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Subject: 就"土地共享先導計劃"表達意見 - 報名及上載陳述書 2020-01-21出席 檔號 : CB1/PL/DEV
(See attached file: image.png)

致: 立法會發展事務委員會

報名及上載陳述書 2020-01-21出席立法會發展事務委員會 檔號 : CB1/PL/DEV

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就"土地共享先導計劃"提供背景資料，並簡述立法會議員就此課題表達的意見和關注。[利用新界的私人農地儲備] 政府文書中顛覆地契的重點(紅色字):

[3. 目前，釋放新界大型私人農地發展潛力的方法主要有兩個，即(a). 發展商向城市規劃委員會("城規會")提交規劃申請，以及向政府提出契約修訂或換地申請，以改變其新界土地的用途及提升有關用地的發展潛力;及(b). 政府以"公共用途"根據《收回土地條例》(第124章)收回有關土地。]

契約修訂或換地申請 程序以補地價換地申請是違反農地地契，政府不能批准將一連串的農地地段合併成為單一農地地段，之後提出契約修訂，因第三條強制性條款中的修訂只涉及四項 - Assign, Demise, Mortgage and Part, 沒有多於一個地段合併之修

訂，同時第一及第二條之強制性條款亦只有限定為一個地段，而並非多於一個農地地段的合併體。無論是1972年真丁屋政策之前或之後，都是針對著一個地段（435.6呎便可登記作為一個獨立業權地段），必先以Deed of Demise / Part 交還政府成為Unleased land，其中之一的附載條件，alienation，可以是政府產業土地或是政府持有土地，之後政府才能以村內部拍賣政府產業土地，close village auction (72年之前)或 72年之後的政府持有土地作為公共用途批出(或售出)1000呎之無契官地作建700呎丁屋土地，private treaty sale of 1000 SF Crown (unleased) Land for a 700SF small house land grant, (72年XCR 219(72)之丁屋政策 dd 14-11-1972 - Public Purposes);

2). **提升有關用地的發展潛力** - 根據第一及第二條強制性條款，2003年Yin Shuen 終審裁決 HK CFA 41/2003，及1985年Winfat 英合議庭終審裁決 Privy Council Appeal 35 of 1984，確定[集體官批地契]是有效的，並且是符合基本法105條之保障 (***This underestimates the Basic Law's reach, which extends beyond preserving old rights and includes conferring new ones***)。故一連串農地地段合併去發展成一個建屋地段是違契的，個別**新界農地地段**要發展成為建屋地地段 Building Lot，必先要有第一條強制性條款中的 ***Previous Licence to Convert***。但是同是根據1898年的中英雙方租地99年協約的**新九龍土地**(Cap. 1 Sch. 5是源於S. 2, 3, 4 & 5 of Ordinance No. 8 of 1900)則全是屬於**無契政府產業土地 Unleased government estate land**，是不受1905年批出之[集體官批地契]限制 (97後稱[集體中央人民政府批地契] Cap 1 Schd. 8)。故新九龍所有土地可以批出為建屋地 (New Kowloon Inland Lot No. 1 地契批予崇真教會是在1927年才批出的)。

3). 每一個新界農地地段要個別Convert為個別獨立建屋地則必須要以第三條強制性條款之修訂，即Deed of Demise or Part modification 申請交還並獲官方批准，才能成為Unleased Land，(在1978年逆權的丁屋內部指示的第8或9條之前都是以Deed of Surrender代表Demise / Part.)，政府才有合契權利制定收回私人農地作為Unleased Land之附載條件 ***alienation*** - 其中包括有最主要的是：(a). 交還後的unleased land 是屬於政府產業土地還是 (b). 根據原地契中的政府持有土地作道路、公共樓房或其他公共用途之用 (Land Held by Government for ***Roads, Public Buildings or Other Public Purposes***), 及(c). 已轉變的及無業權的田基路之雙方毗鄰田主承諾之地籍測量邊界等的附載

條件 alienation。[集體中央人民政府批地契]之農地地段是禁止田主可以合併個別農地地段申請 Convert，而政府亦在地契中無權利批准一連串農地地段一整體地作出 Assign, Demise, Mortgage, 及/或 Part 之四項修訂，因為該四項指明之修訂皆無合併地段的修訂規定。在未成為 Unleased Land 之前，政府無權改變其農地上的地役權限。

4). 個別獨立一個私人農地地段可以作為私人建屋者，依地契只有(一): 以地契修訂交還農地成為無契官地後，才能由政府批准其建丁屋 (Deed of Demise / Part modification for Exchange into Building Lot - New Grant Lot) 或 (二): 在農地建屋作為繼續務農之用(或是荒廢農地 fallowfield, 而不能有任何構築) - 即是第一條強制性條款之例外情況，但其剩餘的農地(或是 fallowfield) 都不能違反第二條強制性條款去築起任何構築(例如圍牆或道路構築等)。Winfat 終審一案中: ‘... .. The severed land may be and prior to resumption the resumed land might lawfully have been used for open storage of motor vehicles or any other purpose apart from **building purposes** inconsistent with the proper occupation of the said lands as **agricultural or garden ground** or from any noisy, noisome or offensive trade or business.’ 綠色字是指原農地地段，棕色字是指原屋地地段。該兩終審案例皆裁定只有涉及新界農地地段 (新界屋地地段則未能找到有關的案例) 之地契是有效的，故特府是必須遵從及全面執行農地地契，因此合併個別獨立農地作一個整體建屋地之發展權利，只有透過由政府整體徵收土地 Resume, 依據地契中的 ‘...for the improvement of the said Colony of Hong Kong, or for any other public purposes whatsoever....’ 在依據124章賠償及徵收後成為政府產業土地之後，政府才有權利將 Unleased Land 依131章作整體規劃發展 - 即可公開賣地或/及作其他任何公共用途之土地。

5). 在法治恪守地契之大前提下，政府無權接受任何田主合併他們名下個別農地地段，更無合契權利接受以補地價形式作原地換地申請。新界農地要 Convert 為建屋地必須首要成為 Unleased Government Estate Land, 交還原農地的業權人已非官地業權人，故整體規劃發展的權利及責任只有特府，交還前的業權人發展商已依法收了賠償，故不能仍有任何優惠或得益。這個所謂土地共享計劃正是特府顛覆農地地契的意圖，借此推卸責任，接受了短暫微小的補地價金額，卻可達到政府不須作 Improvement 及時 Public Purposes 的整體長遠規劃發

展。同時亦導致當今仍生活在這些農地中或其週邊的居民之[地役權限及共活人權]等的設施，由特府違契地送給合法的發展商及非法的套丁發展商。

農地地契之[地役權限及共活人權]中特府之責任 *all the easements and appurtenances ... EXCEPT And RESERVED...*

