairy Farm Company, the government and the company itself will have to pay off a huge price to the clearance of the surrounding squatter structures. From the perspective of the government, making efforts to clear the squatter structures in Pok Fu Lam village militates against their own interest. In accordance with the 1982 squatter control policy, the government shall carry the duty to rehouse all the surveyed squatter if their squatter structures have been demolished. In addition, Pok Fu Lam village is famous for its strong sense of belonging and community. Demolishing the whole village or a part of the village will trigger the outcry from the residents, which is a risk the government does not want to take.

On the other hand, clearing the squatters to make the way for the two abandoned

buildings does not carry much economic benefit to the Dairy Farm Company. As the land grant term SC 20 provides: *A right-of-way from Pokfulam Road to the new lot on a line to be approved by the Director of Public Works will be given.... and the lessees shall be responsible for the whole as if they were absolute owners thereof.*[10] This term indicates that all the expense of constructing the new road should be covered by the Dairy Farm Company, which means the company may have to bear the resettlement cost of the villagers. Moreover, in view of the granted 75 years lease, the lease of this lot is about to expire in the early 2030s.

In short, the issue of the road construction is tightly bonded with the current situation of Pok Fu Lam village. From the standpoint of both parties, under the shadow of the long-lasting squatter problems, it is not worthy of taking so much efforts to make way for the construction of the vehicular road.

4. Conclusion

The lawsuit between the Dairy Farm Company and the Director of Lands originates from the long-standing squatter problem in Pok Fu Lam village. From the very beginning, the residents of Pok Fu Lam Village could not legalize their ownership of the land. Although the condition was once improved by the Block Crown Lease of 1893, the landholding in Pok Fu Lam village become chaotic and tricky again with the missing of the original layout plan and a large influx of population. As a result, the squatter structures have become the main architectures in this area and laid negative influence on the further development of the whole area.

In addition to the squatter problems left over by history, the government and the Dairy Farm Company also play the negative roles in this case. Instead of facing the problems and trying to solve them, out of the consideration of the balance of interests, both parties choose to tolerate the adverse influence on the surrounding environment brought by the squatters. It is the government's indifferent attitude towards the interest of the villagers and the profit-seeking stance of the Dairy Farm Company make it impossible to thoroughly solve the squatter problems.

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[10] The Dairy Farm Company, Limited v. The Director of Lands, HCMP 2423/2017.

were actually made or produced, with a statement that they were made or produced there.

Savings. 50 & 51 Vict. c. 28, s. 19.

17.—(1) This Ordinance shall not exempt any person from any action or other proceeding which might, but for the provisions of this Ordinance, be brought against him.

(2) Nothing in this Ordinance shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Ordinance.

(3) Nothing in this Ordinance shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the Colony who *bonâ fide* acts in obedience to the instructions of such master, and who, on demand made by or on behalf of the prosecutor, has given full information as to his master.

False representation as to Royal Warrant, etc. 50 & 51 Vict. c. 28, s. 20.

18. Every person who falsely represents that any goods are made by a person holding a Royal Warrant, or for the service of His Majesty, or any of the Royal Family, or any Government department, colonial or otherwise, shall upon summary conviction be liable to a fine not exceeding one hundred dollars.

[*Originally* No. 27 of 1890.

Law Rev. Ord., 1924.] *

No. 5 of 1890.

An Ordinance to make provision with respect to squatting on Crown lands.

[1st May, 1891.]

WHEREAS at the date of the establishment of this Colony certain persons were in the occupation of land therein, and they and their descendants and representatives have continued to hold the same without any grant of any lease or interest from the Crown; AND WHEREAS certain other persons have, since the establishment of the Colony, taken possession of land therein, and they and their descendants and representatives have occupied the same without any grant of any lease or interest from the Crown; AND WHEREAS certain other persons have been and are in occupation of land within the Colony under licence from the Crown (known as Squatters Licences) but without any other grant of any lease or interest from the Crown; AND WHEREAS it is desirable that the irregular occupation of Crown land should be discontinued, but that such of the above-mentioned occupiers (hereinafter referred to as squatters) as may be deemed to have an equitable claim thereto shall receive leases from the Crown of their several holdings, on the terms and subject to the conditions hereinafter mentioned:—

* As amended by Law Rev. Ord., 1923.

Short title.

1. This Ordinance may be cited as the Squatters Ordinance, 1890.

Board for determination of claims by squatters to leases. *

2. Claims by squatters to leases from the Crown shall, subject to the provisions of this Ordinance, be heard and determined by a Board, (hereinafter referred to as the Board) which shall consist of one of the judges, the Director of Public Works and the Secretary for Chinese Affairs and one other person to be from time to time appointed by the Governor.

Chairman and quorum of Board.

3.—(1) The judge shall be the chairman of the Board, and three members thereof shall form a quorum.

(2) In the case of an equal division of opinion the chairman shall have a casting vote.

(3) There shall be a secretary to the Board, to be appointed by the Governor, whose duty it shall be to keep a record of all proceedings and decisions of the Board, to receive all claims and communications to the Board, and to issue all orders and directions of the Board.

Powers of Board.

4. The Board shall have the following powers :—

(1) to determine within what time claims to leases in any specified village or district shall be presented to the Board, and in what form and manner such claims are to be presented;

(2) to cause to be notified in any village or district in which land is occupied by squatters, and in such manner as the Board may direct, notice of the time within which claims to such land must be made, and the form and manner of making such claims; and

(3) to fix the dates and times and places for the hearing of such claims to leases, and to cause notice of such dates and times and places to be notified to claimants in such manner as the Board may direct.

Report in favour of claim by Director of Public Works before hearing.

5. If in any case it appears to the Director of Public Works before the hearing, that a lease can be granted to any claimant without further investigation, he shall report the same to the Board accordingly, and in such case it shall not be necessary for the claimant or his witnesses to appear before the Board, unless the Board so orders.

Further powers of Board for hearing of claims.

6.—(1) For the purpose of the hearing of any claim to a lease, the Board shall have powers similar to those vested in the Supreme Court on the occasion of any action in respect of the following matters; namely,

* As amended by Law Rev. Ord., 1923.

(*a*) enforcing the attendance of witnesses and examining them upon oath or otherwise;

(*b*) compelling the production of documents;

(*c*) punishing persons guilty of contempt of the Board or of any order of the Board;

(*d*) ordering inspection of property; and

(*e*) making and enforcing any order which may be necessary to the proper hearing and determination of any question before the Board.

(2) The Board may exercise all or any of such powers for the purposes of any claim before the Board to the same extent as the Supreme Court might exercise them or any of them for the purposes of any action.

Powers of entry and view.

7. Any member of the Board shall, for the purposes of any inquiry made by the Board, have power to enter and view any premises or property, and the Board shall have power to authorise any person nominated by the Board to enter and view any premises or property for the like purpose.

Power of Board with respect to witness committing perjury.

8. If in any claim to a lease it appears to the Board that any witness has committed wilful and corrupt perjury, the Board may, for the purpose of punishing such perjury, exercise powers similar to and to the same extent as those conferred on the Supreme Court by section 31 of the Supreme Court Ordinance, 1873, for the punishment of perjury in any cause, action, or suit.

Ordinance No. 3 of 1873.

Issue of process.

9. Any summons, order, warrant, or direction of the Board shall be deemed to be duly made with the authority of the Board if it is signed by the chairman of the Board and issued by the secretary, and any such summons, order, or warrant so signed and issued in connexion with and for the purposes of any claim to a lease shall be equivalent to any form of summons, order, or warrant issued in any action in the Supreme Court for enforcing the attendance of witnesses, or compelling the production of documents, or otherwise for the purposes of any action.

Power to allow or disallow claim.

10. The Board may allow or disallow any claim to a lease or allow the same as to part of the claim or subject to such conditions as it may think fit.

Fixing rent before hearing of claim.

11. The Director of Public Works shall, before the hearing of the claims relating to land in any village or district, fix the several rents to be charged in any leases which may be

granted, and the amount of the rent so fixed shall be communicated in the notice for claims referred to in section 4 (2); but the Governor may, on the recommendation of the Board or of his own motion, grant the lease in any particular case with a rent lower than that previously fixed by the Director of Public Works.

Granting of lease where claim allowed unless Governor declines.

12.—(1) In any case where the Board allows the claim a lease shall be granted unless the Governor in his discretion declines to grant a lease, in which case the claim shall be referred to the Director of Public Works who may negotiate with the claimant in respect of the grant of a lease of other lands in lieu of the holding in relation to which the claim is made.

(2) In the event of a failure to effect such negotiation the Board shall decide what compensation shall be paid to the claimant in respect of such holding and of any building or fixture, the removal of which is in the opinion of the Director of Public Works necessary or desirable in the public interest, and in such case the amount awarded by the Board shall be paid by the Government to such person as the Board may direct.

Provided always that in estimating any claim for compensation the Board shall take into consideration the condition of a building as regards the security of its structure and its sanitary condition.

Squatter without lease etc., to be deemed trespasser.

13. After the commencement of this Ordinance, occupation by any person as a squatter, or without licence, or without any grant of any estate or interest from the Crown, of land a lease for which has been disallowed by the Board, or in respect of which compensation as above mentioned has been paid, or for which no lease has been claimed under this Ordinance shall be deemed to be a trespass; and the person so occupying without having a grant as aforesaid may be dealt with as a trespasser accordingly.

No appeal from decision of Board.

14. No appeal shall lie from any decision of the Board, nor shall its proceedings be liable to revision by or removal to the Supreme Court by writ of *certiorari* or other legal process.

Form of lease.

15. Leases to be granted to squatters under this Ordinance shall be in such form as may be submitted by the Board and approved by the Governor in Council.

第118章	《官契(薄扶林)條例》	01/07/1997	Cap. 118	CROWN LEASE (POK FU LAM) ORDINANCE	01/07/1997

本條例旨在訂定條文，以便更清楚地確定將位於香港島薄扶林的若干部分土地辨識為根據1893年1月1日所立官契批租的位於薄扶林的各幅及各塊土地。

[1966年10月28日]

To make provision for the better establishment of the identity of certain portions of ground situated at Pok Fu Lam in the Island of Hong Kong with the parcels and plots of ground at the said Pok Fu Lam that were demised under a Crown Lease dated 1 January 1893.

