IN THE PRIVY COUNCIL No. 9 of 1979

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

WONG LAI YING and OTHERS Appellants

- and -

CHINACHEM INVESTMENT CO.LTD. Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal by leave of the Court of Appeal of Hong Kong from an order of that Court (Briggs, C.J., Huggins and Pickering JJ.A.) made on 4th August 1978 and a further order made on 9th November 1978, whereby the Court of Appeal allowed the appeal of the Respondent from an Order of Li J. made on 3rd December 1977.

p.86, 1.3
p.88
p.63

2. Following the action by the Appellants as Plaintiffs against the Respondent as Defendant Li J. (1) granted the Appellants a declaration that the divers agreements entered into between the Respondent and the Appellants in respect of the sale and purchase of various equal undivided parts of and in Inland Lot No.8171 and of and in the building to be known as "University Heights" had not been frustrated (2) granted a further declaration that the Appellants were at all material times and remained entitled under the said agreements to wait for completion and to be paid interest at the end of every calendar month at the rate of 1% per calendar month on all amounts paid under the said agreements from the expiry date for completion of the building subject to such extension as permitted under the said

pp.63-64

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agreements until the date of completion of the said building (3) granted a further declaration that the Appellants are entitled to be paid interest at the end of every calendar month at the rate aforesaid until completion (4) ordered specific performance of the said agreements and (5) dismissed the Respondents counterclaim for a declaration that the said agreements had been frustrated.

p.87

pp.88-89

3. The Court of Appeal set aside the judgment of Li J. and entered judgment for the Respondent for a declaration that the said agreements had been frustrated and by a further order ordered the Respondent to pay to the Appellants interest at the rate of 8% per annum on all sums paid by the Appellants respectively to the Respondent such interest to run from the respective dates of payment by the Appellants until the date of repayment of the said sums by the Respondent to the Appellants. The Appellants were ordered to pay the Respondent's costs before Li J. and in the Court of Appeal. This appeal is brought pursuant to the Order of the Court of Appeal of Hong Kong of 3rd April 1979 granting final leave to appeal to Her Majesty in Council.

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THE FACTS

4. This appeal arises from an action by the Appellants (1975 No.2739) to enforce various agreements entered into between each of them on the one hand and the Respondent on the other for the sale and purchase of undivided shares in a site (Inland Lot No.8171) and an apartment building to be erected thereon by the Respondent and which was to be known as University Heights. The Respondent was the owner and developer of the site and vendor under each of the agreements for sale and purchase.

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p.99

5. The development involved the erection of two blocks of flats on a site bounded in the north by Babington Path and in the south by Kotewall Road. These blocks are described on the plan attached to the Respondent's instruction form which was issued to the Applicants prior to the execution of the agreements as "block A" and "block B" and the Appellants will refer to them as such herein. The site was served by an access road leading from Kotewall Road. The brochure produced by the

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Respondent advertised a high class development of flats and the prices of flats purchased by the Appellants range from $112,875 to $193,920 per unit.

RECORD
p.116
pp.5-7

6. The agreements referred to are identical in all material respects and for the purpose of the action and this appeal the agreement dated 20th March 1971 between the Respondent and the First Appellant has been produced in evidence. The material parts of the agreement provide as follows :

p.100

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"1. The Vendor shall sell and the Purchaser shall purchase ALL THOSE eleven equal undivided 1613th parts or shares of and in ALL THAT piece or parcel of ground (more particularly delineated on the Block plan hereto annexed and thereon coloured green and green hatched brown) registered in the Land Office as INLAND LOT NO.8171 (hereinafter called "the said Land") and of and in the messuages erections and buildings now in the course of being erected thereon and to be known as UNIVERSITY HEIGHTS (hereinafter referred to as "the said Building") in accordance with the plans and specifications approved by the Building Authority

p.100, 1.10

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TOGETHER with the sole and exclusive right to hold use occupy and enjoy ALL THAT Apartment "B2" on the 6th FLOOR and CAR PARKING SPACE No. 18 on Deck "D" of the said "University Heights" as shown and coloured pink on the plan hereto annexed (hereinafter called "the said Apartment") which said building the Vendor agrees to complete in manner hereinafter mentioned.

