

ON APPEAL  
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

- 10 WONG LAI YING 1st Appellant
- MAN CHIU TONG 2nd Appellant
- CHUNG YUK WA, AGNES 3rd Appellant
- LEUNG SHING KWAN, CHARLES and  
LAM SHUK HAN, MARGARET 4th Appellants
- 10 WONG MAN TAK and LUI LAI YING 5th Appellants
- KWOK ON PONG 6th Appellant
- TAM KWOK CHEUNG, NG TACK MAY and  
NG TACK MAY, Personal  
Representative of NG MAY LAN  
deceased 7th Appellants
- CHAN KAI SHIU and  
LAI KWOK MEI, AMY 8th Appellants
- 20 TSENG HING YU 9th Appellant
- CHENG SI YIC and  
CHEUNG LAI SUN, JULIANA 10th Appellants
- LO KAM TO 11th Appellant
- LO KAI FAI 12th Appellant
- YIM YAN 13th Appellant
- CHAN KWAN SHEUNG 14th Appellant
- AU YEUNG CHUNG OI, BETTY 15th Appellant
- LAM TSANG SUK YEE 16th Appellant
- CHENG CHI CHION 17th Appellant
- LI YU TUNG 18th Appellant
- 30 TSANG SUK YEE 19th Appellant
- LOCK CHEUNG HELEN 20th Appellant
- TO SAI MUI 21st Appellant
- TSANG YUK KING 22nd Appellant
- LOKE YIP NGOI YAN 23rd Appellant
- NG HOI MING 24th Appellant

- and -

CHINACHEM INVESTMENT CO. LTD. Respondent

CASE FOR THE RESPONDENT

RECORD

- 40 1. This is an appeal from a judgment of the Court of Appeal of Hong Kong (Briggs C.J., Huggins and Pickering JJ.A.) dated 4th August 1978 allowing with costs the Respondent's appeal from a judgment of Li, J. in the Supreme Court of Hong Kong dated 3rd December 1977. p.70 1.1- p.85 1.37
- 2. The question for decision is whether some 24 p.50 1.1- p.62 1.29

RECORD

pp.100-110

p.16 1.44

p.59 11.8-27

agreements (hereinafter called "the Agreements") entered into between the Appellants and the Respondents were frustrated by the Po Shan Road landslip disaster (hereinafter called "the landslip") which occurred on 18th June 1972. It is conceded by the Appellants that the landslip was an unforeseeable natural disaster as a result of which it became impossible for the Respondent to fulfil its contractual obligations.

3. The Agreements were in similar terms, and provided, in substance, for the construction by the Respondent of two blocks of flats of twelve storeys each known as "University Heights" (hereinafter called "the Building") on land owned by the Respondent and the sale of various equal undivided shares of and in the site and the Building to the Appellants, each of whom would be entitled under the relevant Agreement to the sole use and occupation of the flat or flats therein specified. The provisions of a typical Agreement, so far as material to these proceedings are as follows:- 10 20

p.100 11.10-40

"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 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" together also with various easements and other rights more fully set out 30 40

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

p.101 11.1-4

2. (a) The purchase price shall be \$112,875.00 (Dollars one hundred and twelve thousand eight hundred and seventy five only) which shall be paid by the Purchaser to the Vendor in the manner speicified in the Schedule hereto. 50

3. (1) The Vendor shall comply with the requirement of the Building Authority and of the Director of Public Works relating 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.

10 (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 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 of such amount and interest to be in full and final settlement of all claims by the Purchaser against the Vendor hereunder.

20 (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) 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.

30 (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 :-

RECORD

- (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.

10

p.106 1.17

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

p.108 11.31-40

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 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 void as if the same had not been entered into and neither party hereto shall have any claim against the other in respect thereof.

20

30

p.109 11.11-16

THE SCHEDULE ABOVE REFERRED TO  
TERMS OF PAYMENT OF THE PURCHASE PRICE

The purchase price shall be \$112,875.00 which shall be paid by the Purchaser to the Vendor in the manner following:-

40

RECORD

Upon signing this Agreement the Purchaser shall pay to the Vendor the sum of \$112,875.00 as deposit and in full payment of the purchase price".

