Judgment 23 of 1972

1972 Judgment 23

In the Privy Council.

No. 17 of 1971 (appeal)

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED

(2nd Defendant) . . . . . *Appellant*

AND

YEE SANG METAL SUPPLIES COMPANY

(Plaintiff) . . . . . *Respondent*

Record of Proceedings

NABARRO, NATHANSON & CO.,
211, PICCADILLY,
LONDON, W1A 2SA
Solicitors for the Appellant

SHARPE PRITCHARD & CO.,
109, KINGSWAY,
LONDON, WC2B 6PA
Solicitors for the Respondent

No. of

In the Privy Council. 17 OF 1971

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

BETWEEN

TAK MING COMPANY LIMITED
(2nd Defendant) .. .. *Appellant*

AND

YEE SANG METAL SUPPLIES COMPANY
(Plaintiff) .. .. *Respondent*

RECORD OF PROCEEDINGS

In the Supreme Court of Hong Kong.

Original Jurisdiction

No. 1. Summons Inter-Parte 6th August 1969

No. 1.

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. 2nd Defendant

SUMMONS INTER-PARTY

Let all parties concerned attend before the Judge in Chambers at the Supreme Court, Hong Kong on Saturday the 16th day of August, 1969, at 10.00 o'clock in the forenoon, on the hearing of an application on the part of Plaintiffs for **an order** that interest be paid by the 2nd Defendant to the Plaintiffs on the sum of $332,635.17 assessed to be payable by the 2nd Defendant to the Plaintiffs pursuant to the judgment in this action of the Honourable Mr. Justice Pickering on 3rd January, 1969, such interest to be paid at the rate of 8% per annum from the commencement of this action on 16th November, 1966 until payment of the judgment debt.

E. S. HAYDON
Registrar.

Dated the 6th day of August, 1969.

This Summons was taken out by HASTINGS AND COMPANY of Marina House, First Floor, Victoria in the Colony of Hong Kong, Solicitors for

In the Supreme Court of Hong Kong.

Original Jurisdiction

No. 1.
Summons Inter-Parte 6th August 1969

the Plaintiffs.

To the abovenamed 2nd Defendant whose registered office is situated at No. 76 Sai Yee Street, Kowloon in the Colony of Hong Kong, and Messrs. Samuel Soo & Co., its solicitors.

(Sd.) Hastings & Co.

Estimated time not exceeding 15 minutes.

No. 2.

In the Supreme Court of Hong Kong.

Original Jurisdiction

No. 2 Affirmation of Wong Kai Tung 6th August 1969

AFFIRMATION OF WONG KAI TUNG

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. 2nd Defendant

10 **AFFIRMATION OF WONG KAI TUNG**

I, Wong Kai Tung, of Marina House, 1st floor, Queen's Road Central Victoria in the Colony of Hongkong, Solicitor, do solemnly sincerely and truly affirm and say as follows:—

1. I am the Solicitor acting for the Plaintiffs in the above action and I make this affirmation in support of the Plaintiff's application against the 2nd Defendant for interest.

2. The Statement of Claim in this action against the 2nd Defendant contains a claim for interest upon the principal amount claimed at the rate of 8% per annum from the commencement of this action.

20 3. By his judgment in this action dated 3rd January, 1969, the Honourable Mr. Justice Pickering gave judgment in favour of the Plaintiffs and ordered that the quantum payable by the 2nd Defendant should be determined separately.

4. Subsequently counsel for the Plaintiffs and counsel for the 2nd Defendant appeared before the said judge in chambers on 8th February, 1969 and, by consent, an order was made for the appointment of Mr. D. A. Bailey to assess the quantum. I am advised by Mr. Swaine, counsel for the Plaintiffs, and verily believe that at this hearing he asked to be on record as intending to make an application for interest at the appropriate time.

5. Mr. Bailey has now assessed the quantum payable by the 2nd Defendant
30 to the Plaintiffs at $332,635.17. His assessment is dated the 30th July 1969, a signed and sealed copy of which is produced attached hereto and marked "WKTI".

6. Application is now made on behalf of the Plaintiffs for the 2nd Defendant to pay to the Plaintiffs interest at the rate of 8% per annum on the abovesaid sum of $332,635.17 from the commencement of this action namely 16th November, 1966 until payment of the judgment of the judgment debt.

AND LASTLY I do solemnly sincerely and truly affirm and say that the contents of this my affirmation are true.

AFFIRMED at the Court of Justice)
40 Supreme Court Victoria Hongkong,)
this 6th day of August, 1969)

Before me,

(Sd.) HO YU HO
A Commissioner &c.

(Sd.) WONG KAI TUNG

This affirmation is filed on behalf of the Plaintiffs herein.

In the Supreme Court of Hong Kong.

Original Jurisdiction

No. 3. Order of the Honourable Mr. Justice Briggs 16th August 1969.

No. 3.

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.

Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. 2nd Defendant

BEFORE THE HONOURABLE MR. JUSTICE BRIGGS IN CHAMBERS

O R D E R

UPON HEARING Counsel for the Plaintiffs and for the 2nd Defendant AND UPON READING the Affirmation of Wong Kai Tung filed herein on the 7th day of August, 1969.

IT IS ORDERED that the application on the part of the Plaintiffs for an order that interest be paid by the 2nd Defendant to the Plaintiffs on the sum of $332,635.17 assessed to be payable by the 2nd Defendant to the Plaintiffs pursuant to the judgment in this action of the Honourable Mr. Justice Pickering on the 3rd day of January, 1969, such interest to be paid at the rate of 8% per annum from the commencement of this action on the 16th day of November, 1966 until payment of the judgment debt be dismissed with costs to be taxed to the 2nd Defendant. Certificate for counsel.

Dated the 16th day of August 1969.