6). 1905年由港督簽發的[集體官批地契]給予1898年前已經有居民佔用的土地，分別為(1). 農地/園地(garden)地段(即私人農地地段, Private Agricultural Lot)登記附表; 及(2). 屋地 House Lot/街市地 Market Lot登記附表之私人建屋地, Private Building Lot. 在私人屋地地界範圍內, 即村界/街市界範圍內的土地及構築物羣中, 涉及的[地役權限及共活人權]管治責任已經無法爭議, 因為當時沒有測量及制定個別獨立樓房之地籍及地貌邊界 Cadastral/Topographic Boundary Survey, 而只是根據農地地段群 Demarcation District Field Sheet 中之田基路測量之地籍及地貌邊界, 作為登記獨立農地地界之餘, 還可以界定到村界/街市界之地貌邊界(即最靠近屋地羣之田基路的地貌邊界)。而私人建屋地之存亡, 搬村或發展等, 並不涉及現時的主題 - 私人農地發展為私人建屋地之情況。我亦找不到任何終審案例涉及屋地地契之裁決。

7). 農地地契中[地役權限及共活人權], 就是指經過99年後已變更的田基路、石屎車輛通道構築、來去水管道構築、供電電纜構築、電話電訊網絡構築及用以確立車輛通道的邊界圍牆/柵等構築, 全是由政府根據地契作為管治所有的[地役權限及共活人權]之基本人權設施給予所有居民, 而並非是供一個田主獨自使用的。這個提供給所有居民的基本生活權利必須只有特府去承擔的, 而地契亦是這樣規定:-

.....all the **easements and appurtenances** whatsoever to the said demised premises belonging, or in anywise appertaining, **EXCEPT and RESERVED** unto His said Majesty, His Heirs, Successors and Assigns all Mines, Minerals, and Quarries of Stone in, under and upon the said premises and all such Earth Soil, Marl, Clay, Chalk, Brick-earth, Gravel, Sand, Stone and Stones, and other Earths or Materials, which now are or hereafter during the continuance of this demise shall be under or upon the said premises or any part or parts thereof, as His said Majesty, His Heirs Successors or Assigns may require **for the Roads, Public Buildings, or other Public Purposes** of the said Colony of Hong Kong with full liberty of Ingress, Egress, and Regress, to

and for His said Majesty, His Heirs, Successors and Assigns, and His and their Agents, Servants, and Workmen at reasonable times in the day during the continuance of this demise, with or without horses, carts, carriages, and all other necessary things, into, upon, from and out of all or any part or parts of the premises hereby expressed to be demised to view, dig for, **convert and carry away**, the said excepted Minerals, Stone, Earths and other things respectively on any part or parts thereof respectively : thereby doing as little damage as possible to the Lessees : AND ALSO SAVE AND EXCEPT full power to His said Majesty, His Heirs, Successors and assigns, **to make and conduct in, over, along, through or under the said premises, all and any Public or Common sewers, drains, or water-coursed, water or other mains, telegraph and telephone lines** with full power at all times to enter into and upon the said demised premises for the purposes of **making, : laying, erecting, inspecting or repairing the same..... all existing Public or Private rights and easements** in, over, along, through or under the said demised premises or any part or parts thereof respectively or in any wise appertaining thereto and subject also to such mortgages incumbrances, tenancies, estates and interest (if any) as are mentioned in the Schedule hereto or **are duly entered against the same premises in the registers** thereof in the Land Office and subject to all existing rights of all persons occupying the said premises as tenants or mortgagees of the lessee;..... Lessee shall and will, from time to time, and at all times hereafter when, where, and as often as need or occasion shall be and require, at his or her and their proper costs and charges, **well and sufficiently Repair, Uphold, Support, Maintain, Pave, Purge, Scour, Cleanse, Empty, Amend and keep the messuage or tenements, and all other erections and buildings**, now or at any time hereafter standing upon the said pieces or parcels of ground hereby expressed to be demised, and **all the Walls, Rails, Light. Pavements, Privies, Sinks, Drains, and Water-courses** thereunto belonging and which shall in anywise belong or appertain unto the same, in, by, and with all and all manner of needful and necessary reparations, cleansing and amendments whatsoever, the whole to the done to the satisfaction of the Surveyor of His said Majesty, His Heirs, Successors or Assigns. And the said messuage or tenement, erection, buildings and premises being so well and sufficiently repaired, sustained and amended, at the end or sooner determination of the said term hereby granted shall and will peaceably and quietly deliver up to His said Majesty, His Heirs, Successors or Assigns : And further it shall and may be lawful to and for His said Majesty, His Heir, Successors or assigns, by His or their Surveyor, or other persons deputed to act for him or them, **twice or oftener in every year** during the said term, at all reasonable times in the day, to enter and come into and upon the said premised hereby expressed to the demised **to view, search, and see**, the conditions of the same, and of all decays, defects, and wants of reparation and amendments, which upon every such view or views shall be found, to give or leave notice or warning in writing, at or upon the said premises or some part

thereof, unto or for the Lessee to repair and amend the same within Three Calendar Months then next following, within which said time or space of Three Calendar months, after every such notice or warning shall be so given, or left as aforesaid, the Lessee will repair and amend the same accordingly.....

8). 所有共活人權之構築之可以建於私人農地內及無契的田基路周邊，就是因為基于港府要信守承諾 - EXCEPT And RESERVED, 要保障所有居民基本共活人權。其中所述的 all existing Public or Private rights and easements 必須登記，當然要包括更新的地籍測量(要毗鄰田主確認地貌測量的結果), 然後依地契修訂文書 - Deed of Part modification, 由港府批准及登記在田土廳。第152章 《新界(可續期政府租契)條例》第4(4)(b)之公眾權利可續期至1997-06-30有確認, 及在第150章 《新界土地契約(續期)條例》之弁言亦可續期至2047年的。但是在1972年真正丁屋政策生效之後, 田主必先要以分地協約修訂交回港府成為無契官地時, 就要更新地籍測量邊界 (包括Intention of building lot grant of 1000 SF及剩餘的農地及田基路作為政府持有土地作道路、公共樓房或其他公共用途 - 例如行局通過的丁屋政策)。1978年前還有一紙Deed of Surrender, 勉強可作為Deed of Part, 但之後的新界政務司之內部丁屋指令第8/9影響下, Deed of Surrender也沒有了, 直接將整農地地段違契地發出丁屋建屋牌而不作地籍測量, 而只有地貌測量。

9). 1978年的土地訟裁官(即1993年前的Land Officer (or Registrar)亦以文書指出, 各分區理民府主任不制作分地協約修訂(亦可理解為不更新地籍測量)是政府疏忽履行農地地契職責。'. the Government could well be mulcted in substantial damage. The D.O. in the case referred to is one where Government could well be charged with negligence.'