[28 October 1966]

弁言

茲因——

(1) 藉該官契，該各幅土地已按該官契附表所述的各個年期，分別批租予姓名或名稱載列於該附表的人；

(2) 該各幅土地在上述附表有所載列和描述，並曾按照該官契所訂在一份存放於土地註冊處的薄扶林圖則上作出更具體的劃定及描述； (由1993年第8號第2條修訂)

(3) 照現時看來，在批租該各幅土地中的若干幅土地時，曾連帶撥出若干塊土地作耕種用，而持有此若干塊土地，除須就該若干幅土地每年繳付地稅外，亦須就此若干塊土地每年另繳地稅；

(4) 該薄扶林圖則存放失誤和無法於目前尋回，以致在辨識該各幅及各塊土地方面出現困難；

(5) 為免生疑問和為了根據該官契作為合法承租人的人的權益，宜清楚地確定對該等土地的辨識；

Preamble

WHEREAS—

(1) by the said Crown Lease the said parcels of ground were demised respectively to the persons whose names are set out in a schedule to the said Lease for the terms of years stated in that schedule:

(2) the said parcels of ground are set out and described in the said schedule and were according to the said Lease more particularly delineated and described on a plan of Pok Fu Lam deposited in the Land Registry: (Amended 8 of 1993 s. 2)

(3) it appears that in association with the demise of a number of the said parcels of ground certain plots of ground were set aside as land for use in cultivation to be held at annual rents additional to those required to be paid in respect of such parcels of ground:

(4) the said plan of Pok Fu Lam has been mislaid and cannot now be found in consequence of which some difficulty arises as to the identity as aforesaid of the said parcels and plots of ground:

(5) for the avoidance of doubts and in the interests of the rightful lessees under the said Lease it is considered expedient that such identity be clearly established:

1. 簡稱

本條例可引稱為《官契(薄扶林)條例》。

1. Short title

This Ordinance may be cited as the Crown Lease (Pok Fu Lam) Ordinance.

2. 釋義

在本條例中，除文意另有所指外——

"刊登" (published)指在憲報和在一份每日在香港行銷的英文報章及一份每日在香港行銷的中文報章刊登；

"批租" (demised)指根據官契批租；

"官契" (Lease)指一份於1893年1月1日由政府作為一方和姓名或名稱載列於官契附表的幾位人士為另一方所訂立的批租契約，而藉該契約將位於香港島薄扶林的若干幅土地予以批租；

"原有圖則" (original plan)指官契所述的薄扶林圖則，該圖則現時存放於土地註冊處內； *(由1993年第8號第2條修訂)*

"幅" (parcel)指官契附表所載列和描述的任何一幅批租土地；

"塊" (plot)指在批租多幅土地中的若干幅土地時，看來曾連帶撥出作耕種用的多塊土地中的任何一塊土地，而持有此多塊土地，除須就該若干幅土地每年繳付地稅外，亦須就此多塊土地每年另繳地稅；

"署長" (Director)指地政總署署長或其妥為授權的代表。 *(由1982年第76號法律公告修訂；由1986年第94號法律公告修訂；由1993年第291號法律公告修訂)*

2. Interpretation

(Adaptation amendments retroactively made - see 3 of 2000 s. 3)

In this Ordinance, unless the context otherwise requires—

"demised" (批租) means demised under the Lease;

"Director" (署長) means the Director of Lands or his duly authorized representative; *(Amended L.N. 76 of 1982; L.N. 94 of 1986; L.N. 291 of 1993)*

"Lease" (官契) means the Indenture of Lease dated 1 January 1893, and made between the Crown of the one part and the several persons whose names are set out in the schedule to the Lease of the other part, whereby certain parcels of ground situated at Pok Fu Lam in the Island of Hong Kong were demised;

"original plan" (原有圖則) means the plan of Pok Fu Lam mentioned in the Lease as being deposited in the Land Registry; *(Amended 8 of 1993 s. 2)*

"parcel" (幅) means any of the parcels of ground demised and set out and described in the schedule to the Lease;

"plot" (塊) means any of those plots of ground that in association with the demise of certain of the parcels appear to have been set aside as land for use in cultivation to be held at annual rents additional to the rents required to be paid in respect of such parcels;

"published" (刊登) means published in the Gazette and in one daily newspaper printed in the English language for circulation in Hong Kong and in one such newspaper printed in the Chinese language. *(Amended 3 of 2000 s. 3)*

3. 總督可指示擬備圖則

總督可在本條例的生效日期後，盡快指示署長擬備圖則，以便能為各方面的目的由該圖則取代原有圖則。

3. Governor may direct the preparation of a plan

As soon as may be after the commencement of this Ordinance the Governor may direct the Director to prepare a plan with the object of replacing for all purposes the original plan.

4. 圖則的擬備

在接獲根據第3條發出的指示後，署長須擬備圖則，並可安排取得其認為適合的有助於擬備該圖則的數據及資料。

4. Preparation of plan

On receipt of the direction under section 3, the Director shall prepare the plan and may cause such data and information to be obtained as he thinks fit for the purpose of assisting in the preparation of the plan.

5. 圖則的內容

5. Contents of plan

該圖則須按現有記錄和所取得的數據及資料，盡可能對各幅及各塊土地作出劃定和描述，並須 ——

(a) 顯示每幅土地的位置和在批租該幅土地時連帶撥出的每塊土地的位置；

(b) 在切實可行範圍內盡量提供關於每幅土地和上述的每塊土地的現行郵寄地址；

(c) 提供任何其他可得的與確定各幅及各塊土地的位置有關的資料。

The plan shall delineate and describe the parcels and plots in so far as is possible from existing records and the data and information obtained and shall—

(a) indicate the position of each parcel and that of any plot set aside in association with the demise thereof;

(b) give as far as practicable the current postal address of each parcel and any such plot;

(c) give any other available information relevant to the establishment of the position of the parcels and plots.

6. 擬定的圖則須供公開查閱；和對圖則提出反對的方法

在圖則擬定後，署長須安排刊登公告，宣布以下事項 ——

(a) 該圖則已經擬備，可供公眾查閱；

(b) 可查閱該圖則的合適場所和開放給公眾查閱圖則的時間；

(c) 任何人如聲稱對該圖則所包括的任何土地享有權益，並認為該圖則有任何損及該權益的錯誤之處，可於該公告在憲報刊登日期之後的60天內，或在總督於任何特定個案中所容許的較長期限內，向署長送達書面申請，指明該權益的性質和指明其認為該圖則有錯誤之處(連同足以顯示其達致如此認信的理由)，以及要求對該圖則據此而作出改正。

6. Completed plan to be open to inspection; and method of objection thereto

Upon completion of the plan the Director shall cause a notice to be published declaring—

(a) that the plan has been prepared and is available for inspection by the public;

(b) a suitable place at which the plan may be so inspected and the hours during which it shall be open to such inspection;

(c) that any person claiming to have an interest in any land comprised in the plan and who considers that the plan is incorrect in any manner that is prejudicial to such interest may, within 60 days after the date of the publication of such notice in the Gazette, or within such longer period as the Governor may allow in any particular case, serve upon the Director an application in writing specifying the nature of such interest and the manner in which such person considers the plan to be incorrect together with sufficient indication of the grounds for such consideration, and requesting that the plan be corrected accordingly.

7. 由署長批准圖則

(1) 在根據第6條指明或容許的期限屆滿後，署長須考慮其依據該條而接獲的申請書(如有的話)，以及可指示取得其認為適合的與任何該等申請書有關的進一步數據及資料。

(2) 署長經考慮該等申請書和(如署長已作出指示)所取得的任何進一步數據及資料後，又或署長如沒有接獲申請書，他可容許該圖則不作任何修訂，或以其認為適合的形式將該圖則修訂。其後，署長須安排刊登關於批准該圖則的公告，而其所批准的圖則可一如根據第6條公開予公眾查閱者，或一如按照本款修訂並指明修訂之處者。

7. Approval of plan by Director

(1) Upon the expiration of the period specified or allowed under section 6, the Director shall consider the applications (if any) received by him pursuant to that section and may direct such further data and information to be obtained relative to any such application as he thinks fit.

(2) After consideration of such applications and, if he has so directed, of any such further data and information obtained, or, where no such applications are received by him, the Director may allow the plan to stand unamended or amend it in such manner as he thinks fit, and thereafter shall cause a notice to be published approving the plan, either in the form as made available to the public under section 6, or as amended in accordance with this subsection and specifying the manner in which the same has been amended.

8. 向地方法院申請修訂圖則

(1) 任何人聲稱對根據第7(2)條批准的圖則所包括的任何土地享有權益，並認為該圖則有任何損及該權益的錯誤之處，可於公告根據該款在憲報刊登日期之後的30天內，向地方法院申請命令，指示署長以申請書所指明的形式，或以法院認為公正的其他形式，修訂該圖則。

(2) 儘管《官方法律程序條例》(第300章)另有規定，根據第(1)款提出的申請，須以署長為被告人，而法院可自行或因應向其提出的申請，將其覺得任何可能會受該項作出修訂圖則的指示的命令影響的人，安排加入為共同被告人。*(由1997年第255號法律公告修訂)*

(3) 在根據本條進行的法律程序中將加入為共同被告人的人，如不在香港，或經合理調查後仍未能找到，則法院可憑其酌情決定權委任一名律師以代表該人。

(4) 根據本條向地方法院提起的申請，須以原訴傳票提起，並就所有關於訟費及費用的目的而言，當作是一宗申索額超逾$500但不超逾$2,000的訴訟。

8. Application to District Court for amendment of plan

(Adaptation amendments retroactively made - see 3 of 2000 s. 3)

(1) Any person claiming to have an interest in any land comprised in the plan as approved under section 7(2) and who considers that such plan is incorrect in any manner that is prejudicial to such interest may, within 30 days after the publication under that subsection of the notice in the Gazette, apply to the District Court for an order directing the Director to amend the plan in the manner specified in the application or in such other manner as the court may think just.

