

61975

14 OF 1973

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE APPEAL COURT OF HONG KONG

BETWEEN :

YAT TUNG INVESTMENT COMPANY LIMITED Appellant

- and -

DAO HENG BANK LIMITED First Respondent

- and -

CHOI KEE LIMITED Second Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from the judgment of the Appeal Court of Hong Kong (Blair-Kerr C.J., Huggins and McMullin JJ) dismissing an appeal by the Appellant against an Order by Briggs J. on the 23rd day of October 1972 that the Appellant's Statement of Claim herein be struck out with costs to the First and Second Respondents to be taxed.

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2. The facts are as follows: The action concerns a piece of ground in Hong Kong registered in the Land Office as Section I of Inland Lot No.2082 on which have been erected buildings now known as Nos.195 and 197 Johnston Road and No.114 Thompson Road, Victoria, Hong Kong, hereinafter called "the said property" or in the alternative as was indicated by counsel on behalf of the Appellant before the courts in Hong Kong for damages against the 1st Respondent for fraud and/or negligence and/or breach of duty for improperly selling the property to the 2nd Respondent, by way of suitable amendments to the pleadings.

3. The Appellant is a private limited company incorporated in Hong Kong and was at all material times a regular customer of the 1st Respondent Bank, who is associated with or affiliated to the 2nd Respondent Choi Kee Limited.

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CASE FOR THE APPELLANTS

The membership of the 2nd Respondent is so closely linked with that of the 1st Respondent as to infer the 2nd Respondent is a holding Company of the 1st Respondent.

4. The authorised capital of the 2nd Respondent is \$200,000.00 divided into 2,000 shares of \$100.00 each but at all material times, only 2 shares had been allotted and fully paid for, that is to say, the 2nd Respondent has paid-up capital of only \$200.00

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5. One of the aforesaid shares is issued to one Tung Wei Lin of No.30, Kennedy Road, Victoria in the Colony of Hong Kong who was at all material times the second largest individual shareholder and also a director of the 1st Respondent, although in the papers filed by the 1st Respondent with the Companies Registry, he is described as a "banker" but in the 2nd Respondent as a "merchant".

6. The largest individual shareholder of the 1st Respondent is one Tung Hsi Hui, a close relative of the said Tung Wei Lin and who also resides at No.30, Kennedy Road aforesaid.

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7. The other of the aforesaid shares of the 2nd Respondent is issued to one Chung Kwok Yan who was at all material times also a shareholder of the 1st Respondent.

8. The relevant assignment and the memorial of registration, (hereinafter referred to as the said sale documents) purporting to assign the remaining 41/45th parts or shares of the property from the 1st Respondent as mortgagee to the 2nd Respondent as Vendor, were signed on behalf of the 1st Respondent by the said Tung Wei Lin and another, and on behalf of the 2nd Respondent by the said Chung Kwok Yan and another.

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9. Properties in Hong Kong with only 2 exceptions (immaterial to the present case) are all held under long Crown Leases (not Freehold) and whenever a property is mentioned herein it is the freely assignable Crown Lease to the property that is implied unless otherwise expressly stated. This includes undivided parts therefore usually with a right to exclusive possession of some specific part of the building erected on the land in accordance with the Crown Lease.

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10. The said property was formerly owned by 4 individuals (hereinafter collectively called "the former owners") and mortgaged to the 1st Respondent on the 31st day of January 1964 for \$1,000,000.00 and further charged on the 14th day of July 1967 for \$200,000.00.

10 11. By a Building Contract dated the 17th day of March 1966, the former owners employed one Mee Ah Construction Company as general contractor to erect a 14-storey building on the said property. The said Mee Ah Construction Company was later incorporated as a private limited company in Hong Kong (hereinafter called "Mee Ah") with the absolute majority of the shares being owned by a Mr. Lai Yung Kwong who also owns the absolute majority of the shares in the appellant company. The said Building Contract provided for retention by the former owners of 30% of the construction costs payable to Mee Ah. The building was in near completion in July 1967 when construction was suspended because the former owners were in default in construction instalment payments. It should be noted at this juncture that a series of riots that occurred between May and November 1967 and as consequence thereof, general business in the Colony including property market suffered very severely. Sometime in February 1968 the former owners disappeared from the Colony and have not been heard of since.

20 30 40 12. On the 13th day of May 1968 the 1st Respondent exercised its power of sale under the building mortgage and further charge aforesaid. On that date, the site and the unfinished building upon it were sold by public auction. The Appellant was then incorporated for the sole purpose of bidding at the said auction and the said property was knocked down at \$880,000.00 to your Appellant.