總結

10). 本地法例訂立是不能有違反農地地契的條文, 131章城規條例有關"契約修訂或換地申請, 以改變其新界土地的用途及提升有關用地的發展潛力" 是違反地契條文, 亦令城規會可僭越了特府只能規劃無契官地之權利。私人農地在未有Deed of Part/Demise modification 之前並非無契官地。故其契約修訂亦必須依據地契自1905年以來的符合地契條文的程序及措施。城規會無權接收發展商之合併農地交回後成為無契官地, 然後

以補地價形式改變成建屋地，這是違反地契條文內容。故特府繼續接受發展商補地價形式，作為現場換為建屋地之申請，是知法犯法，顛覆其在地契中之責任。因此只有透過地契內的徵收土地條款及其制訂之124章收地條例才是合契合法的，由政府以負責任的長遠整體規劃目標去發展農地。

11). 綜合上述重點如下:-

- 地契中只有有四項修訂，並沒有合併獨立農地地段修訂；
- [地役權限及共活人權]條款中對於田基路、通道及所有公用設施已是無契官地，故此農地地段是不能合併，只能徵回；
- 1905年後新界農地受制於[集體官批地契]，但新九龍地域則全屬無契官地，港府才有全權規劃發展新九龍的權責；
- 1978年因新界政務司的逆權內部指令，導致沒有繼續制訂 Deed of Surrender (類似Part/Demise)，令到其實已經交回成為無契官地的部分土地成為違契的私人農地，而政府卻不執行其Deed of Part及更新地籍邊界的職責；
- 所有涉及的原來的無契田基路皆無作更新之地籍測量，導致已變更的地貌分界與認可了改變的地籍邊界互相矛盾，政府做就村長或地方惡勢力霸佔[地役權限及共活人權]之共用設施；及，
- 1985年 Winfat 及 2003年 Yin Shuen之終審裁決，1969年之 Cap 152 及 1988年之 Cap 150皆認定農地地契是有效的。而該兩終審裁決都是有關政府以農地地契及124章徵地作公共用途發展之用。至於以合併農地修訂交回政府成為 Unleased Government Estate Land後，政府竟違反要公開發售 Estate Land之原則，容許該發展商以補地價模式換成建屋地，這是首先違反農地地契，繼而違反了大地主 (Overlord, 現為中央人民政府)，根據普通法原則，要港府公開賣無契官地之原則。未有聽聞有人提出政府違地契的司法覆核訴訟，很明顯基於授受相悅理由，發展商當然不會提出。但問題在於特府一直以違契行為，達到輸送利益給大發展商之餘，還可以卸責不作長遠整體發展規劃，是誘因令發展商拒絕將口袋的農地交回或接受徵回。

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附錄：

Block Crown Lease 1905 (old schedules of agricultural and house lots) =
Block PRC Government Lease under Schedule 8 of Cap 1, post 1st July 1997

Validity and Enforceability of the Block PRC Government Lease (for
Agricultural/Garden scheduled lots) - Ruling of the Court of Final
Appeal in 2003 (relevant parts)

Director of Lands v Yin Shuen Enterprises Ltd & Anor FACV 2&3/2002;
[2003] 2 HKLRD 399, (2003) 6 HKCFAR 1

*DIRECTOR OF LANDS v. YIN SHUEN ENTERPRISES LTD. AND
ANOTHER* [2003] HKCFA 41; [2003] 2 HKLRD 399; (2003) 6 HKCFAR
1; [2003] 2 HKC 490 ; FACV 2/2002 (17 January 2003)

Mr Justice Bokhary PJ :

*1. Any person whose property is compulsorily acquired has a constitutional right to compensation according to the property's "real value". Article 105 of the Basic Law so provides, thus entrenching a promise made in Section VI of Annex I of the Joint Declaration. In such circumstances, the role which the Joint Declaration and the Basic Law play in preserving Hong Kong's pre-handover system drew Mr Robert Tang SC for the Director of Lands into submitting at one stage that no pre-handover law was open to constitutional review under art. 105. **This underestimates the Basic Law's reach, which extends beyond preserving old rights and includes conferring new ones.** For example, we held in *Gurung Kesh Bahadur v. Director of Immigration* [2002] 2 HKLRD 775 that art. 31 of the Basic Law confers rights additional to those conferred by the Bill of Rights enacted before the handover. Section 12(c) of the Lands Resumption Ordinance, Cap. 124, excludes compensation "in respect of any expectancy or probability of the grant or renewal or continuance, by the Government or by any person, of any licence, permission, lease or permit whatsoever". Wisely Mr Tang did not press his submission that s.12(c) is immune from constitutional review under art. 105. He concentrated instead on his able argument that **s.12(c) merely excludes a speculative element which sometimes inflates land prices and that such exclusion is consistent with compensation according to the real value of the property resumed.** I accept this argument for the reasons given by Lord Millett NPJ with whose judgment I agree.*

Lord Millett NPJ :

*5. These two appeals raise an important issue of principle in regard to the assessment of compensation payable on the resumption of land under the Lands Resumption Ordinance, Cap. 124 ("the Ordinance"). Both appeals raise the same issue and have been heard together. They concern **land which possesses significant development potential but is held under a***

Government lease on terms which do not permit building. *The question is whether the compensation payable on resumption should reflect a price in excess of the value of the land subject to the restrictions if the evidence shows that purchasers are willing to pay such a price in the hope or expectation of obtaining a modification of the terms of the lease. The question turns on the meaning and effect of s.12(c) of the Ordinance.*

The facts

8. *The detailed facts can be found in the judgments of the Tribunal and the Court of Appeal, and there is no need to set them out again in full. In each case the land, which was resumed in 1999 for public housing, was unimproved agricultural land in the New Territories and was currently either vacant or used for open storage. It was zoned for residential use, close to an urban area with road frontage and suitable for residential development. In each case the land was held under a Crown (now a Government) lease, was demised as agricultural or garden land and was subject to restrictive covenants. These consisted of (i) a user covenant which prohibited the use of the land for building purposes other than for its occupation as agricultural or garden ground; and (ii) a building covenant which prohibited the erection of any building on the land without the approval of the Crown's (now the Government's) surveyor.*

The decisions below

9. *The claimants' comparables were challenged by the Government's valuer on the ground (inter alia) that the prices paid contained a large element of what he described as "hope value", that is to say the amount which a purchaser is prepared to pay in excess of the market price of the land for the use permitted under the lease in the hope or expectation of obtaining a modification of the terms of the lease to permit development. He contended that the comparables in question should be disregarded because s.12(c) of the Ordinance excludes this element of the value of the land from compensation.*