B. L. JONES.
Assistant Registrar.

In the Supreme Court of Hong Kong

Original Jurisdiction

No. 4
Notice of Motion
26th May 1970

No. 4

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction
Action No. 2212 of 1966

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. 2nd Defendant

NOTICE OF MOTION

TAKE NOTICE that the Full Court will be moved on Thursday the 9th day of July 1970 at 10.00 o'clock or so soon as Counsel for the Plaintiffs can be heard that the judgment in this action of Mr. Justice Pickering dated the 3rd January 1969 should be corrected by the inclusion of an order that the 2nd Defendants pay interest to the Plaintiffs on the judgment debt at the rate of 8% per annum from the commencement of this action or alternatively from the date of the judgment to the date of payment pursuant to the claim in the Statement of Claim in this action, the amount of such judgment debt having been assessed in the sum of $332,635.17, the ground of this application being that, owing to an accidental omission, the said judgment did not provide for this part of the Plaintiff's claim.

Dated the 26th day of May 1970.

sd. HASTINGS & CO.
Solicitors for the Plaintiffs

To: the Registrar
the 2nd Defendants and
their solicitors,
Messrs. Samuel Soo & Co.

In the Supreme Court of Hong Kong.

Original Jurisdiction

No. 5
Copy of Notes of the Judge, the Honourable Mr. Justice Pickering

No. 5

COPY OF NOTES OF THE JUDGE, THE HONOURABLE MR. JUSTICE PICKERING

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. .. 2nd Defendant

26.6.70. at 10 a.m.
Swaine (Hasting & Co.) for Plaintiffs
Mills-Owens (Samuel Soo & Co.)
for 2nd Defendant

JUDGE'S NOTES

Mills-Owens: Preliminary objection. Already made before another judge at first instance res judicata.
16.8.69 before Briggs, J.
They did not appeal and cannot take out another application for the same relief.

Swaine: I was not present. I drafted the papers. Application this morning is fundamentally different. Prayer before Briggs was for him to make an order for interest. Motion before you is for you to correct a judgment already given so as to include interest.

Instructed that before Briggs his reason for dismissing was that he had no jurisdiction — that an order for interest must be made in the judgment and it was too late for interest to be awarded after delivery of the judgment.

Submit that is perfectly right — either you get order for interest in a judgment or not at all.

Para. 4 of Tung's affidavit (Fol. 56).

We had to await Bailey's assessment because there was a suggestion that nothing more might be payable by 2nd defendant.

Mills-Owens: (in reply). Briggs, J. refused as having no jurisdiction. How have you got jurisdiction. Application under slip rule does not have to be made to same judge.

Relief sought was precisely same relief as is now sought.

If he had no jurisdiction neither have you. Party cannot have several bites at the cherry by framing his application slightly differently.

Court: It seems to me that the applications are different. Briggs, J. was asked to make an Order as it were de novo. I am not being asked to do that but to correct my own judgment. That application was expressed to be made under 0.6 r.2(a). I am being moved under the slip rule. Not res judicata.

Swaine: Statement of Claim was for a specified sum of money. Issue and quantum both disputed. You determined liability first.

Question for you really is, if question had been before you when you were delivering judgment would you have acceded to a request for interest.

Jurisdiction is beyond question 0.20 r.11 20/11/2.

Re Inchcape (1942) Ch.394.

My case does not go as far as Inchcape. There was a prayer for interest but the judgment was handed down and counsel had no opportunity to ask for interest. Since quantum remained to be assessed, such a request might have been premature.

Ask correction of judgment to allow for interest as prayed.

Mills-Owens: 23/8/69. Final judgment for amount assessed.

1. Matter is long past your judgment. It is now in Privy Council. Highly unsatisfactory to have another series of appeals on interests. Your discretion should be exercised against award of interest.
2. 0.20 r.11 "Accidental slips". Submit this was not accidental.
3. (and more fundamental). No jurisdiction.

2. "Accidental" or not. Notes to 20/11/1 p.324 and p.325. You must be able to say to yourself "Yes. Of course I would have awarded interest". 1953 H.K.L.R. 135. Headnote and foot of p.146. Only distinction is that in present case spescific claim for interest in the pleadings.

I adopt "It is one thing···" that is a valid criticism of this application. "Interest was very much in our minds at time of judgment". He raised the matter before you on 8.2.69. Should there and then have asked for correction.

Not an accidental omission. An intentional omission on counsel's part.

Moore and Buchanan (1967 1 W.L.R. 1341.) Headnote and 1350. Interest present in my learned friend's mind as long ago as 8.2.69. Now before Privy Council.

Application should have been made timeously. No answer to say actual quantum was not assessed till later.

3. **No jurisdiction.** Power of Court to award interest in absence of substantive legislation.

Law Reform (Interest on Claims and Judgments) Ordinance (6 of 1970) came into effect 9.1.70. **Not retrospective.**

Power in England is Law Reform(Miscellaneous Provisions) Act 134.

White Book p.36 6/2/7.

No right to interest at common law in absence contract, mercantile usage or statute.

Halsbury Vol.27, para.8 and note (u).

Trans Trust S.P.R.L. v. **Danubian Trading Co. Ltd.** 1952, 2 Q.B. at 306.

R. S. Court 0.6 r.2(a).

But notwithstanding that before Court has power to award interest there must be substantive legislation. There was none until 1970. Fact that legislature thought it necessary pass such legislation suggested no such power prior thereto.

That is so of interest on the debt—as to judgment position must be different but my learned friend must point to substantive legislation.

Interest on judgment. In U.K.

Judgments Act 1838 which previously applied in Hong Kong but not since

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1966. 0.42/1/6.

If against me I will say interest should only run from assessment of amount (23.8.69).

Interest on judgment is under 1838 Act. S.4. Application English Law Ordinance Judgments Act is not included nor S.28 Civil Procedure Act 1833.

Therefore as from 7.1.66 we no longer have Judgments Act 1838 in Hong Kong and therefore there is no power in Court to give interest on judgments. Not aware of any ordinance granting power to give interest on judgments until 6/19/70.

If you are against me you still have discretion as to proper period and proper rate. **10**

1970 Ordinance says 8%.

Under Cap. 23 maximum was 8%.

Practice Direction 29.10.1909.

11.35 a.m. Court adjourns.

11.50 a.m. Court resumes as before.

Swaine: Practice Direction.

Old Code 0.15 r.7. Section 351 of old Code was forerunner and is referred to by the Practice Direction.

The old 0.6 r.2(a) is taken verbatim from the old code. **20**

In Statement of Claim prayer for interest was under 0.15 r.7 then in force.