13. On the 23rd day of May 1968, the assignment of the said property to the Appellant was completed at the office of Messrs Patrick Poon & Company, a firm of solicitors acting for the 1st Respondent. No money was however paid by your Appellant to the 1st Respondent as consideration for the said assignment, but instead a building mortgage on the said property in favour of the 1st Respondent was

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executed at the same time to secure \$1,000,000.00 to be payable to your Appellant by 5 instalments. Out of the first instalment of \$940,000.00, \$880,000.00 was retained by the 1st Respondent as the purchase price for the said property and a further sum of \$24,000.00 odd was deducted by the said firm of solicitors as legal costs and stamp duty. Of the remaining 4 instalments, \$55,000.00 had been paid directly by the 1st Respondent to Mee Ah as part payments to construction costs on the said 14-storey building, leaving \$5,000.00 applied for by your Appellant but which has never been paid out by the said mortgagee. 10

14. The Appellant and Mee Ah, in spite of their different incorporate identities, were and still are in fact one certain interest, and both are managed by the said Lai Yung Kwong, the majority shareholder.

15. The construction of the said building was eventually completed by Mee Ah, and the necessary Occupation Permit, issued by the Building Authority of the Hong Kong Government, was finally obtained on the 22nd day of November 1968. Meanwhile there were two separate assignments of 4 units of the said property to divers purchasers in which your Appellant as purportedly the owner of the redemption, was the assignor. 20

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16. On the 8th day of August 1969, the Appellant commenced an Original Action out of the Supreme Court of Hong Kong entitled O.J.Action No.969 of 1969 in which the Appellant was the 1st Plaintiff, Mee Ah was the 2nd Plaintiff and the 1st Respondent was the Defendant. The allegation of the Appellant then was that the 1st Respondent was the true beneficial owner of the said property, that your Appellant was a mere nominee of and trustee for the 1st Respondent and that in consequence, the said mortgage described in paragraph 12 hereinabove was null, void and of no effect. The Court however held that (subject to the said mortgage) at the date of the said action, your Appellant was the legal and beneficial owner of the said property, and the said mortgage was not void. The Appellant then appealed to the Full Court of Hong Kong in Civil Appeal No.23 of 1971 against the decision of the said Court aforesaid. The said appeal was dismissed and the Appellant must now accept that decision and this Action (O.J.Action No.534 of 1972) is based thereon. 30 40

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and 21

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17. In the said O.J.Action No.969 of 1969, the Appellant and Mee Ah also claimed against the 1st

Respondent for payment of a sum of \$435,783.81 being the balance of the costs of construction of the said building. The aforesaid claim was also dismissed after trial and subsequently affirmed by the said appeal.

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10 18. On the 26th day of November 1969 i.e. after action brought but before trial, the 1st Respondent purported to exercise its power of sale under the said mortgage, purportedly by public auction, and the said property was again purportedly knocked down at \$1,040,000.00 to the 2nd Respondent. There was then executed the purported said sale documents. Land values had been rising rapidly throughout the year 1969 and it is alleged that at the time of the said purported public auction and the execution of the said sale documents the said 41/45 parts should have been worth almost \$2m. As the date of the purported sale however, came so soon after the Appellant had commenced the action attacking the validity of the mortgage itself and the said purported sale appeared to them but a counter move on the part of the 1st Respondent, the Appellants did nothing about the said sale until after their own action O.J.Action 969 of 1969 had been dismissed by the Full Court on the 4th day of February 1972

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30 19. In January 1970, the 1st Respondent in the said O.J.Action No.969 of 1969, counter-claimed for the sum of \$45,231.97 being an aggregate sum consisting of expenses at the said auction including advertisement, legal costs and interest under the said mortgage. The said counterclaim also succeeded and judgment for the said sum was awarded.

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40 20. On the 16th day of June 1970, the 2nd Respondent took out a Writ of Summons under O.J.Action No.909 of 1970 against the Appellant, Mee Ah and others seeking possession of the 41/45th parts or shares of the said property. A Defence was duly pleaded and filed in effect repeating their contentions in Original Jurisdiction Action No. 969 of 1969. After various interlocutory hearings, the said Action was adjourned sine die.

