

致: 立法會, 尊貴 謝偉銓議員

2015 年 7 月 16 日公聽會重建合作社意見書

淺談兩份監管公務員樓法律文件

公務員建屋合作社有關兩份法律文件 Govt Lease(GL) and Letter of Modification(LOM).

約五十年前作為僱主/僱員福利關係, 政府批地與公務員建屋收取三份一地價,GL 沒有寫明要公務員付回, 其他發展條件與五十年前土地 GL 大同小異. 其一主要條件是樓房只准 sublease 紿公務員使用. 約於 1997 前數年政府同意樓房擁有權由合作社轉到公務員個人名下.

政府要求先解散合作社, 委任 Liquidator, 然後發出一份 LOM 要公務員接受. 該 LOM 內所列條件比 GL 苛辣得多. 公務員團體無奈接受, 因合作社已解散, 無得番轉頭. 苛辣條件之一是 Restrict to existing bulk 不理該地塊 permitted plot ratio 是否已用盡. 其二是政府有絕對權採用 valuation approach 去決定補地價數目 ie ,existing use value (EUV) or Redevelop value (RV) if Govt considers the land is ripe for redevelopment. 若用 RV 計, 今天麵粉遠貴過麵包, 上蓋則毫無價值, 合作社輸得重慘. 分契後初期 補地價用 EUV 計尚有發展商願收購重建. 時至今日, 人老樓殘, 行梯無力, 強制驗樓維修, 重建天價, 退休無業, 借貸無門, 難脫困境.

講番 當年政府批地意願, 詳閱 GL 內容並無講述政府要收回三份二地價文字, 此說亦可求証 (h) 段載於一本 1987 年 4 月白皮書小冊子”新界土地契約續期,(包括新九龍)” 以作證明. 其內容一段說: “按優惠地價批給由公務員組成建屋合作社”. 能否講一句政府只是籍 alienation, 及 進取的 RV valuation 而剝奪公務員應有僱員身份福利?. 政府常常強調公平公正依法辦事, 如此補地價政策, 已非常接近“**Derogation From Grant**” Doctrine. Final Appeal Court JUDGEMENT FACV No. 1 of 2008 page 28 and 29 值得政府和合作社深思. 道義上是否對公務員是合情合理.

當然, 政府是大地主, 公務員樓是租客, 租客要求大地主改變租地條款, 大地主有權趁機加入任何條款; 但當政府是僱主, 公務員是僱員, 優惠價批地與僱員作為福利及僱傭條件, 及後又趁機加入異常苛刻條件, 大幅偏離 GL 內的條件, 籍此收回其已付出的福利, 是否屬 Derogation from Grant ? 該判決書甚具參考價值, 及支援我們的免付/減付補地價理據。

T M Lau

柏苑業主立案法團發言人

11 July 2015

附件: 判決書 page 28,29, front page, 白皮書 h 段.

九三 皇基大
Right of way case

FACV No. 1 of 2008

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 1 OF 2008 (CIVIL)
(ON APPEAL FROM CACV NO. 227 OF 2005)**

Between:

KUNG MING TAK TONG CO LTD

**Plaintiff
(Appellant)**

- and -

PARK SOLID ENTERPRISES LIMITED

**1st Defendant
(1st Respondent)**

INFO KING LIMITED

**2nd Defendant
(2nd Respondent)**

Court:

Chief Justice Li, Mr Justice Bokhary PJ,
Mr Justice Chan PJ, Mr Justice Ribeiro PJ and
Lord Millett NPJ

Dates of Hearing:

7 – 11 July 2008

Date of Judgment:

8 September 2008

JUDGMENT

obviously intended to be filled either by a new window or, as in the events which happened, a counter.