Before action came on for trial Code had been superseded by amendments to Rules of the Supreme Court.

He contends invalid and nothing short of Ordinance would give power to a Court to award interest. Astounding that these rules have never been successfully challenged. Short answer is that there is special power given by Ordinance to the Rules Committee to make the rule in the 1967 rules i.e. the rule which has now been abolished by 1970 Ordinance. Section 38 Cap. 4 contains in s.s. (1)(u).

Power to award interest was power contained in old Code. There is power **30** by Ordinance for Rules Committee to make similar rules. 1(a) contains power to make rules etc. etc. Power to award interest has been exercised in regard to interest from commencement of suit. Rules did not purport to allow interest prior to that. Power to award interest is co-extensive with the suit itself. No difference from power to award costs once suit is instituted.

1970 Ordinance goes much further than Rules in matter of interest.

S.30(A) "Between when cause of action arose and judgment".

Speculation to enquire why Ordinance passed. Obviously to confer powers wider than those in Rules.

As to why 1838 and 1833 Acts do not apply—legislature did not think **40** it necessary since power existed under Rules of the Supreme Court.

2. His second point.

37 H.K.L.R. case.

We did ask for interest in Statement of Claim. Moreover in that case claim was for damages. Ours was for work done. Considerable difference in merits of claim for interest on a promise to pay and damages for breach of contract.

Test is had the point been squarely before you when you delivered judgment would you have awarded interest as matter of course. Submit you would.

Concede the merit of submission that there are different periods to be taken into account. I asked for maximum period. In your discretion to disallow from commencement of suit and allow it only from date of judgment. There is no question that you would have given interest from date of judgment.

Buchanan and Moore readily distinguishable. Judgment still outstanding. Your exercise of discretion under slip rule **would** be of benefit to plaintiffs. Further, at p.1350 'E' No manoeuvre in this case.

10 He says intentional omission. That not borne out by the matter before you. We attempted obtain interest before Briggs, J. You may think that application was misconstrued and should have been under slip rule.

No opportunity for counsel to address you on the judgment.

We did not sleep on it but took the wrong steps.

Pending appeal in Privy Council does not matter one bit. If you allow interest and they appeal up to Privy Council question is one of costs.

Not able to say what practice of judges was in 1953 but in last 10 years judges have as matter of course awarded interest at least from date of judgment.

C.A.V.

20 (Sd.) W. F. Pickering.

12.15 p.m. Court adjourned.

7th July, 1970.

9.30 a.m. Court resumes for delivery of decision; appearances as before.

Judgment read.

Each side to bear own costs of the motion.

(Sd.) W. F. Pickering.

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No. 6.

JUDGMENT

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. .. 2nd Defendant

Coram: Pickering, J.

DECISION

On the 3rd of January, 1969, I gave judgment for the plaintiff firm in an action against the second defendant company whereunder the plaintiffs claimed the sum of $352,000 in respect of an alleged promise by the second defendant company to pay for steelwork performed by the plaintiffs on a 16-storey building. In addition to the claim for $352,000, the plaintiffs claimed interest thereon at the rate of 8 per cent per annum from the commencement of the action to the date of payment under 0.15 r.7 of the then Code of Civil Procedure.

At the trial both parties requested me, partly with a view to a possible saving of costs, to confine my judgment to the issue of liability leaving that of quantum to be assessed subsequently by an expert, a structural engineer. This I agreed to do and, in the result, I found the second defendant company liable to the plaintiff firm for the balance, if any, of the price of work done on the site by the plaintiff firm in excess of the sum of $884,000 already then received by the plaintiffs. In my judgment I made no reference to the plaintiffs' claim for interest on the sum of $352,000.

The matter now comes before me on a notice of motion asking that my judgment of 3rd of January, 1969, be corrected by the inclusion of an order that the second defendant company pay interest to the plaintiff firm on the judgment debt at the rate of 8 per cent per annum from the commencement of the action, or, alternatively, from the date of the judgment to the date of payment pursuant to the claim in the Statement of Claim. The amount of the judgment debt was assessed by the expert at $332,635.17 and judgment has been entered for that amount against the second defendant company. The ground of the present application is that owing to an accidental omission the judgment of 3rd January 1969 as to liability did not provide for interest on whatever sum might be assessed as due to the plaintiff firm.

At the outset of the present hearing Mr. Mills-Owens for the second defendant company raised the preliminary argument that the matter was res judicata. A summons had been taken out by the plaintiffs under 0.6 r.2A of the Rules of the Supreme Court asking for an order that interest be paid by the second defendants to the plaintiffs on the said sum of $332,635.17 and that such interest be at the rate of 8 per cent per annum from the date of commencement of the action until payment of the judgment debt. On the 16th of August, 1969, my brother Briggs refused the application being, I am informed by counsel, of

the view that he had no jurisdiction to make the order sought and that a successful plaintiff could either obtain an order for interest at the time of his judgment or not at all. In the light of that refusal, counsel urged, the issue had been decided and the matter was res judicata.

Had this application before me been made under 0.6 r.2A I would have been constrained to agree, but the notice of motion does not ask me, as the summons asked my brother Briggs, to, as it were, **pluck** an amount of interest out of empty air and then **tack** it on to the amount of a judgment already entered. What I am asked to do is to correct my judgment by including in it an order for the payment of interest which order was in fact a part of the plaintiffs' Prayer in the original Statement of Claim. The application is made under the Slip Rule (0.20 r.11), and I am in **no doubt** that I have jurisdiction under that order and rule to make the correction sought provided that the original failure to order the payment of interest was in fact **an accidental slip** or omission and that all the circumstances of the case render it equitable that I should so exercise my discretion. Equally, my brother had no jurisdiction to make the order sought of him, but the issue is now as to whether the Slip Rule should be applied and that issue is not res judicata.

Mr. Swaine, for the plaintiff firm, submitted that the question for the court was really whether, if the award or otherwise of interest had been in my mind when I was delivering judgment, I would or would not have acceded to the request for interest. Mr. Swaine quoted the case of **Re Inchape**(1) and said that the judgment in the present case having been handed down and not read in court, counsel had had no opportunity to ask for interest and indeed, since the quantum remained to be assessed, such a request might have been premature.