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AND TOGETHER ALSO with :-

(a) the right in common with the Vendor and the owners and occupiers of other apartments and units in the said buildings and all persons authorised by them respectively to use for the purposes of access to and egress from the said apartment the entrance halls, lifts, staircases and landings in the said buildings and such of the passages therein as are not included in any other apartment units in the said building or are not reserved to the Vendor as hereinafter provided,

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(b) the free and uninterrupted passage and running of water, sewage, gas and electricity from and to the said Apartment through the sewers, drains, watercourses, cables, pipes and wires which now are or may at any time hereafter be in under or passing through the said land or any other portion of the said building, and

(c) all other rights, rights of way (if any) privileges, easements and appurtenances thereto belonging or appertaining or therewith at any time held used occupied or enjoyed 10

EXCEPTED & RESERVED and subject to the rights referred to in Clause 9 (A) and (B) hereof.

. . . .

p.101, 1.25

3. (1) The Vendor shall comply with the requirement of the Building Authority and of the director of Public Works relating 20 to the said building and shall complete the building within the period of eighteen months from the date of the issue by the Building Authority of a permit of commencement of building works.

(2) If the Vendor shall fail to complete the said building within the period as aforesaid or such further period as may be allowed under sub-paragraph (4) hereof, the Purchaser shall be entitled on giving to 30 the Vendor not less than 14 days notice in writing in that behalf to rescind this Agreement and on the expiry of such notice this Agreement shall be rescinded and the Vendor shall repay to the Purchaser all amounts paid by the Purchaser hereunder together with interest thereon at the rate of one per cent per calendar month from the date or dates on which such amounts were paid to the date of repayment the payment 40 of such amount and interest to be in full and final settlement of all claims by the Purchaser against the Vendor hereunder.

(3) If the Vendor shall fail to complete the said building within the said period of eighteen months as aforesaid (subject to such extension as may be granted by the Architect under sub-paragraph (4) hereof)

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the Purchaser shall have the option notwithstanding any extension of time or further period granted as aforesaid either to rescind this Agreement in which event the above-mentioned provisions for rescission shall apply or to wait for the completion of the building in which event the Vendor shall pay to the Purchaser interest at the rate of one per cent per calendar month on all amounts paid hereunder from the expiry date of completion of the building (subject to such extension as aforesaid) until the date of the completion of the said building.

p.102, 1.1

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(4) The Architect shall grant such extension of time for the completion of the said building beyond the said eighteen months as aforesaid (not exceeding in any event 365 days in the aggregate) as shall appear to the Architect to be reasonable having regard to delay caused by any of the following, that is to say :-

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(a) Strike or lockout of workmen,
(b) Bad weather,
(c) Riots or civil commotion,
(d) Force Majeure or Act of God,
(e) Delay in completing the foundations due to water rock or similar obstruction or difficulty,
(f) Delay in connecting drainage or water pipes in dealing with the application for permit of commencement of building works or occupation permit or attributable to the Public Works Department or any other Department or Authority concerned,
(g) Default of contractors or sub-contractors,
(h) Act of the Queen's enemies and
(i) Any other cause beyond the control of the Vendor.

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. . . .

9A. The said undivided shares of and in the said land and buildings and the exclusive right to hold use occupy and enjoy the said Apartment are sold :-

p.104, ll. 7-14 inclusive

(1) For all the residue of the term of 75 years with a right of renewal for a

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further term of 75 years created by the said Conditions of Exchange No. 9303 as modified or varied by a Letter of Modification dated the 20th day of February 1971 (hereinafter collectively called "the said Conditions") and subject to the payment of a due proportion of the rent and to the observance and performance of the lessee's covenants and conditions therein reserved and contained. 10

. . . .

p.106, 1.17

12. Time shall in every respect be of the essence of this Contract.

. . . .

p.107,11.39-42 inclusive

17. Notwithstanding anything hereinbefore contained, the Vendor shall have the right to make such alterations to the said plans as may be approved by the Public Works Department but shall notify the Purchaser 20 as soon as possible after the approval of any amendment which affects the said Apartment.

. . . .

p.108, 131

22. It is further agreed that notwithstanding anything herein contained should any dispute arise between the parties touching or concerning this Agreement or should any unforeseen circumstances beyond the Vendor's control arise whereby the Vendor 30 becomes unable to sell the said undivided shares and Apartment to the Purchaser as hereinbefore provided, the Vendor shall be at liberty to rescind this Agreement forthwith and to refund to the Purchaser all instalments of purchase price paid by the Purchaser hereunder without interest or compensation and upon such rescission and upon repayment of the instalments of purchase price this Agreement shall become null and 40 void as if the same had not been entered into and neither party hereto shall have any claim against the other in respect thereof."

p.109

7. Upon signing the agreements each of the Appellants paid to the Respondent's solicitors the amount of the deposit specified in the Schedule to the agreements. The amount of the deposit paid

by each of the Appellants is set out in the Schedule to the Statement of Claim.