60. There remains the Appellant's claim to a right to have its potential customers have unrestricted access through the Entrance Lobby to approach the counter and buy refreshments. There is no easement known to the law for the access of air except through a definite aperture or channel;⁴³ or for the enjoyment of a right to an uninterrupted sight of an advertisement on the dominant owner's premises by passers-by on the main road;⁴⁴ or for the enjoyment of an unrestricted flow of potential customers through the servient owner's land to his kiosk.⁴⁵ If a shop owner wishes to restrain the owner of adjoining premises from restricting the passage of potential customers to his premises, whether to view the display in his shop window or to buy refreshments, he must do so by way of a restrictive covenant or rely on the doctrine of derogation from grant, to which we now come.

G. Derogation from grant

61. The rule that a man may not derogate from his grant is a general principle of law. As noted above, it has been described as a maxim which merely encapsulates in a legal maxim a rule of common honesty. As Bowen LJ put it in *Birmingham, Dudley & District Banking Co v Ross*: "... a grantor having given a thing with one hand is not to take away the means of enjoying it

⁴³ *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch. 437.

⁴⁴ *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264 CA.

⁴⁵ *Platt v London Underground Ltd* [2001] 2 EGLR 121.

with the other.”⁴⁶ This approach was endorsed by Lord Denning MR in *Molton Builders Ltd v City of Westminster*,⁴⁷ where he said:

“.... if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit: because that would be to take away with one hand what is given with the other.”

62. As we have seen, the rule in *Wheeldon v Burrows* is founded on the doctrine of derogation from grant, but as one might expect, given its width, the doctrine is plainly not limited to cases about easements⁴⁸ and has been held to apply where the derogation involves a right which cannot constitute an easement.⁴⁹ Indeed, the doctrine is not limited to grants of interests in land but has been applied, for instance, to contracts for the sale of motor cars.⁵⁰

63. In *Platt v London Underground Ltd*, Neuberger J summarises the case-law and helpfully indicates how the non-derogation doctrine is to be applied:⁵¹

“3. [The exercise of determining the extent of the implied obligation not to derogate from grant] involves identifying what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered into: per Sir Donald Nicholls VC in *Johnson & Son Ltd v Holland* (1988) 1 EGLR 264 at 267.

...
6. When considering a claim based on derogation from grant, one has to take into account not only the terms of the lease, but also the surrounding circumstances at the date of the grant as known to the parties: see *Chartered Trust plc v Davies* (1997) 2 EGLR 83 at 87C, per Henry LJ.

⁴⁶ (1888) 38 Ch. D. 295 at 313.

⁴⁷ (1975) 30 P&CR 182 at 186.

⁴⁸ *Browne v Flower* [1911] 1 Ch 219 at 225 per Parker J.

⁴⁹ *Cable v Bryant* [1908] 1 Ch 259.

⁵⁰ *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577.

⁵¹ [2001] 2 EGLR 121 at 122.

達十五年。在有些情況下，如興建有關的康樂設施需要大量投資，而該等設施是開放給普羅市民使用的話，契約可以提前複檢，而續期可能超過十五年。

(e) 碼頭土地契約

碼頭土地契約將於期滿前一兩年內複檢。在不妨礙發展計劃，特別是未來的填海計劃下，這些契約會獲得續批，以不超過十年為限。

(f) 機場土地契約

有關機場土地契約的續期問題，仍在考慮階段。政府現正研究的興建新機場建議方案為其中一項考慮因素。

(g) 員工宿舍土地契約

以私人協約方式按優惠地價批出的員工宿舍土地契約通常會續期至二〇四七年六月三十日。

→ (h) 公務員合作建屋計劃和政府興建的公務員建屋計劃土地契約

這類契約包括按優惠地價批給由公務員組成的合作社的土地契約作為興建房屋以供社員居住的用途，也包括就政府興建的公務員建屋計劃批給財政司立案法團的土地契約。這類契約通常會續期至二〇四七年六月三十日。

(i) 加油站土地契約

正如市區內現有加油站契約滿期的情況一樣，作此項用途的新界土地契約都不會獲得續期。但倘若仍有需要在原址設立加油站，則現有業主可繳付地價而獲重新批地二十一年。