Mr. Mills-Owens for the second defendant company pointed out that formal judgment for the amount assessed had been entered on the 23rd of August, 1969, and the second defendant company's appeal to the Full Court on the issue of liability having been dismissed, the matter was now before the Privy Council; it would be highly unsatisfactory to have a parallel series of appeals on the question of interest. This is an observation with which I cannot but agree, but it does not, in my view, constitute a reason for depriving the plaintiffs of the fruits of their claim to interest if otherwise they are entitled to it.

Counsel further referred to the case of **Mogra** v. **Pavri & another**(2) where the court had declined to add interest to the judgment debt and relied in particular upon a passage where Gould J. said:

> "It is one thing to remedy an omission to ask for something which would have been granted almost as of course; it is quite another to embark at this stage on the decision of a question which would entail considerable argument on the merits and on law. I am satisfied that the rule does not give jurisdiction to go so far. If it did, it would also enable counsel to argue an alternative claim or defence which had slipped his memory at the trial."

It does not seem to me that this passage assists the second defendant company for the reason that in the present case, unlike the **Mogra** case, the plaintiffs did claim interest in their Statement of Claim. Moreover, in the **Mogra** case, it was held that the judge was functus officio "the Slip Rule apart". The very good reason for refusing to apply the Slip Rule in the **Mogra** case was that interest had never been claimed in the Pleadings or argued or asked for at the

(1) (1942) Ch. 394 (2) 37 H.K.L.R. 135

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hearing. In the present case there was a specific claim for interest in the Statement of Claim.

Perhaps more in point was the next case referred to, which was **Moore** v. **Buchanan**(3) where the court of appeal held that "although the court was always competent, on an application under the slip rule, to correct its judgment, it had jurisdiction to exercise its discretion not to do so, not only in cases where the rights of third parties had intervened, but in cases where something had happened since the date of the oral judgment which rendered it **in**expedient or **in**equitable so to do".

In the present case, counsel continued, the plaintiffs had failed to act timeously, for, on the admission of their counsel, interest had been very much in their minds at the date of judgment and as early as the 8th of February, 1969, the possibility of an application for the correction of the judgment by the inclusion of an order for interest had been mentioned to the judge when the case was again before the court for the appointment of an assessor of damages: application should have been made timeously and it was **no** answer **to** say that at that date the damages had not been assessed.

Mr. Mill-Owens' most fundamental approach, however, was in his argument that the court had no jurisdiction to make the order sought. The statutory authority for the award of interest on judgments lay in the Law Reform (Interest on Claims and Judgments) Ordinance, 1970, which came into force on the 9th of January, 1970, and was not retrospective so that it was not in force at the date of the judgment in this action. At common law there was no right to interest in the absence of contract or merchantile usage. True, 0.6 r.2A of the present Rules of the Supreme Court purported to give the court power to award interest but notwithstanding that before the court in fact had any such power there must be substantive legislation in force and there was no such legislation until 1970. Since neither the Judgments Act of 1838 nor s.28 of the Civil Procedure Act 1833 were included in the schedule to the Application of English Laws Ordinance, Cap.88, it followed that at the date of the judgment there was no power in the court to award interest.

Replying on this issue of the court's jurisdiction, Mr. Swaine, after briefly reviewing the history of the award of interest upon judgments by the courts in Hong Kong, said that at the date of the Statement of Claim, the relevant power was contained in 0.15 r.7 of the former Code of Civil Procedure which was the order and rule invoked in the Prayer for interest in the Statement of Claim. That order and rule had been superseded before the action came on for trial by new Rules of the Supreme Court, notably 0.6 r.2A which reads:—

> "2A. When the action is for a sum of money due to the plaintiff the court may in the judgment order interest at such rate as the court may think proper to be paid on the principal sum adjudged from the commencement of the action to the date of the judgment, in addition to any interest adjudged on such principal sum for any period prior to the commencement of the action; and further interest, at such rate as may for the time being be fixed by the court, shall be recoverable on the aggregate sum so adjudged, from the date of the judgment to the date of payment."

and which was reproduced verbatim from 0.15 r.7 of the former Code of Civil

(3) (1967) 1 W.L.R. 1341

Procedure.

The statutory authority for the making of 0.6 r.2A was to be found in s.38, sub-s.(1)(u) of the Supreme Court Ordinance, Cap. 4, providing:

"38. (1) Rules of court under this Ordinance may prescribe or provide for —

.....

.....

.....

(u) all matters which could heretofore or which have heretofore been provided for or regulated by or which have been contained in the Code of Civil Procedure."

Thus, counsel argued, at the date of the judgment there was valid power, derived ultimately from substantive legislation, to award interest as from the commencement of the action.

These appear to me to be cogent and convincing arguments, and I am unable to agree that at the date of judgment the court had in any event, no jurisdiction to award interest.

As to the allegation that the Plaintiffs had not acted timeously, Mr. Swaine urged that they had not gone to sleep on the matter, but had taken the step, albeit a mis-conceived step, of attempting to obtain an order for the payment of interest under 0.6 r.2A of the Rules of the Supreme Court. The case of **Buchanan** v. **Moore** (supra) was readily distinguishable since in that case the court of appeal had thought it oppressive to go back to the judge under the Slip Rule at a stage when the application of that rule could no longer possibly assist the applicant. In the present case the application of the Rule would be of very real advantage to the plaintiff firm.

A most important matter for me to consider is what I would have done at the time I gave judgment had this matter of interest been in my mind. After a lengthy trial, in the course of which both sides asked me to confine my decision to the issue of liability, and having written a long judgment which occasioned to me no small difficulty, my mind was on the issue of liability rather than upon any figures. But had I thought the matter through further, as I should have done, I am in no doubt whatever, having a very clear recollection of the case and at the evasiveness of Mr. Cheng, witness for the second defendant company, that I would have made an award of interest. Unfortunately for the plaintiff firm, I did not read the lengthy judgment in court but handed it down so that the omission was not obvious to counsel for the plaintiff before I had left the court.