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pp.5-7

8. The amended plans for the development of University Heights were approved by the Building Authority on 9th October 1971, the approval of earlier plans having been obtained in September 1970, and consent to the commencement and carrying out of the building works was given by the Building Authority on 17th November
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1971. On 3rd December 1971 the Respondent gave notice to the Building Authority in accordance with regulation 29 of the Building (Administration) Regulations of the appointment of Mr. C.H.Duff as the authorized architect in respect of the development.

p.120
p.16,1.38
p.121
p.123

9. The eighteen months completion period specified by clause 3(1) of the agreement expired therefore on 17th May 1973 subject to a maximum possible extension under clause 3(4)
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to 17th May 1974.

p.100, 1.25
p.102, 1.8

10. The consent granted on 17th November 1971 enabled the Respondent to commence work on the spread footing of block B which began shortly afterwards. Additional consents for the access road ramp and the retaining wall and for drainage work were obtained on 3rd February 1972 and 2nd June 1972 respectively. By the beginning of June 1972 the foundations of block B had been laid and the reinforcement
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concrete work had reached one storey in height thus completing the lower car park for that block.

p.16, 1.40

11. On 18th June 1972 a landslip occurred in the area of Po Shan Road and Kotewall Road. A full description of the landslip and the events leading up to it is contained at pp.18-19 of the Final Report of the Commission of Inquiry published in November 1972. The eastern half of the Respondent's site was covered with rock
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and other debris in some places up to a depth of 25 feet. The site was immediately occupied by the Government of Hong Kong to enable rescue and salvage work to take place. Correspondence then ensued between the Respondent's solicitors and the Director of Public Works regarding the clearance of the site and the removal of the Respondent's plant and equipment. On 23rd June 1972 the said Solicitors stated that the Respondents had voluntarily ceased building
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operations on the site. On 27th October 1972

See Appendix
pp.126-128
p.126
p.129

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Mr. C.H. Duff, the authorised architect wrote to the Director of Public Works to enquire when building operations might be resumed. His letter received a reply on 3rd November 1972 which stated :

p.131, l.11

"2. It is now agreed that the work on adjoining and nearby sites and the investigations carried out by the P.W.D. have progressed to the point where work related to the redevelopment of I.L.8171 could be recommenced. However it will be necessary for 'consent' to resumption of work to be obtained (in view of the delay of over 3 months) and this consent will not be issued until the project has been completely reconsidered and further plans have been submitted and approved. 10

3. It will be necessary for you to resubmit detailed proposals for safeguarding the stability of all land adjoining your lot particularly the hillslope below Kotewall Road on which your access road is presumably to be constructed. Your site formation and foundation proposals should be accompanied by supporting calculations and based on data obtained from a comprehensive site investigation. The calculations must also make allowance for fluctuations in the natural water table and the saturation of the surface soil, equivalent to at least the conditions experienced in June 1972. In addition the proposal should be supported by a construction programme and plans and notes clearly indicating the steps to be taken. This will prevent a dangerous situation materialising during the construction phase. 20 30

4. As you say in your letter, it is clear that part of the structure, so far erected, are unusable and must be demolished. If it is your intention to retain any part of the structure (or foundations) I shall require to be completely satisfied that these parts are in no way affected by earth movement and that these parts can be incorporated in the building safely. Again this requirement must be related to the slope analysis data and comprehensive site investigations. 40

5. It will be apparent that I am not, at this stage, prepared to consent to the recommencement of works to erect structures, 50