(2) Notwithstanding anything contained in the Crown Proceedings Ordinance (Cap. 300), the Director shall be named as defendant in any application made under subsection (1), and the court, of its own motion or on application made to it, may in addition cause to be joined as co-defendant any person who it appears may be affected by any order which may be made directing the amendment of the plan.

(3) In any case in which a person to be joined as a co-defendant in proceedings under this section is absent from Hong Kong or cannot, after reasonable inquiry, be found, the court may in its discretion appoint a solicitor to represent such person. *(Amended 3 of 2000 s. 3)*

(4) An application to the District Court under this section shall be instituted by an originating summons and shall for all purposes relating to costs and fees be deemed to be an action in respect of which the value of the claim exceeds $500 but does not exceed $2,000.

9. 地方法院可命令修訂圖則

凡根據第8條提出的申請在該條所指明的期限內提出，地方法院在聆訊各方的申述及其所援引的任何證據後，如認為適合，可命令署長以申請書所指明的形式，或以法院認為公正的其他形式，對根據第7(2)條批准的圖則作出修訂。

9. District Court may order the amendment of the plan

Where an application is made under section 8 within the time specified therein, the District Court, having heard the representations of the parties and any evidence adduced by them, may, if it thinks fit, order the Director to amend the plan as

approved under section 7(2), either in the manner specified in the application or in such other manner as the court may think just.

10. 向大法官上訴

根據第8條作出的申請的任何一方，如因地方法院根據第9條所作的決定感到受屈，可在該項決定作出後14天內，就該決定向大法官上訴。大法官可確認、推翻或更改地方法院的決定，而大法官對該宗上訴的決定為最終決定。

10. **Appeal to a judge**

Any party to an application made under section 8 who is aggrieved by a decision of the District Court under section 9 may appeal against such decision within 14 days after the making thereof to a judge, who may confirm, reverse or vary the decision of the District Court, and the decision of the judge on any such appeal shall be final.

11. 以經批准或修訂的圖則取代原有圖則

根據第7(2)條批准的圖則，或在所有申請及上訴均分別根據第9及10條予以最終處理後按地方法院或大法官所發命令作出修訂的圖則，就各方面的目的而言，須當作為原有圖則；署長須安排刊登公告，述明該圖則為一如上述般批准的圖則，或如圖則經過修訂，則指明其經過修訂之處。

11. **Plan as approved or amended to take the place of original plan**

The plan, as approved under section 7(2), or, if amended by order of the District Court or a judge, as so amended after all applications and all appeals have been finally disposed of under sections 9 and 10, respectively, shall be deemed for all purposes to be the original plan; and the Director shall cause a notice to be published stating that the plan stands as so approved, or, where the plan is so amended, specifying the manner in which it is amended.

Squatter Control Policy

on Surveyed Squatter Structures

Lands Department

March 2021 (revised)

This pamphlet can be downloaded from the Lands Department website
http://www.landsd.gov.hk/en/squatter_control/sqctrl.htm

Contents

Introduction

This pamphlet sets out information on the established policies applicable to squatter control (SC) of surveyed squatter structures. The information contained in this booklet is for reference only and is not intended to create any legal rights or interests and does not confer upon any person the right of occupation of land (whether leased or unleased) nor shall it be construed as a representation that the persons in occupation of the land have any rights or interests whatsoever in the land which they occupy. The pamphlet serves only to explain the key features of the current arrangements in dealing with surveyed squatter structures. The information contained herein may be subject to revision without any prior notice.

Surveyed Squatter Structures

The surveyed squatter structures referred to in this pamphlet are those unauthorised structures erected on Government land and leased agricultural land before June 1982 and have been surveyed and recorded by Government before June 1982 (1982 Survey) (Surveyed Squatter Structure).

1. Use, Materials and Size of Surveyed Squatter Structure

1.1 The 1982 Survey recorded the location, dimensions (i.e. length, width, height), building materials and use of the Surveyed Squatter Structure (SC Survey Record).

1.2 Government's position is that any Surveyed Squatter Structure on Government land is unauthorised occupation of Government land and any Surveyed Squatter Structure on leased agricultural land is an unauthorised structure on leased agricultural land, but they are tolerated to remain on a temporary basis, provided the location, dimensions, building materials and use are the same as the record in the 1982 Survey, until the Surveyed Squatter Structure has to be cleared for development, environmental improvement or safety reasons, or until the Surveyed Squatter Structure is phased out through natural wastage (e.g. when the structure is not occupied or ceases to exist). Such tolerance does not create any legal rights or interests or obligations and does not confer on any person the right of occupation of land.

1.3 Extension, new erection, addition, change of use or alteration with materials that do not conform with the SC Survey Record are not allowed. A Surveyed Squatter Structure with extension, new erection, addition, change of use or alteration with materials that do not conform with the record of the 1982 Survey will lose the status of a Surveyed Squatter Structure and the SC Survey Record will be cancelled. Having considered that the squatter control policy explicitly requires enforcement actions to be taken against unauthorized squatter structures and does not encourage unauthorized extension, Lands Department issued a press release on 22.6.2016 to announce the strengthened squatter control measures with immediate effect. Specifically, if there is evidence showing that a new extension has been completed after that day, actions will be taken such as cancelling the squatter survey number instantly and demolishing the whole unauthorized structure on government land immediately upon detection without giving any opportunity to rectify, or taking lease enforcement actions against cases involving newly extended structures on private land as appropriate.

1.4 Some of the Surveyed Squatter Structures may also be authorised by licences or other forms of approval issued by the Government (licensed structures). If they are found to be non-compliant with the records in the 1982 Survey, their SC Survey Record will be cancelled and they will then be subject to the conditions of the licences or other approval.

2. Rebuilding and Repair of Surveyed Squatter Structure

2.1 *Rebuilding*

2.1.1 Rebuilding of both domestic and non-domestic Surveyed Squatter Structure in an urban area is not allowed. Urban area means districts other than those in the New Territories area. For the purpose of this pamphlet, "New Territories area" includes Tuen Mun, Yuen Long, Fanling, Sheung Shui, Tai Po, Shatin, Sai Kung and Islands. Rebuilding of non-domestic Surveyed Squatter Structure in the New Territories area is also not allowed.

2.1.2 Rebuilding of a Surveyed Squatter Structure with temporary materials on Government land in the New Territories area may be allowed, provided that :

- approval of the Squatter Control Office ("SCO") of Lands Department is obtained;

- the Surveyed Squatter Structure is for domestic use as recorded in the 1982 Survey; and

- the location, dimensions, building materials (where temporary materials are used) and use of the rebuilt squatter structure will remain the same as the SC Survey Record. Asbestos can be replaced by other temporary materials.

2.1.3 Rebuilding of a Surveyed Squatter Structure with temporary materials on leased agricultural land may be allowed in the New Territories area provided that :

- the squatters who are not the registered owner of the leased agricultural land have obtained the consent of the registered owner;
- the squatters have obtained the No Objection Letter for Rebuilding from the relevant SCO;
- the Surveyed Squatter Structure is for domestic use as recorded in the 1982 Survey;
- the location, dimensions, building materials (where temporary materials are used) and use of the rebuilt squatter structure will remain the same as the SC Survey Record. Asbestos can be replaced by other temporary materials

2.1.4 If the Surveyed Squatter Structure to be rebuilt in the New Territories area is in permanent material as recorded in the 1982 Survey or permanent building material is used in rebuilding, the rebuilt structure will lose the status of the Surveyed Squatter Structure. Applications for rebuilding in such circumstances should be submitted to the respective District Lands Office ("DLO"), and upon approval, the DLO, may issue a Short Term Tenancy (STT) for Government land or a Short Term Waiver (STW) for leased agricultural land.

2.1.5 Some of the Surveyed Squatter Structures may also be licensed structures, in which case separate approval of the respective DLOs will also be required for the rebuilding of licensed structures.

2.2 *Repair*

2.2.1 Repair of a Surveyed Squatter Structure on Government land may be allowed, provided that :

- approval of the respective SCO is obtained; and

- the location, dimensions, building materials and use of the repaired squatter structure remain the same as the SC Survey Record. Asbestos can be replaced by other temporary materials.

2.2.2 Where the Surveyed Squatter Structure is on leased agricultural land, repair works to the Surveyed Squatter Structure may be allowed, provided that :

- the squatters who are not the registered owner of the leased agricultural land have obtained the consent of the registered owner;

- the squatters have obtained the No Objection letter for Repair from the relevant SCO;

- the location, dimensions, building materials and use of the repaired squatter structure remain the same as the SC Survey Record. Asbestos can be replaced by other temporary materials.

3 Non-compliance

3.1 Rebuilding, repair or other works including extension, new erection, addition, change of use or alteration with materials to the Surveyed Squatter Structures without prior approval as set out in Section 2 above is not allowed. The non-compliant structure does not conform with the SC Survey Record and will lose its status as a Surveyed Squatter Structure. The effect is that the SC Survey Record will be cancelled and the structure will no longer be tolerated. As the structure constitutes unauthorised occupation of Government land or is an unauthorised structure on leased agricultural land, it will be subject to appropriate enforcement action by Government without any compensation including ex-gratia allowances.

3.2 If the structure is on Government land, Government may prosecute the occupier for an offence of unlawful occupation of unleased land, demolish the unauthorised structure and following prosecution, recover the cost of demolition from the person convicted of such offence.

3.3 If the structure is on leased agricultural land, Government may take appropriate lease enforcement action including re-entry action, or enter the leased agricultural land to demolish the unauthorised structure, and recover the cost of demolition from the lessee.

4. Surrender of Surveyed Squatter Structures

4.1 A territory-wide Squatter Occupancy Survey was carried out by the Government in 1984/85 whereby the occupants of Surveyed Squatter Structures were registered.

4.2 Surveyed Squatter Structures which are no longer occupied by the registered occupants or other occupants will be phased out, with the SC Survey Record cancelled and the structures subject to appropriate enforcement action by Government.