On the basis of what I would have done on the date of judgment, had counsel had an opportunity of drawing my attention to the Prayer for interest, I would today be disposed to exercise my discretion to correct my finding to include an award of interest.

It remains to consider whether or not anything has occurred in the interim which would render it inequitable for me so to act now. No third party rights have intervened; if the correction is now made the second defendant company

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1970

will be in no worse position in regard to the amount of the judgment against it than had the award of interest been made at the time of the judgment. It is true that if the second defendants are advised to appeal against my present decision, they would be obliged to run two parallel lines of appeal. Such a disadvantage would go to the question of the costs of such second line of appeal and the question of where the burden of such costs should lie would no doubt be a matter for the appellate court after due consideration of all the factors including whether or not the plaintiffs can be said to have acted timeously in regard to their present application or whether it would have been competent to them to have brought such application in good time for the issue of interest to have been incorporated with the appeal against liability.

In all the circumstances the proper course appears to me to be to order the correction of the first sentence of the final paragraph of my judgment of 3rd January 1969. That sentence ran:—

> " The second defendant company is however liable to the plaintiff firm for the balance, if any, of the price of work done on the site by the plaintiff firm in excess of the sum of $884,000.00 already received by the plaintiffs."

and is to be corrected by the deletion of the full stop at the end thereof and the addition of the words:—

> "and such balance, if any, is to bear interest at the rate of 8% per annum from the date of commencement of this action until the date of payment."

In parenthesis I would observe that this is what the plaintiff firm asked for in its Statement of Claim but less than it might have asked for. Under 0.15 r.7 of the old Code of Civil Procedure as reproduced in 0.6 r.2A of the Rules of the Supreme Court it would have been open to the plaintiff firm to have asked for interest on the amount found due as from the date of the writ to the date of judgment and then for further interest on that aggregate sum so adjudged, from the date of the judgment to the date of payment. Such however was not the Prayer and the correction is confined to the terms of the Prayer.

I will hear counsel as to the costs of this Motion.

(W. F. Pickering)
Puisne Judge.

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No. 7
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7th July 1970

No. 7.

IN THE SUPREME COURT OF HONG KONG

Original Jurisdiction.
Action No. 2212 of 1966.

Between YEE SANG METAL SUPPLIES COMPANY .. .. .. Plaintiffs

and

DEFAG CONSTRUCTION COMPANY .. .. .. 1st Defendants
TAK MING COMPANY LIMITED .. .. .. 2nd Defendant

BEFORE THE HONOURABLE MR. JUSTICE PICKERING IN COURT

ORDER

Upon the application of the Plaintiffs and upon hearing Counsel for the Plaintiffs and Counsel for the 2nd Defendants IT IS ORDERED that the judgment in this action of Mr. Justice Pickering dated the 3rd day of January 1969 be corrected by the inclusion of an order that the 2nd Defendants pay interest to the Plaintiffs on the judgment debt of $332,635.17 at the rate of 8% per annum from the date of commencement of this action to the date of payment and that each party should pay its own costs of this application.

Dated the 7th day of July, 1970

Assistant Registrar
(Sd.) S. H. MAYO.

In the Supreme Court of Hong Kong.

Appellate Jurisdiction

No. 8
Notice of Appeal
16th July 1970

No. 8.

NOTICE OF APPEAL

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction

Civil Appeal No. 26 of 1970
(On Appeal from a Decision in Original Jurisdiction Action No. 2212 of 1966)

Between TAK MING COMPANY LIMITED .. .. Appellant (2nd Defendant)
and
YEE SANG METAL SUPPLIES COMPANY .. .. Respondent (Plaintiffs) 10

NOTICE OF MOTION OF APPEAL

TAKE NOTICE that the Full Court will be moved so soon as Counsel can be heard on behalf of the abovenamed 2nd Defendant Tak Ming Company Limited (the Appellant) on appeal from the decision herein of the Honourable Mr. Justice Pickering given on the 7th day of July, 1970, whereby it was ordered that the judgment of Mr. Justice Pickering dated the 3rd January 1969 be corrected by the addition of the words "and such balance, if any, is to bear interest at the rate of 8% per annum from the date of commencement of this action until the date of payment", for an order that the said decision may be set 20 aside or reversed or rescinded and that judgment may be entered for the 2nd Defendant (the Appellant) on the Notice of Motion dated 26th May 1970 in the above-mentioned proceedings and for an order that the costs of the said Motion be borne by the Plaintiff (the Respondent).

And for an order that the Respondent pay to the Appellant the costs of this appeal to be taxed.

And Further Take Notice that the grounds of this appeal are:—

(1) That the learned trial judge was wrong in law in holding that the Respondent's application for the payment of interest on the judgment debt was not a matter which was res judicata. 30

(2) That the learned trial judge erred in law in holding that the slip rule was applicable.

(3) That the learned trial judge was wrong in holding that in the circumstances of the case the Court should exercise its discretion in favour of the Respondent in granting the application.

(4) That the learned trial judge was wrong in holding that at the date of judgment the Court had any jurisdiction to award interest.

(5) That the learned judge should have ordered the Respondent to pay the Appellant's costs of the Motion in any event.

And Further Take Notice that the abovenamed 2nd Defendant proposes 40 to apply to set down this appeal in the appeal list.

Dated the 16th day of July, 1970.

(Sd.) Samuel Soo & Company

Solicitors for the 2nd Defendant.

To: the abovenamed Plaintiffs and
to Messrs. Hastings & Co.,
their Solicitors.

In the Supreme Court of Hong Kong.

Appellate Jurisdiction

No. 9 Judgment of the Full Court 1st December 1970.

No. 9.

JUDGMENT OF THE FULL COURT

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction

Civil Appeal No. 26 of 1970

(On Appeal from a Decision in Original Jurisdiction Action No. 2212 of 1966)

Between TAK MING COMPANY LIMITED .. .. Appellant

and

YEE SANG METAL SUPPLIES COMPANY .. .. Respondent

JUDGMENT OF THE FULL COURT

J U D G M E N T

Coram: Full Court (Blair-Kerr, Mills-Owens and McMullin JJ.) in Court.