		RECORD
	nor to any cutting or filling in or on the site contours as they were prior to June 18th. I would, however, be prepared to agree to allow the removal of spoil and also demolition works on approval of plans showing your intentions and I would be prepared to deal with such plans as a priority issue."	
10	12. On 22nd November 1972 Mr. Duff wrote to the Public Works Department for consent to commence the removal of debris from the site. This consent was granted on 1st December 1972. There then followed correspondence between Mr. Duff and the Building Authority regarding the clearance of the site which involved the demolition of the existing reinforced concrete structure down to the footings. By June 1973 the site had been cleared and reinstated to its original contour before the landslip.	p.133 p.138 pp.139-144 p.53,11. 26-28
20 30 40	13. In order to satisfy the requirements of the Building Authority as set out in their letter of 3rd November 1972 in August 1973 the Respondent engaged a firm of consultant engineers, Messrs. Scott Wilson Kirkpatrick & Partners to carry out a comprehensive investigation of the site. This firm submitted a report to the Respondent in August 1974. In their report Messrs. Scott Wilson Kirkpatrick & Partners had recommended inter alia the trimming of the southern slope of the site as a first step towards stabilizing the hillside. The Commission of Enquiry had recommended that no foundations in the area should be provided unless they bore on rock and Mr. K.C.Brian-Boys, the Chief Geotechnical Engineer in the Building Ordinance Office considered it necessary to discover whether caisson foundations could be provided without reaching to rock. A number of discussions took place with Mr. Boys between December 1974 and May 1975. Messrs. Scott Wilson Kirkpatrick & Partners were asked to prepare a further report which was submitted to the Respondent in May 1975 and a copy sent to the Building Authority.	p.146 pp.160-175 p.180 p.180 p.192
50	14. At a meeting held on 23rd May 1975 Mr.Boys stated that he required clarification of a few minor points and in response to this request Messrs. Scott Wilson Kirkpatrick & Partners submitted amended pages on 16th June 1975 for inclusion in their further report.	p.321, 1.23 pp.194-201

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p.211
p.212
pp.213-214
p.222
p.232
p.262
p.322, 1.31

15. On 10th July 1975 Mr. Duff submitted an application to the Building Authority for permission to excavate for caissons. This application was subsequently withdrawn by Mr.Duff on 7th August 1975 after it came to his knowledge that such consent was likely to be refused. An amended application was submitted on 8th August 1975. Anticipating the grant of permission based upon the revised application preparatory work was commenced on the site on 23rd August 1975 but was halted by Government order following a complaint from a local resident. On 26th August 1975 Mr. Duff was informed at a meeting with the Government Building Surveyor that consent for the excavation of the caissons would not be given until all the details of the proposed works had been supplied to the Building Authority. Detailed plans and calculations were submitted on 15th September 1975 and were finally approved on 17th November 1975. Excavation work commenced on 29th November 1975.

p.59,11.22-27

16. The development of "University Heights" was completed in January 1978. To satisfy the requirements of the Building Authority it was necessary to construct a different type of retaining wall and a different type of foundation. In all other respects the development was in accordance with the plans approved in 1971.

17. On 4th December 1973 some three months after Messrs. Scott Wilson Kirkpatrick & Partners had begun their first survey Mr. Alan Kwan, a Director of the Respondent wrote to the Respondent's customers including the Appellants inter alia as follows :-

p.153, 1.6

> "No doubt that you have been aware of that the construction programme of the above building has been affected by the Po Shan Road land slip in June 1972.
>
> We are already in close touch with the Public Works Department and have the understanding that the construction work would be permitted subject to further site investigation and the implementation of certain precautionary measures. Such precautionary measures are required not because of any underdesign of the development; rather, it is because of the proximity of the above building to Kotewall Court that had collapsed during the rain storm.

We have already employed a reputable civil engineering consulting firm to do an extensive site investigation in order to make recommendations to the Government for measures to ensure the stability of the proposed development. However, this procedure is going to be time consuming. Though feeling confident that we would be able to eventually go ahead with the construction, we cannot be certain how much time it would require for all the negotiations with Government. But we have the common objective with every of our customers - i.e. try by all means to proceed with the construction work and to complete the building as soon as possible.

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For those who urgently require accommodation, we have devised a scheme to provide immediate accommodations."

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After further enquiries from various of the Appellants including a letter dated 23rd April 1975 from Messrs. Ford, Kwan & Co., the solicitors acting for the First and Second Appellants, the Respondent's property manager, Mr. John Cooper wrote to Messrs. Ford Kwan & Co. on 25th April 1975 stating :

p.187

"We refer to your letter of 23rd April and wish to inform you that we have pursued the matter of construction on site I.L. 8171 since the landslide of June 1972 with due diligence which entailed our engaging a prominent firm of consulting engineers, Scott, Wilson and Kirkpatrick, and conducting extensive negotiations with Mr. B.Boyce of the P.W.D. Building Ordinance Office in an effort to complete the said project at an early date.

p.189, 1.9

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Please rest assured that we are doing everything in our power to expedite the matter."