A number of the Agreements called for payment of part only of the purchase price upon signature, and for payment of the balance by instalments.

10 4. Hong Kong island consists of land which is largely mountainous. In recent years a great deal of development has taken place upon the sides of these mountains. The particular area where these blocks of flats were being built is known as "mid-levels" which indicates that the site is part of the way up the mountainside. The angle of the slope at the site is about 35%, but the slope above is steeper.

Annex Fig. 4  
(before p.71)

20 5. Consent to commence building work was granted by the Building Authority on 17th November 1971 and accordingly completion of the building was due under the Agreements before 17th May 1973.

pp.121-122

6. By June 1972 work had finished on the approved foundations for the lower of the two blocks. The first and second floors of the car-park level of this block had been built and some work on the foundations of the other block had been done. Some HK \$ 2 million worth of construction work had been performed.

p.34 11.35-36

p.34 1.37

30 7. The landslide occurred on part of the hillside immediately above the site of the Building and carried with it various buildings including a block of flats of thirteen storeys called Kotewall Court. As a result several thousand tons of earth and rock as well as a substantial part of the debris of the collapsed buildings buried the site causing extensive damage to the work in progress on the lower of the two tower blocks, and rendering this work largely useless. Part of the site was as much as 25 feet below the surface of the debris. Following the landslide the Respondent was barred from access to the site for a period of 5 months while salvage work was carried out by Government. Since no building work could be carried out during this period the Respondent's building consent automatically lapsed under Section 20 of the Buildings Ordinance, and it became unlawful for the Respondent to continue building.

p.19 11.9-10  
Annex Plates  
10 and 11

p.19 11.42-43  
Annex Plate 7  
p.19 11.35-37  
p.129 1.27-31  
p.19 1.48  
p.318 1.38  
p.17 1.2

C.123 of the  
Laws of Hong  
Kong.

RECORD

pp.131-132 8. A letter dated 3rd November 1972 was sent by the Building Authority to the authorised architect for the development to the effect that the necessary 'consent' to resumption of work would not be issued until the project had been "completely reconsidered" and "further plans had been submitted and approved". It also required a comprehensive site investigation and feasibility studies to be undertaken by the Respondent. The proper inference to be drawn from the said letter dated 3rd November 1972 and from the evidence of its author Mr. K. C. Brian-Boys is that at the said date it was wholly uncertain whether the Building envisaged by the Agreements or any other buildings could ever be built and if so how and in what circumstances and at what expense. As Mr. Wong of the Respondents said in evidence: "When I got [this letter] I felt I did not know if the building work could ever be restarted ...".

p.131 11.16-17

pp.131-132 10  
p.24 1.40

p.24 11.32-44

p.34 1.39

p.140 9. As a result of the landslide the Hong Kong Government wholly reviewed its attitude to construction work on the mid-levels as appears from a circular issued by the Building Authority on 28th December 1972. 20

10. It follows that by December 1972 further performance of the Agreements had become illegal since the Respondent no longer had any valid building permit and in its absence could not lawfully continue or resume building. Further by this time there was total uncertainty as to the future of this construction project. 30

p.138 11. The Respondent thereafter proceeded, with the consent of the Building Authority to clear the site and demolish the damaged building work. The required site investigation could not be started until this was done. Although this work was carried out expeditiously, it could not be completed till May 1973, which was therefore the earliest date at which the required site examination could commence.

p.21 11.1-10  
p.125  
p.319 11.23-40

p.320 40  
p.160

pp.179-180 11. The Respondent then instructed consulting engineers to undertake the work described in the evidence of Mr. Charles Duff, the project architect. Their report became available in August 1974. After considering the report, the Building Authority's expert, Mr. K. C. Brian-Boys, discussed it with the Respondent's experts and called for further studies. It appears from notes prepared by Mr. Brian-Boys dated 24th January 1975 that he still doubted whether caisson foundations, or any foundations for that matter, could be provided without reaching to fresh rock, but that fresh rock had not been found on the site even at a depth of 80 feet. 50