Judgment was given for the plaintiff against the 2nd defendant company in this action on the 3rd of January 1969. The case was tried by Pickering J. who, at the request of the parties confined his judgment to the issue of liability under the plaintiff's claim which was for work done and the materials supplied. By agreement of the parties, the value of such work and material was to be assessed subsequently by an expert structural engineer. The trial judge found for the plaintiff company on the issue of liability. Subsequently judgment in favour of the plaintiff in the sum of $332,635.17 was entered following upon the assessment.

The statement of claim had included a claim for interest at 8% per annum from the commencement of the action or, alternatively from the date of judgment to the date of payment. The judgment, which was handed down, made no provision in respect of the payment of interest.

On the 16th of August 1969, an application was made in chambers by the plaintiff under Order 6, rule 2A of the Rules of the Supreme Court before Briggs J. for an order in the following terms:—

> "that interest be paid by the 2nd defendant to the plaintiff on the sum of $332,635.17 assessed to be payable by the 2nd defendant to the plaintiff pursuant to the judgment in this action of the Hon. Mr. Justice Pickering on the 3rd of January, 1969, such interest to be paid at the rate of 8% per annum from the commencement of this action on the 16th of October, 1966 until payment of the judgment debt."

This application was refused, costs being given to the 2nd defendant. Previously, that is to say on the 8th of February, 1969, the 2nd defendant had appeared before Pickering J. in Chambers and, by consent, an order was made for the appointment of a Mr. D. A. Bailey to assess the quantum due under the judgment. It is common ground that at the hearing of this application Mr. Swaine, who then appeared for the plaintiff, as he has done upon the hearing of this appeal, asked to be put on record as intending to make an application for interest at the appropriate time. No application was actually made to include interest on the judgment on that date.

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No. 9
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On the 26th of May, 1970, the plaintiff filed a notice of motion intimating its intention to ask the Court for an order under the "Slip Rule" correcting the judgment of Pickering J. on the ground that the failure to provide for the payment of interest was an accidental omission from the judgment which was curable by this means. The application was heard by Pickering J. on the 26th of June 1970 when the parties were represented by the same counsel as now appear upon the appeal. The legal argument occupied the entire morning and judgment was reserved. On the 7th of July the Judge granted the plaintiff's application and, having given his reason at length for doing so, ordered that the first sentence of the final paragraph of his judgment of the 3rd of January should be corrected by the deletion of the fullstop at the end thereof and by the addition of the words:

> "And such balance, if any, is to bear interest at the rate of 8% per annum from the date of commencement of this action until date of payment."

Against this decision, the 2nd defendant (the appellant in this Court) now appeals.

The grounds upon which the appellant company appeals to this Court are in general terms the same as the grounds upon which it opposed the application before Pickering J. to correct the judgment with one important exception. In the lower court the point was taken on behalf of the appellant company that the trial judge had no jurisdiction to make an order granting interest in any event either at the trial or subsequently upon the hearing of the application to correct the judgment. For reasons which are not material to the determination of this appeal this point was abandoned by Mr. Mills-Owens in the course of the hearing of the appeal. Shorn of this contention, which was by far the most radical of the arguments advanced before the Judge in Chambers, and leaving aside the question of costs which I will deal with later, the appellant's contentions upon this appeal are two: viz: (1) that the refusal by Briggs J. upon the 16th of August 1969 to make an order granting interest in addition to the other relief already granted to the plaintiff by the judgment was a conclusive determination of the matter between the parties so that when the matter came before Pickering J. on the 9th of July, 1970, it was res judicata and the judge should so have found; (2) even if the judge had power to make the order he should, in his discretion, and upon the circumstances as they appeared including the delay in making the application, have refused to alter the judgment.

When dealing with the submission as to res judicata Pickering J. said:

> "Had this application before me been made under 0.6 r.2A I would have been constrained to agree, but the notice of motion does not ask me, as the summons asked my Brother Briggs, to, as it were, pluck an amount of interest out of empty air and then tack it on to the amount of a judgment already entered. What I am asked to do is to correct my judgment by including in it an order for the payment of interest which order was in fact a part of the plaintiff's prayer in the original statement of claim. The application is made under the Slip Rule (0.20 r.11), and I am in no doubt that I have jurisdiction under that order and rule to make the correction sought provided that the original failure to order the payment of interest was in fact an accidental slip or omission and that all the circumstances of the case render it equitable that I should so exercise my discretion."

Mr. Mills-Owens for the appellant contends that effectively the matter which the Court was called upon to adjudicate was the same on both occasions and that the only difference between the summons and the notice of motion is that, when the matter was being heard by Briggs J., no express reference was made to the Slip Rule as giving the Court power to make the alteration which was sought. Counsel points out that under the existing rules there is no necessity to cite the actual rule relied upon in the summons or application. He drew our attention to the words which appear in rule 2A of Order 6:

> "...the Court may **in the judgment** order interest at such rate etc. ....."

and he says that when the matter was before Briggs J. this was the rule which was specifically being considered by the Court and, in view of the words above quoted, the judge cannot have been in any doubt that what he was being asked to do was to make an alteration in the judgment. He must be said therefore to have considered the propriety of doing so and his refusal must be regarded as a final conclusion, upon the merits, of the application to correct the judgment. No litigant, he says, should be permitted to litigate the same matter twice simply because, on the second occasion, he contrives to change the form but not the substance of the application. He referred us to the decision in **Reichel** v. Mcgrath ((1889) A.C. 665) and in particular to the judgment of Lord Halsbury L. C. where he says at page 668:

> "My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant thereafter be permitted by change in the form of the proceedings to set up the same case again."

It is to be noted however that that was a case in which there had been a full trial of the appellant's claim to be entitled to a certain benefice. The Court had refused to grant to the appellant the declaration which he claimed and thereafter his successor in the benefice brought an action for a declaration declaring his entitlement thereto and claiming an injunction restraining the appellant from interfering with the successor's use of the house and land. In defending this action the appellant set up by way of defence, precisely the claim which had originally been adjudicated upon in the previous action. It will be apparent, therefore, that there was no question but that the merits of the appellant's contention in that case had been disposed of upon trial on the first occasion.