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18. On 19th August 1975 Messrs. Hwang & Co., Solicitors, wrote to the Respondent on behalf of a number of purchasers enquiring whether the Respondent would be willing to pay interest until completion of the building as provided by the contract. The Respondent's Solicitors, Messrs. F. Zimmern & Co. on 20th August 1975,

p.215

pp.213-214

RECORD

some twelve days after an amended application to commence work on the foundations had been submitted and only five days before preparatory work was commenced on the site, wrote to Messrs. Hwang & Co., inter alia, as follows :

p.216, l.14

> "As you are no doubt aware, as a result of the land slides which occurred in the vicinity of the Kotewall Road area in 1972, Government has "frozen" all developments in the Kotewall Road area including I.L. No.8171. 10
>
> We have advised out clients that by virtue of the land slides in 1972 and the subsequent freezing of the subject development, the above-captioned agreement for sale and purchase is frustrated and the parties thereto are discharged from all liabilities arising out of and in connection with the agreement.
>
> We would also like to inform you that our 20 clients are still negotiating with Government with a view to enable them to continue to develope the above premises. Unfortunately, our clients are not in a position to indicate when further works may be executed on the site."

p.218

p.108, l.31

Messrs. F. Zimmern & Co. wrote a further letter on 20th August 1975 to Messrs. Hwang & Co. drawing attention to clause 22 of the sale agreements. 30

p.243

p.245

19. On 20th September 1975 the Respondent through its solicitors returned the deposits to each of the Appellants. The Appellants held the cheques without prejudice to their claim that the sale agreements had not been frustrated and were still subsisting and reserved their rights to claim specific performance and interest.

p.59, l.6

20. At the trial before Li J. Counsel for all parties made a number of formal admissions for the purposes of the proceedings. The admissions 40 were that :

> "1. Insofar as the building work was delayed beyond 31/12/76, the delay was attributable to events for which the Defendant accepts the risk under the sale and purchase agreements, but in respect of

which the Defendant was not at fault.

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2. The Po Shan Road landslip of 18th June 1972 was an unforeseeable natural disaster.

3. As a result of the landslip, it was not possible for the Defendant to have completed the said building before 1/10/76 or reasonably practicable for the Defendants to do so before 31/12/76. The Defendant does not contend that such impossibility existed beyond the said 1/10/76.

4. The Defendant did not exercise the right to rescind, if any, under Clause 22 of the sale and purchase agreements within the required time if the Court should hold that there was an obligation on the part of the Defendant, should it wish to exercise the right, to do so forthwith.

5. The building is expected to be completed by January 1978. The superstructure has already been completed and finishing works are in progress. There were no amendments to the general plans and the various apartments in the building are identical with those shown on the original approved plans in terms of area, configuration, number of undivided shares allocated and the other material respects."

THE JUDGMENTS BELOW

21. At the trial of the action before Li J. counsel for the Respondent abandoned the claim pleaded in paragraphs 8 and 9 of their Defence thereby conceding that in the circumstances of the case it no longer had the right to rescind the sales agreements under clause 22 thereof and to return without interest the deposits paid by the Appellants. The learned judge was therefore able to confine himself to two issues; first whether the sales agreements had become frustrated and second whether if they were still enforceable the proper remedy was to make an order for specific performance.

p.9, l.24
p.33, ll.40-43
p.55, l.4
p.55, l.5

22. The learned judge declared that the sale agreements had not been frustrated and ordered specific performance of the agreements for the following principal reasons which appear from

RECORD his judgment dated 3rd December 1977 :-

p.58, l.37

(1) The whole issue depends on the construction of the contract between the parties. It is necessary to look at the allegedly frustrating event and to consider whether the contract has made provision for such eventuality. If provision has been made then the rights and liabilities of the parties will be determined by the contract. If no such provision has been made it is then necessary to consider whether the event relied upon was foreseeable by the parties when the contract was made. 10

p.58, l.44

(2) If the event is foreseeable then its consequences should fall upon the party who took the risk without making provision for it in the contract. If the event was not foreseeable it is necessary to decide whether its occurrence has caused the performance of the contract to change so in character that it becomes the performance of a different contract. If this is the result the contract will have been frustrated. 20

p.60, l.8

(3) The sale agreements were not simply contracts for the sale of land but are rather in the nature of building contracts. As such the principle of frustration can apply to them. 30

p.60, l.25

(4) But for clause 22 of the sale agreements the contract would have been frustrated by the occurrence of the landslip. This was admitted to be an unforeseeable event which made it impossible to complete the building before 1st October 1976. The combined effect of clauses 3 and 12 of the agreements was to make interest payable on the purchasers' deposits from 17th May 1974 to 1st October 1976. This is something quite different from the original terms of the original agreement. 40

p.60, l.30

(5) Clause 22 of the agreements provides for the unforeseen and for impossibility of performance. The Respondent was