10. *In each case the Tribunal rejected this contention and based its assessment on the claimant's comparables, which it found to be perfectly acceptable. It made no finding whether the prices included an element of "hope value" and made no adjustment to reflect it, taking the view that the claimant was entitled to compensation which fully reflected the development potential of the land even if it could not be realised without first obtaining a modification of the terms of the lease to which the claimant had no legal right.*

16. *Another situation where purchasers on the open market may be prepared to pay more than the intrinsic value of the land was described by H H Judge Cruden, sitting in the Lands Tribunal, in Suen Sun-yau v. Director*

of Buildings and Lands [1991] HKDCLR 33 at p.41. After acknowledging that an owner of land held under a Crown lease with restricted use had no legal right to a change of use, he added:

*"The market reality is that purchasers are prepared to buy agricultural land with non-agricultural potential and accept the risk of obtaining the necessary change of user. Mr. MacNaughton agreed that this commonly, occurred in the market. It was for this very reason that he rejected Mr. Chan's six comparables of agricultural land, because they included an element over and above their value for agricultural use, because of the purchaser's hope that he could obtain a change of user. On the evidence I am satisfied that Lot 22, because of its size and location, was suitable for residential use. I appreciate any purchaser would require to obtain Crown approval for any change of use; probably have to pay a premium; and comply with other conditions. However, I am equally satisfied that a purchaser, fully aware of those risks, would be willing to pay above bare agricultural land market value for the land, with that potentiality. Where land is compulsorily resumed, **the owner is entitled to the present value of the land, including the advantage of those potentialities.**" (emphasis added). The question in the present case is **whether H H Judge Cruden was correct in saying that in these circumstances the claimant is entitled to have compensation assessed on the basis of the open market value, or whether s.12(c) has the effect of excluding the speculative element in that value from the computation.***

*31. These are wide words. The word "lease", if it stood alone, would suggest that the subsection did no more than enact the principle in *Lynch v. The Corporation of the City of Glasgow*. The addition of the word "licence" by itself would probably add little. But the words "permission" and "permit" are a different matter; and the word "whatsoever" precludes the application of the *ejusdem generis* rule.*

*32. The second thing to note is that s.12(c), read with s.12(b), form a consistent whole. **Any value which is attributable to the land by reason of its non-conforming use is to be disregarded, together with the probability or expectancy of obtaining permission to continue such use.** It would be capricious to disregard the prospect of obtaining permission to continue a non-conforming use while having regard to the prospect of obtaining permission to commence one.*

33. The words "licence, permission, lease, or permit whatsoever" are not, however, altogether without limit. Where the grant or refusal of the licence or permission cannot affect the intrinsic value of the land, it is either outside the scope of the subsection or, if within it, without effect. Where the grant of the licence or permission is dependent on the personal

qualifications of the particular applicant, its grant or refusal does not affect the value of the land, for a **claimant who is unable to obtain it can realise the full value of the land's potential by selling it to a purchaser who can**. So there must be some connection between the licence etc. in question and the claimant's interest in the land. In my opinion, the essential connection is an economic one.

38. In *Winfat Enterprise (HK) Co. Ltd v. Attorney-General of Hong Kong* [1985] AC 733 the claimant contended that, insofar as it provided for compensation which represented less than the open market value of the subject land, s.12(c) of the Ordinance was ultra vires. The claim was rejected at all levels on constitutional grounds. No argument was directed to the meaning of the section, on which the case is therefore not an authority; but it was assumed **at every level from the High Court (Kempster J) to the Privy Council that the section provided for compensation which represented less than the open market value of the subject land where it was subject to a user restriction in the Crown lease**. It is worthy of note that, despite the eminence of Counsel and the number and experience of the Judges who heard the case, the assumption on which it was based was never questioned. It evidently represented the Government's official view of the effect of the section, and it was one which was shared by Counsel for the claimants.

45. I do not doubt the correctness of the Tribunal's conclusion, but I have some difficulty with H H Judge Cruden's reasoning, which appears to rest on a distinction between "property" and "administrative" licences. In my opinion the distinction is between licences etc. which are capable of affecting the value of the interest taken and those which are not.

46. Plot ratio directly affects the potential of land for development and hence its value. It is governed by the **Building (Planning) Regulations, Cap. 123**. Generally the plot ratio for any given site is as fixed by those Regulations according to the physical attributes of the site and the type of building to be erected thereon. In the exceptional case where the site abuts on a street less than 4.5 metres wide or does not abut on a street, its plot ratio is determined by the Building Authority. So what falls to be valued is the land with the appropriate plot ratio. **Such value does not include the speculative element which s.12(c) is designed to eliminate, and s.12(c) is not engaged**.

47. Bonus plot ratio is available in two situations: (i) where the Government accepts the **surrender of part of the plot for an open space or other public purposes**; (ii) where it **accepts a surrender of part of the plot for road widening**. In either case the owner of the plot is entitled as of right under the Building Regulations to transfer the unused plot ratio attributable to the part of the plot which is surrendered to the remainder of the plot, and this

enhances the value of the whole. The Government's acceptance of the surrender of part of the plot, however, is discretionary; the owner has no legal right to compel the Government to accept it and hence no legal right to bonus plot ratio in respect of the rest of the site.

*48. At first sight, therefore, the availability of bonus plot ratio falls on the other side of the line. It directly affects the value of the land, and it is **not something to which the claimant is entitled as of right**. But this is a superficial analysis. It is necessary to identify the "**probability or expectancy**" which is involved and which s.12(c) requires to be **disregarded**. It is not the grant of bonus plot ratio, for the claimant has a legal right to this if the precondition is satisfied. **The precondition is the Government's acceptance of the surrender of part of the plot, and this is discretionary**. But the probability or expectancy of the Government accepting a surrender of part of the plot is not within the scope of s.12(c). The section is concerned with the probability or expectancy of the grant of a licence, permit or permission for the claimant to do something on the subject land, not with the probability or expectancy of the Government accepting a surrender of his interest in part of it.*

*49. With the sole exception of H H Judge Cruden's observations in Suen Sun-yau v. Director of Buildings and Lands, therefore, s.12(c) has been consistently understood and applied in Hong Kong to exclude from the compensation payable on resumption of land held under a Crown lease any element which would reflect the speculative element in the value of the land referable to the prospect of obtaining a modification of the user covenant in the lease. This is in accordance with the natural meaning of the section and the object which its introduction into the law of Hong Kong was intended to achieve. Despite the great experience of H H Judge Cruden in this field, I do not think that his observations, made without reference to the section and without having heard argument on the question, can stand **against the terms of the section and the weight of authority to which I have referred, much of it based on his own later and more considered views.***

*50. The Court of Appeal reached a different view for two reasons. In the first place, it said that the Government's argument failed to acknowledge the intrinsic value of the land "with all its potentialities"; and in the second place it failed to have regard to what it called "the realities of the commercial world" to which s.12(d) required observance. But insofar as the intrinsic value of the land includes its development potential, it cannot be realised without a modification of the terms of the lease, and the **prospect of obtaining such a modification falls squarely within the words of s.12(c)**. And insofar as "the realities of the commercial world" include the willingness of purchasers to pay a speculative price in the hope of obtaining a modification of the terms of the lease, s.12(d) is subject to s.12(c). The*

Court of Appeal construed s.12(c) as limited to "licences" etc. which "related to an interest in land" and as excluding compensation for the hope of obtaining the grant of a future interest. This was the argument of Counsel for the claimants in Million-Add Development Ltd v. Secretary for Transport which H H Judge Cruden, in my view rightly, rejected.