4.3 Surveyed Squatter Structures which are no longer occupied should be surrendered to the relevant SCO. If it is found that occupants of a Surveyed Squatter Structure have been allocated subsidised housing by the Housing Department (HD), HD will be informed for follow-up action on the occupancy position of Public Rental Housing as well as other forms of subsidised housing.

5. Do Not Erect, Buy or Rent Squatter Structure

5.1 Surveyed Squatter Structures carry no legal title to the land. They are temporarily tolerated, until they have to be cleared for development, environmental improvement or safety reasons or until they are phased out through natural wastage (i.e. when the structure is not occupied or ceases to exit). When the Surveyed Squatter Structures are cleared by Government, subject to prevailing policy on compensation and rehousing, the occupants may not be eligible for any compensation including ex-gratia allowances. The purchase or renting of Surveyed Squatter Structures is not protected by law nor does it confer any right on the persons occupying the Surveyed Squatter Structure.

5.2 Squatter structures other than those which are Surveyed Squatter Structures or covered by licences or other forms of approval issued by Government are unauthorised structures. They are not temporarily tolerated and are subject to immediate enforcement by the Government in accordance with the relevant laws or land leases. Those who erect and/or occupy such unauthorised structures are liable to prosecution and eviction.

5.3 Members of the pubic are advised not to purchase or rent Surveyed Squatter Structures or unauthorised squatter structures given their nature. Before making a decision to buy or rent structures, members of the public should seek independent professional advice on legal status of the land and the structures thereon and on their exposure to risk or liabilities in the event of enforcement action by the Government against unauthorised or unlawful structures.

For Enquiry

1. Squatter Control Offices, Lands Department

	Address	Tel. No.
Squatter Control/ Hong Kong & Lei Yue Mun Office	19/F, Guardian House, 32 Oi Kwan Road, Wan Chai, Hong Kong	2896 2457
Squatter Control/ Kowloon, Tsuen Wan & Kwai Tsing Office	10/F., 9 Chong Yip Street, Kwun Tong, Kowloon	2778 8181
Squatter Control Team/ Islands *	25/F, Harbour Building, 38 Pier Road, Central, Hong Kong	2852 3185
Squatter Control/ New Territories East (1) Office	G/F, Luk Chuen House, Lek Yuen Estate, Sha Tin, New Territories	2691 7361
	4/F, Sai Kung Government Offices, 34 Chan Man Street, Sai Kung, New Territories	2792 1312
Squatter Control/ New Territories East (2) Office	G/F, Choi Yuk House, Choi Yuen Estate, Sheung Shui, New Territories	2671 0226
Squatter Control Team/ Tuen Mun#	G/F, Hing Tai House, Tai Hing Estate, Tuen Mun, New Territories	2462 3800
Squatter Control Team/ Yuen Long#	G/F, Woo Shui House, Shui Pin Wai Estate, Yuen Long, New Territories	2479 7341

* With effect from 15.6.2020, Squatter Control/Islands Office was subsumed into District Lands Office/Islands.

\# With effect from 1.3.2021, Squatter Control/New Territories West (1) Office & New Territories West (2) Office are subsumed into District Lands Office/Tuen Mun and District Lands Office/Yuen Long following the geographical boundary of the DLOs.

2. District Lands Offices, Lands Department

	Address	Tel. No
District Lands Office/Hong Kong East	3/F & 19/F, Southorn Centre, 130-150 Hennessy Road, Wan Chai, Hong Kong	2835 1684
District Lands Office/Hong Kong West and South	3/F, 19/F & 20/F, Southorn Centre, 130-150 Hennessy Road, Wan Chai, Hong Kong	2835 1711
District Lands Office/Kowloon East and Kowloon West	3/F – 4/F, South Tower, West Kowloon Government Offices, 11 Hoi Ting Road, Yau Ma Tei, Kowloon	2300 1764
District Lands Office/Islands	19/F, Harbour Building, 38 Pier Road, Central, Hong Kong	2852 4265
District Lands Office/Tsuen Wan and Kwai Tsing	10/F and 11/F, Tsuen Wan Station Multi-storey Carpark Building, 174-208 Castle Peak Road, Tsuen Wan, New Territories	2402 1164
District Lands Office/Sha Tin	11/F, Sha Tin Government Offices, 1 Sheung Wo Che Road, Sha Tin, New Territories	2158 4700
District Lands Office/Tai Po	1/F, Tai Po Government Offices, 1 Ting Kok Road, Tai Po, New Territories	2654 1263

	Address	Tel. No
District Lands Office/Sai Kung	3/F and 4/F, Sai Kung Government Offices, 34 Chan Man Street, Sai Kung, New Territories	2791 7019
District Lands Office/Tuen Mun	6/F and 7/F, Tuen Mun Government Offices, 1 Tuen Hi Road, Tuen Mun, New Territories	2451 1176
District Lands Office/North	6/F, North District Government Offices, 3 Pik Fung Road, Fanling, New Territories	2675 1809
District Lands Office/Yuen Long	7/F, 9/F-11/F, Yuen Long Government Offices, 2 Kiu Lok Square, Yuen Long, New Territories	2443 3573

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 2423 OF 2017

BETWEEN

THE DAIRY FARM COMPANY, LIMITED	Plaintiff
and	
SECRETARY FOR JUSTICE for and on behalf of THE DIRECTOR OF LANDS	Defendant

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Before: Hon Wilson Chan J in Court
Dates of Hearing: 18 & 19 September 2019
Date of Judgment: 5 March 2020

J U D G M E N T

A. INTRODUCTION

1. The plaintiff, Dairy Farm Company Limited, is the registered owner of Rural Building Lot No. 758 (the "**Lot**") in Pokfulam by an Agreement and conditions of Exchange (No. 5959) dated 17 March 1958 ("**Land Grant**").

2. By its Originating Summons of 27 October 2017, the plaintiff seeks the following relief:

(1) A declaration that on a proper construction of Special Condition ("**SC**") 20 of the Land Grant the Government of the HKSAR ("**Government**") must give the plaintiff a vehicular right of way ("**VROW**") from Pokfulam Road to the Lot.

(2) A declaration that by failing and/or refusing to give to the plaintiff a VROW between Pokfulam Road and the Lot, the Government has acted in breach of, or has derogated from, the Land Grant.

(3) An order that the Government do give to the plaintiff a VROW.

(4) Further or alternatively, damages to be assessed for breach of, or derogation from, the Land Grant to be paid by the Government to the plaintiff.

3. In summary, the plaintiff has submitted that it is entitled to such relief because:

(1) On a proper construction of the Land Grant – the express language used and the background factual matrix – SC 20 confers a <u>private</u> general right of way, covering rights of both pedestrian and vehicular access between the Lot and Pokfulam Road. This right of way is separate and distinct from (a) the existing footpath; and (b) the proposed stepped access and new road to be constructed under SC 10, which are <u>public</u> rights of way.

(2) Contrary to the Government's case:

(a) It has no discretion to decide on the mode or quality of user (with or without vehicle etc) of the right of way to be given under SC 20.

(b) It has no discretion to refuse the granting of the right of way whether on grounds of "delay" or otherwise. Nor is the plaintiff's claim barred by laches, particularly when Government has suffered no prejudice.

(3) The Government has therefore acted in breach of the Land Grant. Moreover, without a VROW, the Lot has become unfit for the purpose for which it was granted as it is impractical to maintain or redevelop the staff quarters on the Lot. As such, the Government has derogated from the Land Grant.

<u>B. BACKGROUND</u>

4. The facts set out in this Section are reproduced from the plaintiff's Skeleton Argument and, unless otherwise stated, are undisputed or cannot be seriously disputed.

B1. The Land Grant

5. The Lot was originally part of a larger farm lot in Pokfulam ("**Old Lot**") granted to the plaintiff under a Crown Lease dated 4 October 1910 ("**Crown Lease**"). Under the Crown Lease, no person shall use the Old Lot for purposes other than farm, agricultural or garden grounds, or the erection of any buildings on the land except for the proper maintenance, care and enjoyment of the land as a farm or gardens.

6. Before 1956, various one to two storey buildings were erected on the Old Lot, including quarters for staff and workmen. These buildings were only accessible via a footpath from Pokfulam Road (the "**Footpath**") which has existed since at least 1945. By the time of the Land Grant, there was no vehicular access from Pokfulam Road to the Old Lot, and the Lot had been surrounded by unleased Government land.

7. In or around late 1955 or early 1956, the plaintiff proposed to the Government to erect a further block of quarters for its staff and workmen. It was subsequently agreed that the plaintiff should surrender a portion of the Old Lot of about 120,000 sq ft in consideration for the grant of a rural building lot of about 30,000 sq ft (ie the Lot).

8. The correspondence between the plaintiff and the Government shows that:

(1) The parties agreed on the surrender of a portion of the Old Lot and the grant of the Lot with reference to a "layout plan of the area": see the letter dated 18 January 1957 from the Director of Public Works to the

plaintiff, which stated "*[t]he area coloured red, which is proposed as the new rural building lot has been increased to 30,000 square feet to conform as far as possible with the layout plan of the area and the portion of Farm Lot No.71 to be surrendered has been proportionately increased to 120,000 square feet as shown coloured blue*".

(2) The "layout plan of the area" referred to in the 18 January 1957 letter is the "Layout Plan No. L.H. 10/5" dated 6 June 1956 ("**Layout Plan**") sent on or around 26 June 1956 to the plaintiff – which was acknowledged by the Government to have a "considerable interest in Pokfulam Village". The portion depicted by the plan attached to the 18 January 1957 letter notably resembles Plan No. 1 attached to the Land Grant, as well as the relevant part of the Layout Plan.