21. On the 21st day of March 1972, the Appellant

commenced this Action (O.J.Action No.534 of 1972) against the 1st and 2nd Respondents claiming that the said auction sale as shown in paragraph 18 herein- above was fraudulent and/or in breach of the 1st Respondent's duty as mortgagee and/or was otherwise improper in that :

- (a) The 1st and 2nd Respondents though under different cloak in their corporate disguises, were in fact essentially one certain interest and/or alternatively, acting in concert with a common design calculated to obtain the remaining 41/45 parts or shares of the said property at a low price and to extinguish your Appellant's interest therein all to your Appellant's damage. 10
- (b) There was only 4 clear days notice, including a weekend, of the said auction sale given to the public at large, which was insufficient particularly as :
- (c) The advertisements and offers referred prominently to the said O.J. Action No.969 of 1969 without explaining that the Action (because it alleged that the 1st Respondent was the beneficial owner) would not affect the buyer's ultimate title to the said property, and not sufficient time was given for independent prospective buyers to make appropriate inquiries and/or obtain legal advice thereon or at all. 20
- (d) The above mentioned advertisements were calculated to frighten off buyers, to obtain the property for the 2nd Respondent and avoid obtaining a reasonable price therefor. 30
- (e) The 1st and 2nd Respondents staged a mock auction purporting to be attended by 30 odd persons but in fact all or almost all persons present were the servants or agents of either the 1st or 2nd Respondents.
- (f) The purported sale was made at a gross undervalue.
- (g) That the 1st Respondent was in breach of covenant in the said mortgage deed in that only \$995,000.00 out of the agreed aggregate sum of \$1,000,000.00 under the said mortgage was in fact advanced to your Appellant. The 5th instalment in a sum of \$5,000.00 applied for and should be made under the said mortgage was never in fact advanced. 40

Further or in the alternative, the said auction sale was

a complete sham and therefore, void, alternatively, voidable.

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10 22. On the 5th and 6th days of October 1972, there were 3 separate summonses heard together before a judge in Chambers, viz: two in O.J. Action No.909 of 1970 and one in O.J.Action No.534 of 1972. In O.J.Action No. 909 of 1970, a summons filed by the 2nd Respondent seeking an order to strike out the defence of your Appellant, Mee Ah and others and in addition, seeking judgment on their claims. A second summons filed by your Appellant, Mee Ah and others asking liberty to amend their Defence because, as shown in the paragraphs hereinbefore, your appellant must amend their defence in the light of the decision of the Court in O.J.Action No.969 of 1969 or submit to judgment against them. In O.J.Action No. 534 of 1972, the 1st and 2nd Respondent filed a summons seeking an order to strike out the Statement of Claim of the Appellant and for judgment.

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30 23. At the said hearing of the said 3 summonses, the counsel acting for the 1st and 2nd Respondents contended (which was accepted by the learned judge) that if the amendment is allowed, Mr.Lai of the Appellant will have to give evidence totally at variance with the contents of his affirmation made in O.J. Action No.969 of 1969 and/or the amended Defence sought is based on facts which the Appellant had denied in other court proceedings and/or the validity of the sale to Choi Kee as a fact had been litigated in O.J.Action No.969 of 1969, especially in the counterclaim that the court in O.J.Action No.969 of 1969 had, inter alia, come to a firm conclusion of fact that the sale of the said property to the 2nd Respondent on the 28th day of November, 1969 by the 1st Respondent was a genuine transaction, that the court in O.J.Action No.969 of 1969 must have come to a firm conclusion aforesaid on the reasoning that the said court had found in favour of the 1st Respondent on its counterclaim for a specific amount which sum was in effect the balance of an account one item of which was the price received by the 1st Respondent from the 2nd Respondent as a result of the auction property. Further that at the time the Appellant took out O.J.Action No.969 of 1969 the Appellant was confronted with two mutually

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exclusive courses of action between which the Appellant must make its choice, that by taking out O.J.Action No. 969 of 1969, the Appellant had conclusively elected one course of action to the exclusion of the other course of action thereby the Appellant should be estopped to sue upon this action on the doctrine of Res Judicata, that damage sufficient to found an estoppel was done to the 1st and 2nd Respondents and generally that the action was an abuse of the process of the court.

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Pages
84 & 85

24. On holding for the aforesaid reasons, the Appellant's application to amend the Defence was disallowed and the Appellant's Defence as stood in O.J.Action No.909 of 1970 and the Appellant's Statement of Claim in this Action were **struck out**. Judgment was entered for the 1st and 2nd Respondent in O.J. Action No.909 of 1970 and No.534 of 1972.

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25. The Appellant appealed to the Full Court of Hong Kong under Civil Appeal Nos.50 and 51 of 1972 against the said learned judge's decision in O.J.Action No.909 of 1970 and No.534 of 1972 respectively. Counsel for the Appellant informed the said Full Court at the hearing of both appeals together that the learned Judge had taken a wrong view on the various points as shown in paragraph 23 hereinbefore and that inter alia the Appellant's Statement of Claim in O.J.Action No.534 of 1972 cannot or should not be struck out for the reason that if the Appellant's action was to be allowed to proceed, it would not amount to an abuse of the process of the court. The said appeals were however dismissed by the said Full Court, mainly only on the general ground of abuse of the process of the court.