The use of comparables

*51. The claimants' strongest argument was that their comparables were concerned with private sales of land which was also held under Crown leases and subject to similar restrictions. The purchasers must have taken account of the need to obtain a modification of the terms of the relevant lease and the amount of the premium which the Government would be likely to exact. In Watford Construction Co. Ltd v. Secretary for the New Territories [1978] HKLTLR 253 the land was demised as agricultural land. The Lands Tribunal held that, in order to apply s.12(c) it was not necessary to employ a two-stage approach by **first ascertaining the open market value and then quantifying and deducting the expectancy or probability factor**. Giving the judgment of the Tribunal, Power P said:*

"This may, in certain cases, be a proper and useful approach but the Tribunal can see nothing in s.12 that would prevent it from approaching the valuation of land restricted to agricultural use by using the sales of comparable land which is similarly restricted. Indeed, in the present case, the Tribunal is satisfied not only that this is a proper and permitted approach under s.12 but also that it is the approach to the problem of valuation most likely to result in a correct valuation."

52. The Court of Appeal relied strongly on this observation, but properly understood it does not support the Court of Appeal's approach. In the first place, it was made in answer to the contention that s.12(c) required a two-stage approach to be adopted in every case, and that unless the amount of the speculative element could be precisely quantified it could not be deducted from the open market value which the comparables established. In the second place, the Tribunal was manifestly of opinion that the speculative element was to be excluded, as otherwise the two-stage approach could never be justified.

53. In a perfect market, of course, purchasers would pay a price which precisely reflected the prospects of obtaining a modification of the terms of the lease and the costs of obtaining it, including the payment of any premium; and the Government would charge a premium which exactly reflected the additional value which would enure to the land as a result of the modification. In such a market there would be no room for speculation. The value of the land would be the same whether one took account of the

prospects and costs of obtaining a modification or disregarded them, and s.12(c) would have no effect. But the market is not perfect. **Purchasers are prepared to pay prices which do not reflect the intrinsic value of the land, but contain a speculative element for which the Government ought not to be required to pay on resumption.**

The Basic Law

55. *The claimants submitted that, if s.12(c) of the Ordinance has the effect for which the Government contended, then it is incompatible with art. 105 of the Basic Law. This provides:*

*"105. The Hong Kong Special Administrative Region shall, in accordance with law, protect the rights of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the **real value** of the property concerned at the time and shall be freely convertible and paid without undue delay."*

56. *Two points call for comment. First, art. 105 does not require compensation to be based on the open market value of the property concerned but on its "real value". In general, property is worth what it will fetch, and its open market value reflects its real value. But as the Courts of Hong Kong have repeatedly emphasised, this is not always the case. Sometimes **the market is prepared to pay a speculative price which exceeds the true value of the property and reflects an element for which the resuming authority ought not to be required to pay. There is nothing in art. 105 which requires it to do so.***

57. *Secondly, compensation is only required to be paid for "the property concerned", that is to say for the interest acquired. In the present case, that means for **the land for the duration of the Crown lease and subject to the user restrictions in the lease. The right to exploit the development potential of the land by using it as building land was not disposed of by the Crown and remains the property of the Government for which it ought not to be required to pay.** If the claimants' argument is correct, then the Government's practice in charging a full premium on modification of the terms of a Crown lease is also open to challenge under the Basic Law; and I do not consider that that is right.*

Conclusion

58. *I would **allow the appeal, discharge the assessments** and remit both cases to the Lands Tribunal to reconsider the assessment of the compensation on a **full evaluation of all the evidence and in the light of this judgment.** While there can be no objection to the two cases being heard by the same panel, it would be preferable if it was differently constituted from*

either of the original panels. I would order that the Government should have its costs here and in the Court of Appeal but that each party should be left to bear its own costs in the Lands Tribunal.

Mr Justice Bokhary PJ :

59. *The Court is unanimous. These appeals are allowed.* *The assessments are discharged and both cases are remitted to the Lands Tribunal for it to reconsider the assessment of the compensation in each case on a full evaluation of all the evidence and in the light of our judgment. There can be no objection to the two cases being heard by the same panel. But it would be preferable if it was differently constituted from either of the original panels. We award the Government its costs here and in the Court of Appeal, but leave each party to bear its own costs in the Lands Tribunal.*

(Kemal Bokhary) Permanent Judge
(Gerald Nazareth) Non-Permanent Judge
(Patrick Chan) Permanent Judge
(William Silke) Non-Permanent Judge
(Lord Millett) Non-Permanent Judge

Representation:

Mr Robert C Tang SC and Mr Nelson Miu (instructed by the Department of Justice) for the appellant

Mr Benjamin Yu SC, Mr Patrick Chong and Miss Yvonne Cheng (instructed by Messrs K C Ho & Fong) for the 1st and 2nd respondents

(i) a user covenant which prohibited the use of the land for building purposes other than for its occupation as agricultural or garden ground; and (ii) a building covenant which prohibited the erection of any building on the land without the approval of the Crown's (now the Government's) surveyor.

footnote by me: (i) is the first restrictive covenant in the Block Crown Lease; and, (ii) is the second restrictive covenant in the Block Crown Lease. The third restrictive covenant is deed modifications on Assign, Demise, Mortgage, Part with, all or any part.

Privy Council Appeal No. 35 of 1984

Winfat Enterprise (HK) Company Limited Vs. The Attorney-General
Judgment of the Lords of the Judicial Committee of the Privy Council,
Delivered the 11th March 1985

Present at the Hearing: Lord Fraser of Tullybelton, Lord Wilberforce, Lord Diplock, Lord Brightman and Lord Templeman

The form of grant adopted was that of Block Crown Leases with their accompanying schedules. As to the legal nature and effect of these Block Crown Leases their Lordships have already expressed their agreement with what has been said upon this matter in the admirable judgments of Kempster J. and the Court of Appeal. As they have already stated in their Lordships' view the land developers' claim is based upon obvious misunderstandings of British constitutional law relating to Crown colonies. They will humbly advise Her Majesty that this appeal should be dismissed with costs.