9. The Layout Plan reflected the proposed layout for redevelopment of Pokfulam Village. The Layout Plan provided for, *inter alia*:

(1) the widening of Pokfulam Road to 60 feet;

(2) two 45 feet feeder roads connecting Pokfulam Road with the north and east of Pokfulam Village. The Lot would be accessible from the feeder road parallel to the west side of the Lot ("**Proposed New Road**") via a pedestrian stepped access ("**Proposed Stepped Access**");

(3) a layout of building blocks suitable for two-storey buildings;

(4) a series of 30 feet streets suitable for two-storey houses, which would be capable of taking some vehicular traffic; and

(5) sites for public purposes, such as bath and latrine, market and clinic.

10. There is no dispute that vehicular use was already common in or around 1958.

11. During the land exchange negotiation, the plaintiff was already building a new block of staff quarters with 8 storeys. The block was completed on or about 30 January 1957.

12. On 17 March 1958, the plaintiff and the Director of Public Works executed the Land Grant, effecting the surrender of a portion of the Old Lot to the Government in exchange for the grant of the Lot for a term of 75 years from 25 June 1956. The Land Grant contains, *inter alia*, the following General Conditions ("**GC**") and SC:

(1) GC 5, which provides that the lessee must maintain all buildings erected or which may at any time thereafter erected on the Lot in good repair and condition. In the event of demolition of the buildings standing on the Lot, the lessee shall replace the same either by buildings of the same type of no less volume or by buildings of such type and value as shall be approved by the Director of Public Works.

(2) SC 2, which provides that no buildings shall be erected on the Lot except those for providing housing for staff and employees of the grantee and dependent members of the families of such staff and employees, non-paying guests and domestic servants employed by them.

(3) SC 10, which provides: –

"The proposed stepped access shown coloured green on Plan No.1 will be *constructed by Government* at the lessees' costs *as and when the new road is formed*." (emphasis added)

As noted above, Plan No. 1 resembles the relevant part of the Layout Plan, depicting the Proposed Stepped Access which connects the Proposed New Road. It is not disputed that the "new road" referred to in SC 10 (ie the Proposed New Road) has never been formed, and the Proposed Stepped Access has consequently never been built by the Government.

(4) SC 20, which provides: –

"*A right-of-way from Pokfulam Road to the new lot on a line to be approved by the Director of Public Works will be given*. *The lessee shall construct a road or path* on the piece of ground over and along which such right-of-way shall be given at such time or times and in such manner as *the Director of Public Works* may direct *and shall uphold, maintain and repair such road or path* and everything forming portion of or appertaining to it to the satisfaction of the Director of Public Works, and the lessees shall be responsible for the whole as if they were absolute owners thereof. Any alteration of the government road to which the right-of-way is given absorbing a portion of such places of ground or affecting the gradient thereof shall not give rise to any claim by the lessees who shall carry out all consequent alterations to such road or path constructed by them." (emphasis added)

(5) SC 21, which provides: –

"The grant of the right-of-way referred to in Special Condition No. (20), shall be *in such form* and *on such conditions* as may be approved by the *Land Officer* and *shall not give the lessees the exclusive rights to use the road or path constructed by them*, and Government reserves the right to grant right-of-way over such road or path to the lessees of any other lots which may be sold in the vicinity or to take over the whole or any portion of the said road or path for the purposes of a public road without payment of any compensation to the lessees or to other lessees to whom right-of-way over the whole or any portion of the said road or path shall have been granted." (emphasis added)

13. Given its geographical position, absent effective access via a right of way the Lot will be functionally "land-locked".

14. Despite the scale and other characteristics of the Lot (further discussed below) and of Pokfulam Road (a four lane arterial roadway), there exists between them no vehicular access, despite the right of way clause in SC 20 of the Land Grant.

15. Instead, the Lot to present day remains accessible from Pokfulam Road only via the Footpath, which is surrounded by squatter structures on unleased Government land.

B2. The staff quarters

16. In 1961, the block of quarters built in 1957 was extended. The entire block of staff quarters as completed is now known as Block B of the Dairy Farm staff quarters. In 1965, another block of staff quarters was completed, and it is now known as Block A of the Dairy Farm staff quarters.

17. In or about 2005, the use of the Lot as staff quarters ceased. This is because the 2 blocks of staff quarters, due to their old age, became uninhabitable and it was increasingly difficult to maintain the buildings due to the lack of vehicular access.

18. The staff quarters are now in a dilapidated condition, and it is necessary for the plaintiff to erect hoardings around the staff quarters to prevent unauthorised entry as the condition of the buildings poses a real danger to persons within and in the vicinity of the buildings.

19. Due to lack of vehicular access, it is difficult if not impossible and economically infeasible to carry out proper maintenance of the staff quarters or to demolish and replace the same by the construction of new buildings in compliance with GC 5 of the Land Grant, since heavy machinery is required for the demolition of the existing buildings and construction of new buildings on the Lot.

20. A Defective Building Order has been issued in respect of Block B of the staff quarters.

B3. The plaintiff's applications for a VROW

21. Between 2000 and 2005, through its then land consultant David C Lee Surveyors Ltd ("**DLS**"), the plaintiff sought approval from the Government to grant a VROW from Pokfulam Road to the Lot:

(1) On 28 September 2000, DLS wrote to District Lands Office ("**DLO**") and applied for a VROW resembling the proposed road indicated on the Pokfulam Outline Zoning Plan.

(2) On 30 November 2000, DLO replied and stated that it was prepared to grant a right of way over the Footpath leading from Pokfulam Road to the southern boundary of the Lot subject to no adverse comments from the departments concerned.

(3) On 16 February 2001, DLS rejected DLO's offer and pointed out that the Footpath was distinct from the right of way under SC 20.

(4) On 15 October 2002, given DLO's refusal to grant a VROW, DLS proposed to DLO a non-in-situ land exchange. This proposal was rejected on 21 January 2003, but in the letter DLO stated that it would be prepared to grant a right of way under SC 20 which is considered feasible and acceptable to the Government.

(5) On 24 April 2003, a new proposed alignment of the road which runs along the northern boundary of the existing school site in Pokfulam was submitted by DLS to DLO for consideration.

(6) On 16 June 2004, an alternative approach for a VROW was submitted by DLS to DLO. On 6 August 2004, DLO replied that the proposal would involve clearance of squatter structures on the Government land and would "*generate strong opposition from the local community*". It suggested DLS providing further proposed road alignment for study.

(7) On 6 October 2004, another proposed road alignment for a VROW was submitted by DLS to DLO. DLS also stated that the plaintiff would be willing to meet the cost of clearance of Government land including

the cost of reprovisioning of the temporary sitting out area which lies within the proposed alignment. The plaintiff's intention was confirmed again in a letter dated 26 may 2005 from DLS to DLO.

(8) However, the plaintiff's proposal has never been approved by DLO.

22. Several years later, by a letter dated 10 October 2012, the plaintiff through Larry H.C. Tam & Associates Ltd applied once more for provision of a VROW under SC 20 of the Land Grant, submitting a proposal setting out *inter alia* the proposed alignment and layout of the vehicular access to DLO.

23. On 31 May 2013, DLO rejected the plaintiff's application, stating that the Government is not obliged to grant a VROW to the plaintiff. No reason was given for DLO's position.

24. In 2016, the plaintiff requested the Government to review its rejection to grant a VROW. There has been no open reply to the plaintiff's request by the Government.

25. From the correspondence, it is apparent that the Government's unwillingness to grant a VROW to the plaintiff is due to its unwillingness to clear the squatters on the Government land to make way for this. The Government has not sought to deny this in its affidavit evidence. In fact, there is no dispute that the Government can carry out clearance if it decides to do so.

C. CONSTRUCTION OF THE LAND GRANT

C1. Relevant legal principles

26. In the case of an express grant of a right of way, the extent of the rights granted depends on the express terms of the grant. Those terms must be construed in accordance with the general rules as to the interpretation of legal documents. As submitted by the plaintiff, the general principles here are well-established:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to both parties in the situation in which they were at the time of the execution of the document.

(2) The court will focus on the meaning of the relevant words in their documentary, factual and commercial context.

(3) The meaning of the words is to be addressed in light of:

(a) The natural and ordinary meaning of the provision.

(b) Any other relevant provisions in the document.

(c) The overall purpose of the relevant provisions.

(d) The facts and circumstances known or assumed by the parties at the time that the document was executed.

(e) Commercial common sense.

(4) The process is an objective one, subjective evidence as to the intentions of the parties is to be disregarded.

(5) The general rule is that all relevant facts and circumstances can be taking into account as an aid to interpretation of the words used in the document.

(6) As an exception to the general rule referred to in (5) above, the court will not take into account the contents of pre-contractual negotiations save in so far as those negotiations reveal the existence of a background fact which is otherwise relevant.

See *Gale on Easements*, 20th edn (2017), §§9-18 – 9-21; also *Jumbo King Ltd v Faithful Properties* (1999) 2 HKCFAR 279 at 296D-I *per* Lord Hoffmann NPJ; *River Trade Terminal Co Ltd v Secretary for Justice* (2005) 8 HKCFAR 95 at §§34-36 *per* Ribeiro PJ; *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351 at §15 *per* Ma CJ; and recently *Eminent Investments (Asia Pacific) Limited v Dio Corporation* [2019] HKCA 606 at §7.3 *per* Cheung JA.

27. Where the agreement was a formal and complex one, or was negotiated and prepared with the assistance of skilled professionals, the interpretation may be achieved by a greater emphasis on the textual analysis: *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at §13 *per* Lord Hodge.

28. Subsequent conduct of the parties is generally inadmissible to construe a contract: *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603E *per* Lord Reid; *SNE Engineering Co Ltd v Chim Kee Machinery Co Ltd* (unreported, CACV 101/2016, 11.7.2017) at §52 *per* G Lam J (sitting in the Court of Appeal).

29. As stated in *Gale* (at §9-37), the true principle appears in the Judgment of Jenkins J in *Kain v Norfold* [1949] Ch 163 at 168:

> "[Counsel] says, and I think he is supported by authority, that *a right given to the grantee of property at all times hereafter to go, pass and repass over and along a certain way without any reference to horses, carriages, carts or anything else will, per se, unelaborated as it is, give a right of way for all purposes, that is to say, a right to pass with vehicles as well as on foot*, provided that the way to which the grant refers is a way suitable at the date of the grant for use by vehicles. I think that accords with the statement of law contained in the judgment of Jessel MR in *Cannon v Villars*." (emphasis added)

This was said in the context of a right being granted over a "defined strip" within the servient tenement.