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entitled to rescind the agreements soon after the landslip occurred or within a reasonable time of realising that performance of the contract was impossible within the stipulated time. The time limits for exercising the right to rescind must be strictly complied with and the right was not exercised within the stipulated time. p.60, 1.40

10 (6) Since there are clear provisions for the rescission of the agreements in the event of unforeseen circumstances the principle of frustration does not apply. p.61, 1.1

(7) The Respondent has admitted : p.61, 1.34

i) that it was at all material times the registered owner of the property in question;

20 ii) that the apartments which are the subject-matter of the action have not been sold to anyone else; and

iii) that the contractor for the job was at all times an associate company and under the control of the Respondent.

The performance of the contract would not require the supervision of the Court since the internal specifications remain unchanged and specific performance should be ordered.

30 23. The Respondent's appeal to the Court of Appeal was unanimously allowed on 4th August 1978. Full judgments were delivered by Briggs C.J. and Huggins J.A. Pickering J.A. gave a short concurring judgment. pp.70,80,85

(1) Briggs C.J. agreed with Li J. that the landslip was a frustrating event but disagreed with his holding that clause 22 of the contract excluded the doctrine of frustration. Briggs C.J. held that the terms of clause 22 were not sufficiently wide to cover the events which had occurred and more importantly it gave an option to the Respondent Vendor to cancel the contract and had no application to the Appellant Purchasers. p.70, 1.40 p.77, 1.41 p.78, 1.1 40

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(2) Huggins J.A. after holding that the contract was not one merely for the sale and purchase of land (to which the doctrine of frustration might not be applicable) but for the provision of a residence to be built (to which the doctrine was applicable) approached the matter in two stages

p.81, 1.24

i) Was the event which occurred one for which the parties had provided by their contract. 10

ii) If not was the event of such a nature that continued performance would require one or both parties to do something so radically different from what was originally contemplated that it would be unjust to hold the parties as still bound?

p.82, 1.45

(3) As to the first stage Huggins J.A. did not read clause 22 as providing that no unforeseen circumstances beyond the respondent's control should frustrate the contract. Although by exercising the power of rescission under the clause 22 the respondent might have avoided, the fact that it was not exercised did not mean that frustration may not have already occurred. Strictly, if frustration had occurred the clause containing the power to rescind would have been avoided with the rest of the contract. As to the second stage Huggins J.A. held that the landslip was of such a nature that continued performance would require something so radically different from what was originally contemplated that it would be unjust to hold the parties still bound. It was no minor landslip but it must have been apparent that further operations might be delayed indefinitely and might even be impossible. 20 30 40

p.83, 1.10

p.83, 1.22

p.85

(4) Pickering J.A. agreed with Briggs . . adding only one further consideration. If the respondent had been debarred from re-entering the site they would have had to pay interest to the appellants on the deposit in perpetuity

unless the appellants had chosen to rescind their agreements under clause 3. Pickering J.A. could not conceive it to be "quite plain" that the respondent had contracted for so bizarre a result.

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SUBMISSIONS

24. The Appellants accept that the doctrine can apply to the contracts under consideration in this appeal in that they are more than mere contracts for the sale of an interest in land.

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25. The proper test for determining whether a contract has been frustrated was propounded by Lord Radcliffe in his speech in Davis Contractors Ltd. v. Fareham U.D.C. [1956] A.C. 696 at p.729:

> "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

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Lord Reid in the same case at p.721 described the test in a similar way :

> "The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not then it is at an end."

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26. The test is one based upon construction. The Court should approach the matter in three stages :

(1) It should construe the terms of the contract in the light of the relevant facts existing at the date of its formation in order to determine the scope of the original contractual obligation.

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(2) It should consider what would require to be done in order to perform the contract in the changed circumstances

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occasioned by the alleged frustrating event.

(3) Having compared the scope of the original contract with what its performance would now entail the court must then decide whether the performance of the contract in these circumstances would render it "a thing radically different" from the original contractual obligation. 10

In applying the test the Appellants make two principal submissions.