The same observation may be made in respect of the case of **McDougall** v. **Knight** ((1819) 85 Q.B.D. 1); and **Stephenson** v. **Garnett** (L.R. 1 Q.B.D. (1896) 679). On the authority of the latter decision however Mr. Mills-Owens presses the principle this much further that he maintains that if this Court is satisfied that it was open to the successful plaintiff before Briggs J. to ask for a correction of the judgment then, whether he actually did so or not, or whether or not what he did ask for is to be construed as equivalent to asking for a correction of the judgment, he could not thereafter legitimately ask for a correction of the judgment before Pickering J.

Mr. Swaine, for the respondent, does not dispute that in certain circumstances it may be legitimate to apply for the correction of a judgment to a judge other than the judge who delivered it. He answers however that the same matter was clearly not before the two judges. The first judge was being asked, without more ado, to add to a judgment already delivered an order for interest under the powers conferred upon the Court by rule 2A of Order 6. That application did not proceed upon any alleged deficiency in the judgment but simply upon the basis of a right, which the respondent now concedes does not exist, to have an

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order for interest under the rule without reference to anything pleaded or proved in the action or awarded in the judgment as delivered. The second application i.e. under the notice of motion, moved expressly upon the ground that there had been an omission from the judgment, through oversight, of an order which had been asked for and not dealt with. If the first judge had been apprised of the fact that it was alleged that the second judge had accidentally omitted from his judgment something which he must have intended to include therein he might very well have taken the course of referring the matter to that judge since it was his knowledge and intention at the time of judgment which were the matters crucial to the resolution of the issue.

On the hearing of the appeal we were in the difficulty that neither counsel who now appear had appeared upon the original application before Briggs J. The learned judge has not recorded his reasons for refusing the application and we were informed by Mr. Swaine that he had it on the authority of Mr. Arculli, who did appear upon that occasion, that the entire proceedings took only three minutes. The only note of what occurred appears as an endorsement upon the back sheet of counsel's brief a photostatic copy of which, by agreement between counsel in this court, was put before us. That note reads as follows:—

> "Briggs J. in Chambers 16/8/69 at 10 o'clock.
> Application refused with costs. Certificate for counsel. Court said it had no power to grant interest at this stage of proceeding and it should have been done at time of Judgment."

We have in addition, and with the consent of counsel, consulted with the judge himself but, understandably, in view of the long time elapsed since the proceedings, he was unable to afford further illumination upon the question of what arguments were advanced before him. In this rather unsatisfactory state of affairs it does not appear to be possible for us to say that there must have been such an adjudication upon the merits of the application before Briggs J. as to raise a barrier of estoppel between the two proceedings. The question as to whether, as a matter of discretion, the Slip Rule ought to be applied occupied a considerable proportion of the two days allotted to this appeal and, as I have already said, the arguments before Pickering J. including the question of discretion occupied the entire morning. Even if we were to hold with Mr. Mills-Owens that effectively the same issue was put before the two judges we would find it impossible to say, upon what is before us, that there had been a full determination of those issues upon their merits. From the brief note of the proceedings set out above the preferable view would seem to be that the learned judge came swiftly to the conclusion that he had simply no jurisdiction to deal with the matter at all. No doubt he considered that the point was plain enough for him to take the course at once of refusing jurisdiction since there does not appear to have been time for counsel to advance arguments directed either to establishing jurisdiction or to the merits of the application as a whole including (if it were in counsel's mind to raise the matter) the power of the judge under the Slip Rule. I take the view therefore that it has not been shown that there was any adjudication of the application for interest upon its merits. It follows that when the matter came afresh before Pickering J. he was perfectly correct in dismissing the contention as to estoppel although the reason which he gave for doing so may be questionable, a point which need not now be decided.

On the point as to discretion I do not propose to review the authorities relied upon by counsel. It appears to me that these were adequately canvassed and properly dealt with by Pickering J. in the written reasons given by him when correcting his judgment. This is not to say that the submissions of counsel

for the appellant were without substance in this regard. It is true that counsel for the respondent should have asked for an order for interest at the hearing of the action. On the other hand, because of the course taken by agreement between the parties, the issue which then loomed large in everyone's mind was the issue of liability. Application ought to have been made when judgment was delivered but counsel was to a large extent deprived of that opportunity by reason of the fact that the judgment was handed down. It is true also that on the 8th of February, 1969 when Pickering J. made an order concerning the appointment of an assessor, Mr. Swaine specifically reserved his right to ask for interest at the appropriate time. Mr. Mills-Owens says, concerning this, that since it is clear that the matter was in the minds both of counsel and of the judge at that time, an application should thereupon have been made to supply the omission in the judgment. It may be that counsel was mistaken at the time as to his rights and duties in respect of such an application. On the other hand the fact that counsel then announced his intention to claim interest was fair intimation to the other side that the point as to interest had not been abandoned. It is also true that there then ensued a period of 15 months during which no further action was taken by the successful plaintiff to have the judgment rectified. It should be remembered however that the proceedings to which the present dispute is but a small appendage were not asleep during that period. No doubt the minds of the parties and of their legal advisers were adequately occupied with the appeal to the Full Court which was heard and dismissed in June 1969 and thereafter by the consultations and preparations which must have followed and which resulted in the lodging of an appeal to the Privy Council. The latter appeal remains unheard at the present date. During this period also the expert assessor appointed by the Judge to assess the quantum due under the contract was carrying out his work and came to his finding on the 30th of July, 1969.