30. *Halsbury's Laws of England* 5th ed, vol 87 §953 states: "A grant of a right of way to a dwelling house prima facie amounts to a grant of a right of way for all reasonable purposes required for the dwelling house, and would include the right to the use of cars by the dominant owner to set down or pick up passengers, or a right to have a van draw up to the door to load or unload goods."

31. In *Charles v Beach & Anor* (unrep., 1.7.1993),[1] a common vendor of 2 adjoining properties and a narrow strip of land in the form of a roadway of about 9 ft 6 ins wide separating the two properties granted to the purchaser of the dominant tenement a right to use the "path or roadway" lying between the 2 properties. Because the dominant tenement's

[1] The summary of the facts and the *dictum* of the Court of Appeal can be found in (1) *Charles v Beach* [1993] EGCS 124; (2) *Gale* at §9-28; and (3) *Perlman v Rayden* [2004] EWHC 2192 (Ch) at §§39-40.

frontage to the front one third of the driveway was largely occupied by the flank wall of her house, a right of access to the property with vehicles could only be enjoyed effectively if such access was available from the rear two thirds of the driveway. The county court held that the dominant owner was entitled to vehicular access over the whole of the driveway. The decision was upheld by the English Court of Appeal. Waite LJ held that[2]:

> "(1) *The use of the words "path or roadway"* when applied to the driveway in the deed of grant *provide a strong prima facie indication of intention by the grantor to confer the widest rights of both pedestrian and vehicular access.*
>
> (2) *The imposition upon the grantee of a duty to contribute a one quarter share of the expense of keeping the "path or roadway" in repair provides a further powerful indication of intention to confer a right of user in the widest terms*." (emphasis added)

32. As pointed out by the plaintiff, the various principles above were effectively affirmed and applied by the Court of Appeal in *Wisename Ltd v The Secretary for Justice* [1998] 1 HKLRD 71, a case with striking parallels with the present:

(1) There, the Court of Appeal considered the nature and extent of the plaintiff lessee's right of way under a special condition (SC 12) to a right of way between a government road and his otherwise land-locked lot.

(2) The words of SC 12 were in substance identical to those of SC 20 in the present case, save that SC 12's opening words specified the line of the right of way as "*shown coloured yellow on a plan deposited at the District Office*", whereas SC 20 refers to a right of way from Pokfulam Road to the Lot "*on a line to be approved by the Director of Public Works*". As with the disputed term in *Charles v Beach* (above), which referred to "*path or roadway*", both SC 12 and SC 20 refer to "*road or path*".

(3) The Court of Appeal's primary ruling was to affirm that SC 12 conferred "a general right of way", which included "effective vehicular access": see e.g. p.78I-J (Liu JA).

(4) Construing SC 12 "*in the factual matrix of the circumstances surrounding the signing of the New Grant*" (p.77H-I), Liu JA noted that: "*No restrictive words were incorporated into [SC 12], nor could they be found elsewhere in the New Grant*" and there were "*no circumstances or disclosed intention to suggest that the right of way granted was restrictive*": p.78F-G.

(5) Noting that the "*nature and extent of the right of way turns on a construction of the whole grant including but not restricted to Condition 2*" (p.80H), Chan CJHC (as he then was) stated *inter alia* that:

> "*It is significant to note that there is no restriction in Condition 12 or anywhere in the New Grant on the use of the right of way, such as it is only to be used only as footpath and not for vehicular access. The burden is on the Crown (now the HKSAR) to show that it is restricted in use in any particular way. In my view, the government has failed to discharge this burden. On the contrary, there is every indication that the right of way may be exercised and was intended to be exercised for uses including that for vehicular access. In the absence of any express or implied restriction, the right of way in question is a general right of way*" (p.81J-82A; with emphasis supplied).

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[2] Waite LJ's *dictum* is set out in *Perlman* at §40.

(6) In reaching their core conclusions, both Liu JA and Chan CJHC had regard to the circumstances at the time of the New Grant in that case. As analysed below, the background in the present case also strongly supports the same reading of the express words of SC 20 as endorsed by the Court of Appeal.

C2. Why SC 20 obliges the Government to grant a vehicular right of way

33. It is pertinent to start with a textual analysis of the express language used in the Land Grant. The plaintiff correctly made the following points in this regard:

(1) The Land Grant was drafted by the Government, which obviously had carefully chosen the words on the contract.

(2) SC 20 provides that a right of way from Pokfulam Road to the Lot will be given, although the alignment (ie the "*line*") of the way proposed by the plaintiff would have "*to be approved*" by the Director of Public Works at its discretion. This means that the Government has no discretion to generally refuse to grant a right of way to the plaintiff. In other words, the express terms make clear that it is the specific alignment of such right of way under SC 20 that is "*to be approved*", but save for the Director's discretion in that limited regard, the right of way "*will be given*" as a matter of unqualified legal entitlement.

(3) The grant of the right of way was for access to domestic premises. Prima facie, this amounts to the grant of a right of way for all reasonable purposes required for the use of such premises.

(4) SC 20 then provides that the lessee shall construct a road or path on the piece of ground over and along which the right of way shall be given, at such time and in such manner as the Director of Public Works may direct. This has been stated by *Gale* at §9-109 as a settled ancillary right to which the dominant owner is entitled to make the grant effective. Here, the choice is the plaintiff's to decide whether to build a road or path. The language of "road or path" (which is identical to that in *Wisename*) itself indicates the intention of the Government to confer the widest rights of both pedestrian and vehicular access: see *Charles v Beach* discussed in paragraph 31 above.

(5) SC 20 imposes no express restriction on the mode or quality of user of the right of way. On the contrary, it requires the plaintiff to maintain and repair the "road or path". These are powerful indications of the Government's intention to confer a right of user in the widest terms. In *Keefe v Amor* [1965] 1 QB 334 at 345F, Russell LJ observed that an obligation to pay a fair portion of the cost of keeping the way in good repair and condition would be unusual if "all that was envisaged was the impact of human feet".

(6) The last sentence of SC 20 is a standard clause which can be found in other government leases. It means that if there is alteration to Pokfulam Road (ie the "government road" to which the right of way gives access) which absorbs a portion of the ground over which the right of way is given or affects its gradient, the lessee shall not have any claim and shall carry out consequent alterations to the road or path it constructs.

(7) And as Chan CJHC noted in *Wisename* (p.81H-J), the maintenance, repair and other obligations imposed on the grantee should inform the proper construction of SC 12/ SC 20 and in particular the first sentence, "*which cannot be read in isolation*".

(8) SC 21 gives the Land Officer (as opposed to the Director of Public Works) a discretion to approve the "*form and conditions*" of "*the grant*" of the right of way that SC 20 substantively accords. In other words, the particular form and conditions of the legal instrument granting the right of way shall be at the Land Officer's discretion. SC 21 does not give the Government a discretion to decide on the form or other characteristics of the substantive right of way itself, be they its alignment, mode or quality of user. Those matters are governed by SC 20.

(9) The right-of-way under SC 20 is to provide access to and from Pokfulam Road which is vehicular, and this in itself is an indication that the right-of-way is intended to be vehicular. This is the true object and purpose of SC 20 – the object of SC 20 is not to prevent the Lot from being land-locked as the Lot and the Old Lot could always be accessed via the Footpath. SC 20 thus plainly intended to confer something "extra", namely vehicular access to Pokfulam Road, and from that the wider road network that was being contemplated in the area.

34. Further, the above textual points stand in tandem with – and are reinforced by – the following contextual factors. There are two main sets of factors in this regard.

35. First, a number of significant practical considerations strongly support the plaintiff's reading of SC 20:

(1) The Land Grant granted a long lease of 75 years. It is not disputed that vehicular use was already common in 1958. A reasonable person would have concluded that the parties have objectively intended to stipulate for a general right of way that could be exercisable by the use of vehicles at some point in future, with the likely continued development of both (a) the Pokfulam neighbourhood and (b) the prevalence of vehicular modes of transport generally and in that area.

(2) In any event, as the Court of Appeal noted in *Regal Shining Limited v Secretary for Justice* [2016] 3 HKC 291 at §41 (in a dispute over the scope of another form of provision in a Government lease), the long term nature of such a lease militates against restricting the scope of its provisions "*by reference to the specific practice at the time when the lease was made*".

(3) It is highly relevant to note that the plaintiff's undertaking of maintenance and redevelopment obligations under GC 5 would last for a period of 75 years. This strongly supports the construction that the right-of-way is for a vehicular access. This is highlighted by the undisputed fact that it would be practically difficult and economically infeasible for the plaintiff to comply with GC 5: see Section B2 above. Indeed, as a practical proposition, it would have been reasonably apparent even in 1958 that the longer the life of whatever buildings existed or were contemplated at the time of the grant, the greater

would be the logistical demands of maintenance, repair and any rebuilding or redevelopment in respect of those structures.

(4) Another relevant consideration is that it was contemplated that the staff quarters on the Lot would provide housing for more senior staff of the plaintiff: see SC 2 which referred to "*domestic servants*" of the staff. The contemplation of such residents again militates against any restriction of the wide words of SC 20 to pedestrian access only.

36. Second, in terms of the wider documentary and developmental context, it can be seen that:

(1) The Layout Plan was part of the factual (including geographical and developmental) and documentary matrix known to both the plaintiff and the Government: see paragraph 8 above. It contemplated that the Pokfulam Village would be redeveloped with a network of roads and streets capable of taking vehicular traffic. Vehicular access connecting the Lot with such road network leading to Pokfulam Road would align with that planning intention.

(2) That the Layout Plan did not itself provide for a vehicular access from the Lot to the Proposed New Road does not assist the Government. The Layout Plan indicated the public road network intended to be constructed by the Government. SC 20, however, concerns the provision of a private right of way, the alignment of which had yet to be agreed between the plaintiff and the Government by the time of the Land Grant. Accordingly, the "road or path" envisaged under SC 20 would and could not have been shown on the Layout Plan.