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Pages
89 & 92

26. Although not in the pleadings, Leading Counsel for the Appellant gave notice both before the judge of first instance and the Full Court that, if allowed to proceed with this action, the Appellant would in due course apply for suitable amendments, enabling them to claim, in the alternative, damages as a legal remedy if the court held that the Appellant was asking it to exercise its equitable and discretionary jurisdiction to avoid the said sale documents which, in all the circumstances, it would decline so to do.

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27. Counsel for the 1st and 2nd Respondents at

no time questioned the fact that the Appellant, by its Statement of Claim in the present action under appeal, has made out a prima facie case in support of his allegation, but confined his arguments mainly to the conduct by the Appellant of O.J. Action No.969 of 1969 and the decision therein.

28. The Appellant has not sought leave to appeal to Her Majesty in Council in O.J.Action No.909 of 1970 but only in this present action, because

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- (1) the said sale documents are probably voidable rather than void.
 - (2) the Respondents between them, anyhow, would have a good claim to possession of the said property at present.
 - (3) The Appellant failed in its application for a stay of possession pending appeal to the Full Court and is therefore out of possession of the said property.
 - (4) leave to amend is anyhow discretionary.

20 29. The Appellant says that although the Full Court rightly held that both the issues as to the validity and the bona fide of the sale of 26th day of November 1969 was not inconsistent with the Appellant's contention in their Original Jurisdiction Action No. 969 of 1969 and that the said issue had not therefore been decided in that action, the Full Court nevertheless misdirected themselves in holding that :-

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- (1) The validity of the sale to Choi Kee Limited was an issue which was so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of it. Pages
91, 105
107 and 110
 - (2) The case of Greenhalgh v. Mallard 1947 2 A.E.R.255 (from which the above quotation at page 257 is adapted) was rightly decided or otherwise that they should follow the obita dicta insofar as the decision in the said case went outside the law as to res judicata. Pages
91, 105
107 and 110
 - (3) It was not necessary to raise the validity of the said sale to the 2nd Pages 113,
114 & 115

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Respondent by way of a counterclaim but merely by way of defence to the 1st Respondent's counterclaim, the 2nd respondents not being even a party thereon. And, in that a counterclaim is a separate action, it is not an abuse of the process of the court merely to wait until the validity of the mortgage has been decided before attempting to avoid a subsequent sale by the mortgagee whether by way of counterclaim or otherwise.

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- (4) Insofar as Action No.969 of 1969 was an action by the Appellant against the 1st Respondent for money due and owing in the construction of a building on the said property, the fact that the said property was subsequently purported to be sold to the 2nd Respondent and the 1st Respondent purportedly gave credit to the appellant for the sale price received, similarly does not make the present action an abuse of the process of the court, in that the 1st Respondent's defence in the said former action was a complete denial of having entered into a contract or implied contract with the Appellant as contractors and generally, the cause of action in the present action and the parties being different from those before the court in Action No.969 of 1969, whether or not the Appellant could have raised this cause in that action does not make the present action an abuse of the process of the court.

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- (5) Insofar as a part of the judgment of the Hon. Mr. Justice McMullin seems to question the bona fides of the Plaintiffs, nowhere, either before the learned judge in Chambers nor the Full Court was it ever suggested that there was not a bona fide prima facie case made out on the Statement of Claim herein.

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Pages 4 and 9

30. The judgment of the Full Court and of Briggs J. at first instance should be reversed and the Appellant should be permitted to continue with this Action to trial in the normal manner.

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R E A S O N S

- (1) because the Appellant is not bound by any res judicata nor election nor is Lai Yung Kwan bound to give evidence contrary to his former evidence in O.J. Action No.969 of 1969.

- (2) because the issue raised is a matter of substance and a separate cause of action from that raised either the action or the counter-claim of O.J.Action No.969 of 1969 and ought to be tried.
- (3) because the Full Court was wrong in holding that O.J.Action No.534 of 1972 is frivolous vexatious and abusive of the process of the court, and ought to be struck out.

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ROBERT DATEHOUSE
DAVID HIRST
~~BROOK BERNICCHI~~ Q.C.
DAVID VAUGHAN
~~NICHOLAS LYELL~~

14 OF 1973

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

B E T W E E N

YAT TUNG INVESTMENT COMPANY
LIMITED Appellant

- and -

DAO HENG BANK LIMITED First
Respondent

- and -

CHOI KEE LIMITED Second
Respondent

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