The modified 10th declaration by Judge Kempster:

42. As regards the Tenth declaration sought I grant a modified formula, **not opposed by the Crown** here, as follows -

"The severed land may be and prior to resumption the resumed land might lawfully have been used for open storage of motor vehicles or any other purpose apart from **building purposes** inconsistent with the proper occupation of the said lands as **agricultural or garden ground** or from any noisy, noisome or offensive trade or business." Attorney-General v. Melhado Investment Ltd.

(M. Kempster)
Judge of the High Court

Block Crown Lease is now Block PRC Government Lease as interpreted in Schedule 8(1) of Cap. 1:

Exclusive Governance on Easements and Appurtenances in Block PRC Government Lease

*NOW THIS INDENTURE WITNESSETH that in consideration of yearly rents and covenants and stipulations hereinafter reserved and contained, by and on the part and behalf of each Lessee respectively to be paid, done and performed, His said Majesty KING EDWARD VII DOTH hereby grant and demise unto each Lessee All that piece or parcel of ground situate, lying and being in **Surveying District** No. *In the New Territories in the Colony of Hong Kong set out and described in the **Schedule hereto opposite to the name of such Lessee** AND which said piece or parcel of ground is more particularly delineated and described on the **plan or plans of Survey District** No. *attached hereto according to the lot number set out in the Schedule hereto opposite to the **name of such Lessee and marked on the said plan** together with the messuages, erections and buildings thereon***

and all the easements and appurtenances whatsoever to the said demised premises belonging, or in anywise appertaining, EXCEPT and RESERVED unto His said Majesty, His Heirs, Successors and Assigns all Mines, Minerals, and Quarries of Stone in, under and upon the said premises and all such Earth Soil, Marl, Clay, Chalk, Brick-earth, Gravel, Sand, Stone and Stones, and other Earths or Materials, which now are or hereafter during the continuance of this demise shall be under or upon the said premises or any part or parts thereof, as His said Majesty, His Heirs Successors or Assigns may require for the Roads, Public Buildings, or other Public Purposes of the said Colony of Hong Kong with full liberty of Ingress, Egress, and Regress, to and for His said Majesty, His Heirs, Successors and Assigns, and His and their Agents, Servants, and Workmen at reasonable times in the day during the continuance of this demise, with or without horses, carts, carriages, and all other necessary things, into, upon, from and out of all or any part or parts of the premises hereby expressed to be demised to view, dig for, convert and carry away, the said excepted Minerals, Stone, Earths and other things respectively on any part or parts thereof respectively : thereby doing as little damage as possible to the Lessees : AND ALSO SAVE AND EXCEPT full power to His said Majesty, His Heirs, Successors and assigns, to make and conduct in, over, along, through or under the said premises, all and any Public or Common sewers, drains, or water-coursed, water or other mains, telegraph and telephone lines with full power at all times to enter into and upon the said demised premises for the purposes of making, : laying, erecting, inspecting or repairing the same..... all existing Public or Private rights and easements in, over, along, through or under the said demised premises or any part or parts thereof respectively or in any wise appertaining thereto and subject also to such mortgages incumbrances, tenancies, estates and interest (if any) as are mentioned in the Schedule hereto or are duly entered against the same premises in the registers thereof in the Land Office and subject to all existing rights of all persons occupying the said premises as tenants or mortgagees of the lessee;..... Lessee shall and will, from time to time, and at all times hereafter when, where, and as often as need or occasion shall be and require, at his or her and their proper costs and charges, well and sufficiently Repair, Uphold, Support, Maintain, Pave, Purge, Scour, Cleanse, Empty, Amend and keep the messuage or tenements, and all other erections and buildings, now or at any time hereafter standing upon the said pieces or parcels of ground hereby expressed to be demised, and all the Walls, Rails, Light. Pavements, Privies, Sinks, Drains, and Water-courses thereunto belonging and which shall in anywise belong or appertain unto the same, in, by, and with all and all manner of needful and necessary reparations, cleansing and amendments whatsoever, the whole to be done to the satisfaction of the Surveyor of His said Majesty, His Heirs, Successors or Assigns. And the said messuage or tenement, erection, buildings and premises being so well and sufficiently repaired, sustained

and amended, at the end or sooner determination of the said term hereby granted shall and will peaceably and quietly deliver up to His said Majesty, His Heirs, Successors or Assigns : And further it shall and may be lawful to and for His said Majesty, His Heir, Successors or assigns, by His or their Surveyor, or other persons deputed to act for him or them, twice or oftener in every year during the said term, at all reasonable times in the day, to enter and come into and upon the said premises hereby expressed to the demised to view, search, and see, the conditions of the same, and of all decays, defects, and wants of reparation and amendments, which upon every such view or views shall be found, to give or leave notice or warning in writing, at or upon the said premises or some part thereof, unto or for the Lessee to repair and amend the same within Three Calendar Months then next following, within which said time or space of Three Calendar months, after every such notice or warning shall be so given, or left as aforesaid, the Lessee will repair and amend the same accordingly.....

The 3 Restrictive Covenants in the Block PRC Government Lease

.....Lessee or any other person or persons shall not, Nor will, during the continuance of this demise, use, exercise or follow, in or upon the said premises, or any part thereof, any noisy, noisome or offensive trade or business whatever, nor convert any ground hereby expressed to be demised as agricultural or garden ground into use for building purposes other than for the proper occupied of the same ground as agricultural or garden ground without the previous Licence of His said Majesty, His Heirs, Successors or Assigns, signified in writing by the Governor of the said Colony of Hong Kong, or other person duly authorized in that behalf : AND FURTHER that the Lessee or any other person or persons shall not nor will at any time during the said term erect or construct any building or structure of any description on the said demised premises or any part thereof whether demised as agricultural or garden ground or otherwise without first having obtained the approval thereto of the Surveyor to His said Majesty, His Heirs, Successors or Assigns, or other person duly authorized by the Governor of the said Colony of Hong Kong, in that behalf : AND ALSO that the Lessee shall not, nor will, assign, demise, mortgage, or otherwise part with, all or any part of the said premises hereby expressed to be demised for all or any part of the said premises hereby expressed to be granted without forthwith registering such alienation in the Land Office, or such other office as may hereafter be instituted for the purposed of Land Registration in the said Colony of Hong Kong, and paying all reasonable fees and other expenses thereon:.....