37. The Government heavily relies on SC 10 and suggests that since SC 10 only provides a pedestrian stepped access, SC 20 only provides for a similar pedestrian access as a contingency to cater for the possibility that the Proposed New Road is not constructed. It argues that the obligation on the part of the Government under SC 20 can be satisfied by granting a right of way over the Footpath or the Proposed Stepped Access.

38. I agree with the plaintiff that any such reliance on SC 10 is untenable:

(1) Linguistically, it violates the plain and wide language of SC 20, which provides that the lessee shall construct a "road or path" – with both words capable of designating vehicular means of access.

(2) Structurally and substantively, SC 10 and SC 20 are clearly separate and distinct. The Proposed Stepped Access under SC 10 is to be constructed by the Government (at the plaintiff's costs) as and when the Proposed New Road is formed, as part of the redevelopment of the Pokfulam Village indicated in the Layout Plan. In contrast, the "road or path" over which the right of way separately provided for under SC 20 is to be constructed by the plaintiff.

(3) Whereas SC 10 refers to "new road" to be formed, it is reasonably clear from the factual background that this was a reference to the road which was being proposed under the scheme shown in the Layout Plan. The roads being proposed would not provide direct vehicular access to the Lot, and hence the need for a "stepped access" under SC 10.

(4) The road network detailed in the Layout Plan was intended to be public roads. Such a public road network should be distinguished from the private "road or path" that would be constructed by the plaintiff as lessee upon the right of way created in favour of the Lot under SC 20. It is evident from SC 20 that the "road or path" to be constructed by the lessee under SC 20 was, at least initially, to be a private road.

(5) There is no language in the Land Grant to the effect that SC 20 is engaged only if the Proposed New Road and the Proposed Stepped Access under SC 10 are not built. SC 20 clearly creates an independent right of way. If SC 10 is implemented, the "road or path" under SC 20 could connect the Lot to any point of the Proposed New Road, with the precise alignment being subject to the Government's approval.

(6) Accordingly, there is no basis to equate or conflate the intention or purpose of SC 10 with that of SC 20. It is, in all the circumstances, absurd to say SC 20 can be satisfied by the Footpath. The Footpath, which existed since 1945, has always been used by the public. There is a public right of way over the Footpath. It could not have been the intention of the parties under the Land Grant to grant a private right of way over the Footpath.

39. Government. Miscellaneous other (at best) tangential points have been raised in the affidavit evidence filed for the Government. As submitted by the plaintiff, none of them is of merit:

(1) It is said that the Lot or the Old Lot lacked vehicular access prior to the Land Grant. But this is nowhere to the point: SC 20 is precisely intended to grant additional rights from a future-looking perspective.

(2) The Government relies on the internal valuation of the Lot and particularly the statement that "*one must have due regard to the inaccessibility of the site with the usual accompanying engineering difficulties*". However, there being no evidence that the way the Government valued the Lot was known to the plaintiff at the material time, this cannot begin to serve as an aid to interpretation. Whether and if so how the right of way under SC 20 was taken into account by the Government in the valuation is also utterly unclear. In any event, it would not have been unreasonable for any assessment of value of the Lot at the time to exclude consideration of a right-of-way when the right has not yet materialised and when it was wholly uncertain as to when a road or path would be constructed.

(3) The post-contractual matters relied on by the Government are inadmissible for interpretation.

(4) Furthermore, the Government contends that the buildings to be erected on the Lot were intended to be occupied by agricultural labourers to work on the immediate vicinity of the Lot with limited transportation needs. But as submitted above, SC 2 shows that the staff quarters were intended to accommodate senior staff of the plaintiff, and moreover given the long span of the grant, there are no grounds for excluding the use of the buildings for persons or functions requiring vehicles from the scope of SC 20. In any case, it cannot even be shown as a matter of prevailing fact that agricultural labourers would necessarily have no vehicles and no transportation needs after they are off from work.

40. As Chan CJHC held in *Wisename v SJ* (above) at p.81J, the burden falls on the Government as grantor to establish any particular restriction on the scope of SC 20, as a matter of its express terms or of (necessary) implication. For all the above reasons, I agree the Government comes nowhere close to this. On a proper construction of the Land Grant, the plaintiff is entitled to a general right of way from Pokfulam Road to the Lot, including vehicular access, rather than just the presently available pedestrian access.

C3. The Government's case in sum

41. By way of oral submissions, the Government's essential case appears to rest on just these points:

(1) The Lot was land-locked at the time of the Land Grant.

(2) SC 20 was not intended to accord anything beyond what was already in place at the time. Its purpose was merely to ensure that the Lot would not be land-locked, whatever the Government was going to do on the surrounding Government land.

(3) If the Government did not implement the Layout Plan and build the new road network, SC 20 could be fulfilled by the existing pedestrian Footpath. It would then be for the plaintiff to improve the Footpath or construct another (pedestrian) road or path if it wished, pursuant to SC 20, and the alignment of such road or path is not set in stone. SC 20 also conferred the Government a right to modify the alignment of the ROW without compensation.

(4) If the Proposed New Road were built, the Government would be obliged under SC 10 to construct the Proposed Stepped Access which would encroach onto the existing Footpath. The Stepped Access as built would serve as the right of way under SC 20.

(5) The wording of SC 21, which the Government says supports its reading of SC 20.

(6) The user of the staff quarters, and the *locus in quo*, informed the construction of the Land Grant.

SC 20 intended to confer an additional vehicular right-of-way to the plaintiff

42. The fundamental premise of the Government's argument is that SC 20 should be construed as not intended to accord any right to the plaintiff, other than an assurance that the lot would not be landlocked. This fundamental premise is unsustainable as a matter of construction of SC 20.

43. I agree with the plaintiff's submission that the Government's case on SC 20 is beset by several major fallacies.

44. First, as noted in paragraph 6 above, the Footpath existed since at least 1945. By the time of the Land Grant, it must have become a "highway" (ie public road) by dedication and acceptance given the long user: see the principles in *Fortune v Wiltshire Council* [2013] 1 WLR 808 at §§11-14 (Lewison LJ).

45. The "once a highway, always a highway" maxim applies here (see *Fortune* at §11; *Colin Sara, Boundaries and Easements*, 7th edn (2019), §7-009):

(1) There was simply no need to have SC 20 in the Land Grant, if its purpose was only to confer a right of way over the Footpath. The plaintiff and other members of public already enjoyed a right of way.

(2) Further, and in any event, insofar as the Lot was landlocked, the plaintiff would have an implied right of way by necessity: *Gale* at §3-167. If SC 20 were intended (as the Government contends) to assure the plaintiff that it would have a ROW, it would have been superfluous.

46. Second, on a plain textual reading, SC 20 is manifestly future-looking. It provides that a right-of-way "will be given" and that, thereafter, the lessee "shall construct" a road or path for that purpose. SC 21 provides that the grant "shall be" in such form and on such conditions as "may be approved" by the Lands Officer. The language is starkly inconsistent with the proposition that SC 20 was intended to be fulfilled by the existing Footpath.

47. In this regard, *Fully Profit* (Supra) is plainly distinguishable from the present case. That case concerned the meaning of the word "house", which was plainly tied to the existing structure standing on the lot in question at the time of the contract. Here we are concerned with SC 20, which contemplates a road or path which had not yet been built (and is thus inherently forward-looking). In other words, in contrast to the situation in *Fully Profit*, the meaning of the words "road or path" under SC 20 cannot be ascertained by reference to the physical situation at the time of grant. That situation necessarily did not include the road or path that was not yet built.

48. The same problem besets the Government's reliance on the *locus in quo*. This argument ignores the fact that SC 20 is plainly forward looking; and also ignores the fact that even within Plan No. 1 attached to the Conditions of Grant, the parties plainly contemplated substantial development within the area including new roads and high density residential housing in the area.

49. Third, SC 20 was plainly intended to provide a ROW *to Pokfulam Road*, rather than merely a provision to ensure that the lot is not landlocked.

50. Fourth, if SC 20 was intended merely to reflect the existing Footpath, it would not have provided for an alignment to be "on a line to be approved by the Director of Public Works." Instead, it would simply have proceeded to set out the alignment of the ROW (like what happened in *Wisename*). Furthermore, if the intention was to provide the Government with the right to alter the alignment, SC 20 would have been very differently drafted. What was contemplated in SC 20 was the provision of a ROW once and for all, and *not* a flexibility to the Government to change the alignment of an existing footpath from time to time.

51. The Government's argument involves a complete rewrite of SC 20:

(1) Once the ROW is given under SC 20, the parties have no right to change the alignment of the ROW under the clause. See *Gale* at §9-98.

(2) The words starting with "*any alteration of the government road to which the right of way is given ...*" clearly do not give such right. It simply means if the Government alters the alignment of Pokfulam Road (ie the "government road to which the right of way is given"), the plaintiff should carry out consequent alteration of the ROW without compensation. If these words meant what the Government contends, SC 20 could have simply provided the Government has a right to modify the alignment of the ROW as granted.

52. Fifth, if SC 20 were intended to be fulfilled by the Proposed Stepped Access as and when it is built, one would surely expect SC 20 to be linked by express reference to SC 10, which would make plain that the right conferred by SC 10 and SC 20 are in the alternative. Instead, there is nothing in SC 10 or SC 20 to suggest that if SC 10 kicks in, the plaintiff will have no right under SC 20.

53. Sixth, if SC 20 could be satisfied by the Footpath, and the Government wanted to alter or extinguish the Footpath, it would be contrary to common sense that the burden would be on the plaintiff to construct a road or path and to be responsible thereafter for its maintenance and repair.

SC 21

54. As mentioned in paragraph 33(8) above, it was necessary to include SC 21 in the Land Grant because the alignment of the right-of-way had not been decided and therefore a separate legal instrument (ie the noun "grant" in the first line) was necessary. This was not the case in *Wisename*.