27. The first submission of the Appellants is that where the contract makes express provision for the unforeseen event the doctrine of frustration can have no application if that event occurs. Once one accepts that the basis of the doctrine of frustration lies in the construction of the contract it must follow that the parties may agree that the contract shall 20 continue to be enforceable even if circumstances beyond their control operate subsequently to transform the obligations imposed by the contract into those of a more onerous or even radically different nature. This was accepted by the Court of Appeal in The Eugenia [1964] 2 Q.B. 226.

28. Following from this, the Appellants submit that on the true construction of the contract the events which occurred were foreshadowed by the contract and the application of the doctrine 30 of frustration was excluded. The Appellants rely for this submission upon clause 22 of the sale agreements read in conjunction with the other terms of the contract especially clause 3 thereof. One relevant factor surrounding the making of these contracts is that they were prepared by the Respondent as vendor before any authority to build had been obtained. The Respondent can fairly be expected to have considered the nature and difficulty of the 40 building project and to have estimated the time required in order to complete the buildings. Clause 3(1) of the contract stipulates a completion period of 18 months from the date of issue of a building permit. Clause 3(4) does however make provision for the extension of this period for a maximum total period of 365 days in the event of delay due to one or more specified causes. These include an Act of God

pp.101, 108

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(clause 3(4)(d)) and "any other cause beyond the control of the Vendor" (clause 3(4)(i)). The provisions of clause 12 making time of the essence apply to clause 3. In the event that an extension granted pursuant to clause 3.(4) is not sufficient to enable the buildings to be completed the purchaser is given a right to rescind under clause 3(2) of the contract or a right to await completion and to receive interest in the meantime on any deposits paid to the vendor. Finally clause 22 enables the vendor to rescind should it be unable through unforeseen circumstances to complete the sale in the time and otherwise as provided by the agreement.

29. Li J. held, in our submission rightly, that since clause 22 contained clear provisions for the rescission of the contract in the event of unforeseen circumstances the doctrine of frustration did not apply. The Court of Appeal held that the provisions of clause 22 were not wide enough to have this effect. In the submission of the Appellants the Court of Appeal were wrong for these reasons :

(1) The application or not of the doctrine of frustration must depend upon the terms of each particular contract construed as a whole in the light of the surrounding circumstances relevant to the contract.

(2) For these reasons it is not permissible to rely upon authorities dealing with the construction of similar provisions in other contracts unless that contract and the circumstances surrounding it are also the same as the contract in question.

(3) The wording in clause 22 of the present contracts is clear and unambiguous. It admits of no exceptions. There is no attempt in any of the judgments in the Court of Appeal to explain why the construction placed upon clause 22 by Li J. is wrong.

(4) In his judgment Briggs C.J. also emphasized the need for a clause affecting the application of the doctrine of frustration to operate for the benefit of both parties. In Bank Line

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Ltd. v. Arthur Capel & Co. [1919] A.C. 435 relied on by Briggs C.J. the option to determine the charter was exercisable only by the charterer. The owner, contending that the charter party was frustrated, had no such right. In the present case there is however no such disparity. Clause 3(2) gives the purchaser a right of rescission. This is balanced by the right of rescission given to the vendor by clause 22. Whilst it is true that the exercise of the respective rights to rescind are not identical in all respects this cannot in our submission detract from the fact that both parties are nevertheless given such a right. 10

30. The other main submission of the Appellants is that the landslip was not an event sufficient to frustrate the sale agreements even if clause 22 had not been included in them. Landslips caused by heavy rain have been experienced in Hong Kong throughout its history. Only six years before the 1972 landslip, in June 1966 several landslips occurred in mid levels following disastrous rainstorms. The Appellants will contend that the landslip was not in itself a frustrating event, and that frustration would not occur unless and until it became manifest that the site could not be cleared or that permission could not be obtained to proceed with the erection of the blocks of flats or that an unreasonable time had elapsed without it becoming manifest that the erection of the blocks of flats could proceed. 20 30

See Appendix paras.35-42, 53 and 60

31. The effect of the landslip was :

(a) to delay the completion of the buildings beyond the extended completion date;

(b) to make the project more costly to complete by reason of the need: 40

i) to clear the site of debris;

ii) to carry out extensive investigations in order to ascertain what additional works were necessary to complete the buildings upon a stable and secure foundation; and

iii) to carry out additional works by way of caissons and under-pinning to secure the foundations;

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(c) to render the site unavailable for the continuation of building works, a state which the Respondent acquiesced in for some five months in 1972 with the result that the permission to commence building works given on 17th November 1971 lapsed and had to be renewed; and

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(d) to create a period of uncertainty as to whether or not it would eventually prove possible to complete the buildings according to their original design.