The judge was in no doubt that, had his mind been directed to the question of interest, at the time that his judgment was being delivered he would have awarded interest pursuant to the prayer in the statement of claim. In addressing his mind to the arguments and to the authorities, urged upon him by the present appellant, he came to the conclusion that the correction of the judgment in May 1970 made no material alteration in the position of the appellant company other than that it might be compelled, following upon the alteration, to pursue that matter upon appeal separately and in the wake of the main appeal which is now before the Privy Council. He took the view that this was to some extent detrimental to the interests of the appellant company but that it was a matter which was ultimately susceptible of compensation in the way of costs. It is trite law that we should only interfere with the exercise of the judge's discretion if it were clear that he had exercised that discretion upon a wrong principle. Mr. Swaine argues that the judge correctly addressed himself to the principles involved, relying upon various dicta of the Court of Appeal in the case of **Moore v. Buchanan** ((1967) 1 W.L.R. 1341). Mr. Swaine contends that in exercising his discretion the learned judge appeared to have taken into account all the factors relevant to the due exercise of his discretion. The learned judge expressly considered firstly, whether he would have made the order sought had his attention been drawn to the necessity for doing so at the time; secondly, whether the rights of third parties had intervened in such way as to render it inequitable to make the order sought; thirdly, whether anything had otherwise intervened which would render it inexpedient or inequitable to do so. In other words, Mr. Swaine said, he had exercised his discretion at its full width within those principles discerned by Diplock L. J. in the speech of Lord Watson in Hatton v. Harris which is to be found at page 1348 (1967) 1 Weekly Law Reports. Clearly that is so and

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nothing which has been advanced upon the other side seems sufficient to support the allegation that judge in Chambers wrongly exercised his discretion. The delay in itself was not enough to deprive him of discretion and although substantial was not, in the circumstances excessive. In granting the application to correct his judgment the learned judge ordered that each party should pay its own costs of that application. Mr. Mills-Owens asks us to say that, whatever else is to be said about the merits of this appeal that order was clearly wrong. Mr. Swaine seeks to uphold it upon the ground that the appellant's opposition to the application was unjustified. But to say so would be to overlook the fact that it was the successful plaintiff's own default which necessitated the making of the application. The unsuccessful defendant was surely entitled at least to seek out the reason why there had been delay in making the application and, in general, to test the plaintiff as to his bona fides. I think, with respect, that the order was wrong and to that extent only do I think it necessary for us to interfere with the decision of the court below. I think therefore that the judgment in the court below should be varied so that for the order as to costs there will be substituted an order that the costs of that application will go to the appellant (defendant). So far as the costs of this appeal are concerned, it was necessary in any event, for the appellant to approach this court to rectify the order relating to the costs below. Having won upon this issue, although a minor issue in the appeal as a whole, I think that the appropriate order would be that costs should be apportioned.

(Note: Judgment was handed down on 1st December, 1970. The other members of the Court concurring. Costs were apportioned as follows:—

1/3 of appellant's costs to be borne by the respondent and 2/3 of the respondent's costs to be borne by the appellant.)

(A. M. McMullin)
Puisne Judge.

No. 10

In the Supreme Court of Hong Kong.

Appellate Jurisdiction

No. 10 Order of the Full Court dismissing the appeal 1st December 1970

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction
Civil Appeal No. 26 of 1970
(On Appeal from a Decision in Original Jurisdiction Action No. 2212 of 1966)

Between TAK MING COMPANY LIMITED .. .. Appellant (2nd Defendant)

and

YEE SANG METAL SUPPLIES COMPANY .. .. Respondent (Plaintiffs)

BEFORE THE HONOURABLE MR. JUSTICE BLAIR-KERR, MR. JUSTICE MILLS-OWENS AND MR. JUSTICE MCMULLIN IN FULL COURT

O R D E R

Upon reading the Notice of Motion of Appeal dated the 16th July 1970 on behalf of the Appellant (2nd Defendant) by way of appeal from the decision of the Honourable Mr. Justice Pickering given on the 7th July 1970 whereby it was ordered that the Judgment of Mr. Justice Pickering dated the 3rd January 1969 be corrected by the addition of the words:

"And such balance, if any, is to bear interests at the rate of 8% per annum from the date of commencement of this action until the date of payment."

And upon reading the said written decision.

And upon hearing Mr. Richard Mills-Owens of Counsel on behalf of the Appellant (2nd Defendant) and Mr. John Swaine of Counsel on behalf of the Respondent (Plaintiff).

And mature deliberation thereupon had.

It is ordered that the said order of the Honourable Mr. Justice Pickering dated the 7th July 1970, be affirmed, and that this appeal be dismissed with 2/3 of the Respondent's (Plaintiff) costs to be paid by the Appellant (2nd Defendant) to the Respondent (Plaintiff) or his Solicitors and 1/3 of the Appellant's (2nd Defendant) costs to be paid by the Respondent (Paintiff) to the Appellant (2nd Defendant) or his Solicitors all such costs to be taxed by a Taxing Master.

Dated the 1st day of December 1970.

(Sd.) B. L. Jones
Assistant Registrar

In the Supreme Court of Hong Kong.

Appellate Jurisdiction

No. 11
Order of the Full Court Granting Leave to Appeal 24th February 1971

No. 11

ORDER OF THE FULL COURT GRANTING LEAVE TO APPEAL

IN THE SUPREME COURT OF HONG KONG

Appellate Jurisdiction
Civil Appeal No. 26 of 1970
(On Appeal from a Decision in Original Jurisdiction Action No. 2212 of 1966)

Between TAK MING COMPANY LIMITED .. .. Appellant (2nd Defendant)

and

YEE SANG METAL SUPPLIES COMPANY .. .. Respondent (Plaintiffs)

BEFORE THE FULL COURT (THE HONOURABLE MR. JUSTICE BLAIR-KERR, THE HONOURABLE MR. JUSTICE MILLS-OWENS AND THE HONOURABLE MR. JUSTICE MCMULLIN)

O R D E R

Dated the 24th day of February, 1971.

UPON reading the Notice of Motion on behalf of the Appellant dated the 9th day of December 1970 and UPON hearing Counsel for the Appellant and Counsel for the Respondent IT IS ORDERED that leave be granted to the Appellant to appeal to Her Majesty the Queen in Her Privy Council against the Judgment of This Honourable Court pronounced by the Full Court on the 1st day of December, 1970 conditional upon the Appellant within 14 days from the date hereof producing a bank guarantee or other good and sufficient security in the sum of $10,000.00 to the satisfaction of the Registrar of the Court for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting it final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal AND IT IS FURTHER ORDERED that the Appellant shall prepare and despatch to the Registrar of the Privy Council the record of the Appeal within a period of three months from the date hereof and that the Appellant be at liberty to apply for extension of such period, if necessary and that the costs of this application be costs in the cause of the Appeal.

(Sd.) S. H. MAYO
Assistant Registrar.