55. Further, a deed would be necessary to create a legal estate for the easement. In 1958, there was no statutory provision (*c.f.* Conveyancing and Property Ordinance, Cap 219, section 14) to convert equitable interest under the Government lease to legal estate.

56. The reference to "conditions" in SC 21 plainly connotes a further written instrument where the conditions will be set out. What SC 21 was referring to was the legal form and conditions for the grant. This also explains why SC 21 referred to the Land Officer (who in those days was concerned with legal matters), rather than the Director of Public Works named in SC 20.

57. SC 1 indeed assists the plaintiff rather than the Government, as it shows that the function of the Land Officer (as opposed to the Director of Public Works) was to approve the "*form of deed or document*" in those days. The difference in the language between SC 1 and SC 21 is entirely explicable. SC 1 deals with a situation where the plaintiff proposes to enter into an agreement with a third party, and SC 1 provides that the deed or document must be pre-approved by the Land Officer. SC 21 is concerned with the form and conditions of the grant as between the plaintiff and the Government.

58. The Government's argument that the word "form" in SC 21 meant scope of the grant must be rejected. It is plain from the context and reading SC 20 with SC 21 that the "form" refers to the legal form in which the grant would take, for example, whether it would be by way of a deed of grant, or by a letter of modification. The Government failed to explain why in SC 21, the reference was to the Land Officer, when in SC 20, it was the Director of Public Works.

59. Indeed, it appears that in other government leases where the alignment of the right-of-way had not been drawn up, a condition like SC 21 would similarly be provided: see *Favourable Issue Co Ltd v Secretary for Justice* (unrep., HCA 3344/2001, 19.10.2012) at §13.

User of the staff quarters and construction/ maintenance logistics

60. It is wrong to suggest that the existing interior design of the block of staff quarters standing on the Lot in 1958 should inform the construction of SC 20. The building on the Lot could of course be redeveloped subject to the limitation under GC 2, bearing in mind that the lease is a 75 years' lease. As noted, GC 2 envisages occupation of the buildings by domestic servants.

61. There is also no factual basis to say the workers living in the staff quarters would not need vehicles (which could well be arranged by their employer), particular when time moves on.

62. It is also misconceived to rely on the possibility of construction or maintenance of buildings at the site without vehicular access, the examples cited by the Government are only exceptions.

63. At the time of the Land Grant, it would have been known that having vehicular access would be a significant advantage for both such purposes, particularly since Pokfulam Road was itself available for large transport vehicles.

64. The question then is: what reason would there be to positively restrict the scope of the right of way, and exclude the option of vehicular access for such purposes. To this, the Government gives no answer.

D. OTHER ARGUMENTS OF THE GOVERNMENT

65. As an alternative, the Government argues that SC 20 provides a vehicular or pedestrian right of way from Pokfulam Road to the Lot which the Director of Public Works should in his discretion decide.

66. For the reasons set out in Section C (see in particular paragraph 33(4) above), this argument must be rejected. The Government has no discretion to decide the mode or quality of user of the right of way.

67. Under SC 20, the Government does not have any discretion. The contractual duty was that a ROW will be given; not that it may be given.

68. As a further alternative, the Government submits that it is not unreasonable for it to refuse to provide a VROW in the exercise of its discretion having regard to:

(1) Alleged delay on the part of the plaintiff.

(2) The fact that the staff quarters were in use for over 40 years despite the lack of a VROW.

(3) The fact that the remainder of the term of the Land Grant is less than 15 years.

(4) The time, costs and disturbances which may be incurred by (or caused to) both the Government and inhabitants of the locality if a vehicular right of way is to be provided and constructed now, as opposed to much earlier.

69. I agree with the plaintiff that this submission cannot stand:

(1) As analysed in Section C (see in particular in paragraph 33) above, the Government has no discretion to refuse to grant a VROW to the plaintiff. When sought, a VROW will and shall be given under SC 20.

(2) The Government rejected the latest VROW application by the plaintiff without giving any reasons: see paragraph 23 above. The Government's resolute silence at the time sits uncomfortably with its present

assertion that it exercised the discretion to refuse to provide a VROW on the grounds set out in paragraph 68 above, and suggests that these grounds may be merely *ex post facto* justifications.

(3) Its opposition to the present proceedings on the basis that SC 20 did not grant to the plaintiff a VROW is plainly misconceived. Any purported exercise of discretion when the Government has not correctly recognized its obligation cannot possibly stand.

(4) In any event, a contractual discretion has to be exercised rationally and in a way consistent with its contractual purpose, taking only relevant considerations into account: *Barganza v BP Shipping Ltd* [2015] 1 WLR 1661 at §§29-30 *per* Baroness Hale.

(5) I agree with the plaintiff's submission that properly analysed, the four matters relied on by the Government (see paragraph 68 above) in the exercise of the purported discretion are irrelevant considerations, or alternatively are matters which rendered the decision irrational and inconsistent with the purpose of the grant of the right of way:

(a) §68(1): I do not agree that the plaintiff has materially "delayed" given (i) the lack of any temporal limitation (in the context of a 75-year lease) as to when the plaintiff must make any demand for a VROW. Moreover, delay alone, in the absence of detrimental reliance, is not a valid reason to deny the plaintiff's right: see paragraph 70 below.

(b) §68(2): This completely ignores the plaintiff's difficulty in complying with the maintenance and redevelopment obligations under GC 5. The reasoning is also fallacious: it is a non-sequitur to contend that a VROW is somehow wholly unnecessary or unwarranted now merely by reference to past use. Moreover, if the plaintiff is otherwise entitled to a VROW (for the reasons set out above, including the contextual/practical considerations favouring the plaintiff's reading of SC 20), any discretionary reason for denying vehicular access based on "necessity" must be very cogently shown for it to be reasonable. Indeed, even if vehicular access were only highly convenient and beneficial to the plaintiff's use of the site (and not in practical terms absolutely necessary), it would be wholly unreasonable to deny such access absent the strongest countervailing reasons.

(c) §68(3): 15 years remain a significant period of time. Further, the Land Grant is a special purpose lease which, as a matter of the Government's policy, may be extended for a term of 50 years without payment of a premium. The fact that the Government retains the "sole discretion" whether to renew a lease under the policy does *not* mean that the Government may depart from its own policy. By way of example, the Director of Immigration retains a discretion whether to grant, say a dependant visa to an applicant; but since the Director has set out his policy, there is a public law duty on the part of the Director to follow his own policy unless there are cogent reasons not to do so.

(d) §68(4): The inhabitants (squatters) in the vicinity have no legal rights in the Government land, and are subject to enforcement by the Government in accordance with the land leases. Furthermore, the plaintiff was willing to bear the cost of clearance as previously expressed (see paragraph 21(7) above) and is still open to any similar cost proposal if the Government considers cost as an issue.

70. The Government further contends that the grant of a VROW can be denied on the ground of laches and acquiescence. This too is without merit:

(1) Under the equitable doctrine of laches, the court would determine whether it is "practically unjust" to award relief, and this turns on the circumstances of each case. The two important factors are the length of the delay, and the nature of the acts done during the interval: *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239-240 *per* Sir Barnes Peacock.

(2) As already noted, in the context of a 75-year lease in which the parties did not contractually agree any temporal limitation on the invocation of SC 20, there is no reasonable basis for the Government or, for present purposes, the court to find that there has been delay; and still less any delay that should deprive the plaintiff of its contractual rights.

(3) Further, in *Fisher v Brooker* [2009] 1 WLR 1764 at §64, Lord Neuberger, citing *Lindsay Petroleum*, considered that some sort of detrimental reliance is, even if not immutably, "*usually an essential ingredient of laches*".

(4) The Government has not suffered any prejudice that is sufficient to render the grant of relief to the plaintiff unjust.

71. The defence of laches and acquiescence is therefore rejected.

E. BREACH OF LAND GRANT AND DEROGATION FROM GRANT

72. For the reasons stated above, I hold that the Government's refusal to provide a VROW amounts to breach of SC 20.

73. Further or alternatively, I agree that the Government has acted in derogation from grant:

(1) The principle of derogation from grant has been described as one which merely encapsulates in a legal maxim a rule of common honesty. The principle may be succinctly stated as being that, "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other": see *Kung Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd* (2008) 11 HKCFAR 403 at §61 *per* Li CJ.

(2) The application of the principle requires identifying in the first place what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit in the grant, taking into account the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time it was entered into; then one can determine whether the grantor's conduct constitutes a derogation from grant in violation of the implicit obligation identified: see *Rank Profit Industries Ltd v Secretary for Justice* (unrep., FAMV 8/2009, 25.6.2009) at §12 *per* Ribeiro PJ.

(3) By refusing to provide a VROW as promised under SC 20, the Lot is now practically unusable: see Section B2 above. The Government has accordingly acted in derogation from grant.

F. DISPOSITION

74. For all the reasons stated above, I grant the declarations in terms of paragraphs 1 and 2 of the Originating Summons.

75. I make an order in terms of paragraph 3 of the Originating Summons that the Government do give to the plaintiff the Right of Way. I further give liberty to the parties to apply for the purpose of carrying the said order into effect.

76. Under paragraph 4 of the Originating Summons, the plaintiff prayed for damages to be assessed for breach of, and/or derogation from, the Land Grant. However, the plaintiff has confirmed at the hearing that damages is only sought as an alternative mode of relief. Accordingly, I make no order under paragraph 4 of the Originating Summons.

77. I order that the costs of these proceedings be paid by the defendant to the plaintiff, such costs are to be taxed if not agreed with a certificate for two counsel.

78. The above order as to costs is *nisi* and shall become absolute in the absence of any application within 21 days to vary the same.

79. Lastly, I express my gratitude to counsel on both sides for their helpful assistance in this matter.

(Wilson Chan)
Judge of the Court of First Instance
High Court

Mr Benjamin Yu, SC and Mr Abraham Chan, SC leading Mr James Man, instructed by Messrs Mayer Brown JSM, for the plaintiff

Mr Ambrose Ho, SC and Mr Jenkin Suen, SC, instructed by the Department of Justice, for the defendant