The total delay of 2½ years beyond the extended completion was not wholly attributable to the landslip but was in part attributable to delays on the part of the consultant engineers. In the event all these difficulties were overcome within a reasonable time in the circumstances and the buildings were completed in accordance with the original plans save for the caissons and the alterations to the access road.

p.193

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32. Both Li J. and the Court of Appeal held that the landslip and its consequences were sufficient to frustrate the contracts. Li J. took the view that as a result of the landslip the Respondent was obliged by reason of the combined effect of clauses 3 and 12 of the contract to pay interest on the deposits or down payments from 17th May 1974 to 1st October 1976. The learned judge considered that this obligation was quite different from the original terms of the original agreements and that is was a matter to which none of the parties had directed their respective minds. The Court of Appeal approached the matter rather differently. Briggs C.J. decided that the parties obviously contracted on the basis that the land on which the blocks of flats were to be erected would remain continually available and that a valid building permit would remain in force. He further considered that the parties expected completion to take place in a reasonable time and did not contemplate the long period of delay which occurred. The other members of the Court of Appeal appear to have taken a similar view.

p.60, l.25

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p.75, l.25

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33. In the submission of the Appellants none of the matters relied on by either Li J. or the Court of Appeal are sufficient to make the performance of the contracts after the landslip a radically different thing from the original obligation. The contract was in substance a contract to provide accommodation for occupation for a long term of years and it was the Respondent's obligation to complete the erection of the buildings within a limited period of time. 10 Clause 3(4) of the contract allows the contractual completion date to be extended by up to a year in the event of an act of God or other cause beyond the control of the vendor. This power was available in the circumstances but the contract does not stop there. Even apart from clause 22 the provisions of clause 3(3) enable the purchaser to wait for completion. It must therefore have been in the contemplation of the parties that the completion date could be 20 postponed beyond June 1974 which marks the end of the 2½ years period referred to by Briggs C.J. In our respectful submission the learned Chief Justice in construing the scope of the original contract attached little or no weight to the provisions of clause 3(3).

34. The site in question was never an easy one to develop and although the particular landslip in its magnitude was unforeseen, the difficulties of drainage, bad weather, water, rock and 30 other similar problems (which might possibly result in landslips) were known to exist and were referred to in clause 3(4) of the contract. Any additional cost incurred by these factors would be borne by the Respondent. Despite its being distinguished by the Court of Appeal the Davis Contractors case is in our submission very much in point. As Lord Radcliffe said at p.729 :

> "it is not hardship or inconvenience or 40 material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

In the present case there was no such difference. Clause 3(1) of the contract required the Respondent to complete the buildings in compliance

with the requirements of the Building Authority and the Director of Public Works. The contract does not specify the type of foundations to be used nor what operations were to be carried out to ensure the safety and stability of the building. These were matters to be approved by the authorities and to the extent that those requirements changed after the landslip they were still within the terms of the original contract. All that occurred was a period of uncertainty but the project was never abandoned by the developer and was ultimately completed. It was more expensive for the Respondent but it was not radically different in nature from the original contract. Indeed it was not different at all. The flats were of the same proportions and can be conveyed without any amendment to the original contract. All that has occurred is delay and that is not of itself sufficient to frustrate the contract.

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35. Accordingly the Appellants humbly submit that the Orders of the Court of Appeal should be set aside and the Order of Li J. restored for the following among other

R E A S O N S

1. BECAUSE upon the true construction of the contracts the doctrine of frustration has no application.

2. BECAUSE the Court of Appeal and Li J. failed to attach sufficient or any weight to clause 3 of the contracts and therefore erred in holding that the effect of the landslip was to frustrate the said contracts.

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3. BECAUSE even apart from the terms of the contracts the landslip and concomitant delays were not sufficient to frustrate the said contracts.

PAUL BAKER

NICHOLAS PATTEN

No. 9 of 1979

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

WONG LAI YING and OTHERS — Appellants

- and -

CHINACHEM INVESTMENTS CO. LTD. — Respondent

CASE FOR THE APPELLANTS

SIMMONS & SIMMONS,
14 Dominion Street,
London, EC2M 2RJ.