Power and Consequence on Re-enter by His said Majesty (PRC Government) in BGL

beyond the Seas King Defender of the Faith, Emperor of INDIA, of the one part, and the several persons, clans, families and ‘tongs’ whose names are set out in the Schedule hereunder written or in any Schedule which may hereafter be substituted therefore and may be certified by the Governor of Hong Kong to embody the same awards of the Land Court of the New Territories as are embodied in the Schedule hereunder written, or in any Supplemental Schedule signed by the said Governor which may hereafter be attached hereto (which original Schedule, Substituted Schedule and Supplemental Schedules are hereinafter included in the expression “ the Schedule hereto”) and each of whom and whose respective Heirs, Executors, Administrators, Managers and Assigns are where not inapplicable hereinafter included under the designation of “ the Lessees” of the other part: WHEREAS SIR MATTHEW NATHAN, Knight Commander of the most Distinguished Order of Saint Michael and Saint George is now the duly constituted and appointed Governor and Commander-in-Chief of the Colony of Hong Kong and its Dependencies and is duly authorized to enter into these presents in the name and on behalf of His said Majesty : NOW THIS INDENTURE WITNESSETH that in consideration of yearly rents and covenants and stipulations hereinafter reserved and contained, by and on the part and behalf of each Lessee respectively to be paid, done and performed, His said Majesty KING EDWARD VII DOTH hereby grant and demise unto each Lessee All that piece or parcel of ground situate, lying and being in Surveying District No. In the New Territories in the Colony of Hong Kong set out and described in the Schedule hereto opposite to the name of such Lessee AND which said piece or parcel of ground is more particularly delineated and described on the plan or plans of Survey District No. attached hereto according to the lot number set out in the Schedule hereto opposite to the name of such Lessee and marked on the said plan together with the messuages, erections and buildings thereon and **all the easements and appurtenances** whatsoever to the said demised premises belonging, or in anywise appertaining, EXCEPT and RESERVED unto His said Majesty, His Heirs, Successors and Assigns all Mines, Minerals, and Quarries of Stone in, under and upon the said premises and all such Earth Soil, Marl, Clay, Chalk, Brick-earth, Gravel, Sand, Stone and Stones, and other Earths or Materials, which now are or hereafter during the continuance of this demise shall be under or upon the said premises or any part or parts thereof, as His said Majesty, His Heirs Successors or Assigns may require for the **Roads, Public Buildings, or Other Public Purposes** of the said Colony of Hong Kong with full liberty of Ingress, Egress, and Regress, to and for His said Majesty, His Heirs, Successors and Assigns, and His and their Agents, Servants, and Workmen at reasonable times in the day during the continuance of this demise, with or without horses, carts, carriages, and all other necessary things, into, upon, from and out

of all or any part or parts of the premises hereby expressed to be demised to view, dig for, **convert and carry away**, the said excepted Minerals, Stone, Earths and other things respectively on any part or parts thereof respectively : thereby doing as little damage as possible to the Lessees : AND ALSO SAVE AND EXCEPT full power to His said Majesty, His Heirs, Successors and assigns, to make and conduct in, over, along, through or under the said premises, **all and any Public or Common sewers, drains, or water-coursed, water or other mains, telegraph and telephone lines** with full power at all times to enter into and upon the said **demised premises for the purposes of making, : laying, erecting, inspecting or repairing the same** or otherwise in connection therewith TO HAVE AND TO HOLD unto each Lessee the said piece or parcel of ground and premises hereby expressed to be demised to such Lessee, with their and every of their appurtenances from the first day of July One thousand eight hundred and Ninety-eight for and during and unto the full end of the term of Seventy-five years except in the case of those lots opposite which a different term of years or tenancy is stated in the Schedule hereto which lots shall be held for the term of years or tenancy so stated subject nevertheless to **all existing Public or Private rights and easements in, over, along, through or under the said demised premises or any part or parts thereof respectively or in any wise appertaining thereto and subject also to such mortgages incumbrances, tenancies, estates and interest (if any) as are mentioned in the Schedule hereto or are duly entered against the same premises in the registers thereof in the Land Office** and subject to all existing rights of all persons occupying the said premises as tenants or mortgagees of the lessee; YIELDING and paying therefore yearly and every year the sum stated in the schedule hereto against the said Lot number or other sum as may hereafter be fixed in lieu thereof under the provisos next hereinafter contained in Current Money of the said Colony of Hong Kong, on the thirtieth day of June in every year free and clear from all Taxes, Rates, Charges, Assessments and Deductions whatsoever, charged upon or in respect of the said premises or any part thereof, payment of the said Rent for the current year becoming due on the thirtieth day of June One thousand nine hundred and five; PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that on the expiration of the first ten years of the term hereby granted the rent hereby reserved shall cease and thereafter such rent shall be paid and become payable in respect of the said premises for the residue of the term hereby granted as shall be fairly and impartially fixed by the Surveyor to His said Majesty, His Heirs, Successors or Assigns (now the Director of Public Works) as the fair and reasonable rental value of the ground at that date; PROVIDED ALSO that **in the event of any building being erected on any premises expressed to be demised as agricultural or garden ground the rent payable in respect of such premises shall be such sum as shall be specified in the**

licence for the erection of such building to be granted in manner hereinafter appearing; AND each Lessee for himself and herself and for his and her own acts and deeds only and not the one for the other of them doth hereby covenant with His said Majesty, His Heirs, Successors and Assigns by these presents in manner following, that is to say, that the Lessee shall and will yearly, and every year, during the said term hereby granted, well and truly pay or cause to be paid to His said Majesty, His Heirs, Successors and Assigns, the said yearly Rent stated in the Schedule hereto opposite the Lot number of the premises demised to him or her or such other rents as shall become payable under the provisos hereinbefore contained clear of all deductions as aforesaid on the several days and times and in the manner hereinbefore reserved and made payable : AND ALSO that the Lessee shall and will during all the said term hereby granted, bear, pay and discharges all taxes, rates, charges and assessment whatsoever, which now are or shall be hereafter assessed or charged upon, or in respect of, the said premises hereby expressed to be demised to him or her or any part thereof : And will pay the said taxes, rates, charges and assessments for each and every year by annual payments in advance with the rent hereinbefore reserved on the thirtieth day of June in every year : AND ALSO that the Lessee shall and will, from time to time, and at all times hereafter when, where, and as often as need or occasion shall be and require, **at his or her and their proper costs and charges, well and sufficiently Repair, Uphold, Support, Maintain, Pave, Purge, Scour, Cleanse, Empty, Amend and keep the messuage or tenements, and all other erections and buildings, now or at any time hereafter standing upon the said pieces or parcels of ground hereby expressed to be demised, and all the Walls, Rails, Light. Pavements, Privies, Sinks, Drains, and Water-courses thereunto belonging and which shall in anywise belong or appertain unto the same, in, by, and with all and all manner of needful and necessary reparations, cleansing and amendments whatsoever, the whole to the done to the satisfaction of the Surveyor of His said Majesty, His Heirs, Successors or Assigns. And the said messuage or tenement, erection, buildings and premises being so well and sufficiently repaired, sustained and amended, at the end or sooner determination of the said term hereby granted shall and will peaceably and quietly deliver up to His said Majesty, His Heirs, Successors or Assigns : And further it shall and may be lawful to and for His said Majesty, His Heir, Successors or assigns, by His or their Surveyor, or other persons deputed to act for him or them, twice or oftener in every year during the said term, at all reasonable times in the day, to enter and come into and upon the said premised hereby expressed to the demised to view, search, and see, the conditions of the same, and of all decays, defects, and wants of reparation and amendments, which upon every such view or views shall be found, to **give or leave notice or warning in writing**, at or upon the said premises or some part thereof, unto or for**

the Lessee to repair and amend the same within Three Calendar Months then next following, within which said time or space of Three Calendar months, after every such notice or warning shall be so given, or left as aforesaid, the Lessee will repair and amend the same accordingly : **AND FURTHER** that the Lessee or any other person or persons **shall not, Nor will, during the continuance of this demise, use, exercise or follow, in or upon the said premises, or any part thereof, any noisy, noisome or offensive trade or business whatever, nor convert any ground hereby expressed to be demised as agricultural or garden ground into use for building purposes other than for the proper occupied of the same ground as agricultural or garden ground without the previous Licence of His said Majesty, His Heirs, Successors or Assigns, signified in writing by the Governor of the said Colony of Hong Kong, or other person duly authorized in that behalf : AND FURTHER** that the Lessee or any other person or persons **shall not nor will at any time during the said term erect or construct any building or structure of any description on the said demised premises or any part thereof whether demised as agricultural or garden ground or otherwise without first having obtained the approval thereto of the Surveyor to His said Majesty, His Heirs, Successors or Assigns, or other person duly authorized by the Governor of the said Colony of Hong Kong, in that behalf : AND ALSO** that the Lessee **shall not, nor will, assign, demise, mortgage, or otherwise part with, all or any part of the said premises hereby expressed to be demised for all or any part of the said premises hereby expressed to be granted without forthwith registering such alienation in the Land Office, or such other office as may hereafter be instituted for the purposed of Land Registration in the said Colony of Hong Kong, and paying all reasonable fees and other expenses thereon:** Provided always, and it is hereby agreed and declared, that in case the said yearly rents hereinbefore reserved, or any part thereof, shall be in arrear and unpaid by the space of twenty-one days next over, or after any or either of the said days whereon the same ought to be paid as aforesaid (whether lawfully demanded or not) **or in case of the breach or non-performance of any or wither of the covenants** and conditions herein contained, and by or on the part and behalf of the Lessee to be kept done and performed, then, and in either of the said cases, it shall and may be lawful to and for His said Majesty, His Heirs, Successors of Assigns, by the Governor of Hong Kong, or other person duly authorized in that behalf, in and upon the said premises hereby expressed to be demised in respect of which such rent shall be in arrear or such breach or non-performance shall have occurred or any part thereof in the name of the whole, **to re-enter**, and the same to have again, retain, repossess and enjoy, as in His or their first or former estate, **as if these presents had not been made, and the Lessee and all other occupiers of the said premises thereout and thence utterly to expel, put out and amove, this Indenture or anything contained herein to the**

contrary notwithstanding : PROVIDED also, and it is hereby further agreed and declared that His said Majesty, His Heirs, Successors and Assigns, shall **have full power to resume, enter into, and re-take possession of all or any part of the premises hereby expressed to be demised, if required for the improvement of the said Colony of Hong Kong, or for any other public purposes whatsoever,** Thee Calendar Months' notice being given to the Lessee of its being so required, and full and fair compensation for the said Land and the Buildings thereon, being paid to the said Lessee at a valuation, to be fairly and impartially made by the Surveyor of His said Majesty, His Heirs, Successors or Assigns, and upon the exercise of such power the term and estate hereby created shall respectively cease, determine and be void : PROVIDED also, and it is hereby further agreed and declared that each Lessee shall in such cases where the premises are demised for a term of seventy-five years be entitled on the expiration of the said term of Seventy-five years to a renewed Lease of the premises respectively demised to him or her for a further term of twenty-four years less three days without payment of any Fine or Premium therefor and at the Rent hereinafter mentioned; And His said Majesty, His Heirs, Successors or assigns shall and will at the request and cost of such Lessee grant unto him or her on the expiration of the said terms of Seventy-five Years hereby **granted a new Lease of the said premises for the term of twenty-four years less three days** at such Rent as shall be fairly and impartially fixed by the Surveyor of His said Majesty. His Heirs, Successors, or Assigns as the fair and reasonable rental value of the ground at the date of such renewal : **And in all other respects such new Lease shall be granted upon the same terms and under and subject to the same reservations, covenants, stipulations, provisos and declarations as are contained in this present Lease with the exception of this proviso for renewal which shall not be contained in such new Lease.** IN WITNESS whereof the said SIR MATTHEW NATHAN duly authorized by His said Majesty as aforesaid hath executed these present, and hereunto set the Public Seal on the Colony of Hong Kong aforesaid, in the Name and on behalf of His said Majesty.

(Signed)
Matthew Nathan

Examined and certified to be correct.
(Signed) C. Clementi
Member Land Court
Certified True Copy.

Assistant Land Officer

If parties insist on registration without amendment or rectification then the document should be registered "pursuant to statutory duty and for what it is worth" but no reference to joint tenancy or tenancy in common should be shown on the register. This is unsatisfactory (Government may have difficulties in deciding how to pay compensation in redemption or surrender cases, for instance) but is less unsatisfactory than specifying a particular capacity on the register which is incorrect. A mistake of this type could well involve Government in legal liability.

(iii) Division of Property

☆
NTA 102
↓

There is a N.T.A. "Division of Property" form widely used in the Districts for counter transactions for dividing lots into sections. Unfortunately I do not have a copy to hand, but it has a N.T.A. Form number and I can give you a D.O. file reference if you wish to see how such a form is used. It is accompanied usually by a plan.

The form purports to effect a carving out or partition of land but in fact does not and may not even amount to an agreement to do these things. The form should not be used in future at all. It is highly dangerous and if as a result of relying on such a form prepared by a D.O. loss is incurred to private parties, the Government could well be sued in substantial damages. The D.O. in the case referred to is one where Government could well be charged with negligence.

I do not wish to encourage D.O.'s in their conveyancing practice but if they insist on doing division of property they should use the forms in the N.T. Ordinance to convey the various sections to the various owners, each accompanied by a plan. If only one person is the owner and there is no intention of conveying to anyone else, the owner should be advised to use a form of "split" deed poll (scaled) with plan.

↳ one person is the owner and there is no intention of conveying to

Sd. (K.J. Davison)
P. Registrar General
(N.T. Section)

15.06.2015 16:37