RECORD

The Respondent's experts completed their further studies and supplied them to the Authority on 19th June 1975. The Authority called for amendment of the plans, but ultimately gave a limited consent for the resumption of work on 24th November 1975, confined merely to newly required caisson construction for stabilising the hillside above the site of the development.

p.207

pp.261, 262

10 12. In the event, as the result of the landslide and the requirements of the Authority:-

(i) the Respondent had to carry out underpinning work to the main raft foundation of the lower block and to demolish and recast all spread footings to the lower block;

p.264 11.13-21

p.272 11.17-20

(ii) the design of the foundations of the upper block was changed by requiring the sinking of caissons;

p.209 11.16-21

20 (iii) part of the Approach Road had to be completely redesigned and a retaining wall formed by a system of caissons. This involved considerable expense and delay and the Authority required the retaining wall to be completed prior to the commencement of other work; in fact the necessary caisson work was slow and difficult and was not completed until shortly before 6th September 1976.

p.209 11.22-32

p.297

p.180 11.3-5

p.24 11.1-14

p.296

30 (iv) as a result of (iii) the order of work had to be totally re-scheduled, and permission for resumption of work on the Building itself was not granted until 10th November 1976

pp.309, 310

40 So in fact the physical characteristics of the project ultimately completed differed most materially from those of the project originally undertaken. Furthermore the considerable delay and additional expense involved caused the project to become, commercially, an entirely different proposition from that which was envisaged at the date of the Agreements. Moreover by the time permission was finally given to resume building some 1½ years had elapsed beyond the last possible termination of any permissible extension of the date for completion under the Agreements.

p.41 1.45-

p.42 1.2

13. By their Writ, issued on 7th November 1975, the Appellants sought specific performance of the Agreements. The Respondent's primary defence was and is that these had been frustrated by the landslide. A second defence was that the Agreements did not define the fixtures and finishes of the

RECORD

apartments in sufficient detail for this work to form the subject of a specific performance decree.

14. The actions came on for trial on 24th October 1977. At the trial formal admissions were placed before the Judge as follows:-

p.59 11.8-27

"1. Insofar as the building work was delayed beyond 31/12/76, the delay was attributable to events for which the Respondent accepts the risk under the sale and purchase agreements, but in respect of which the Respondent was not at fault. 10

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 Respondent to have completed the said building before 1/10/76 or reasonably practicable for the Respondent to do so before 31/12/76. The Respondent does not contend that such impossibility existed beyond the said 1/10/76. 20

4. The Respondent 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 Respondent, 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 aspects". 30

15. Li, J. decided against the Respondent in his reserved judgment delivered on 3rd December 1977. He rejected the Appellants' first contention that the doctrine of frustration had no application to the Agreements, because they were (on the Appellants' contention) simply agreements for the sale of interests in land. He also accepted on the basis of the said admissions that the landslip was an unforeseeable natural disaster which made performance of the Agreements impossible. But he decided the case on the ground that:- 40



10 "In my opinion clause [22] provides for circumstances which render performance of the agreements impossible. When these happened the [Respondent] had an opportunity to rescind the agreements forthwith by returning the purchase price already paid. Thus the parties had applied their minds to unforeseen events which might cause impossibility of performance subject to certain conditions. That being so, even the unforeseen and impossibility have been provided for in the agreements .....

I am of opinion that 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 11.1-4

20 In the event Li J. granted specific performance of the Agreements although in his view it was unjust that the Respondent should have to deliver the flats to the Appellants as well as to pay interest on the deposits until the date of such delivery. The learned Judge rejected the Respondent's contention that specific performance ought not to be granted because of the lack of definition of the outstanding finishing work.

p.60 1.19

p.62 11.17-19

16. The Court of Appeal of Hong Kong in reversing the judgment of Li, J. unanimously held that the Agreements were frustrated by the landslide.

30 17. As a result of their decision it was unnecessary for them to consider the appeal on the specific performance point. They therefore directed that the point should not be argued. In giving his reasons for allowing the appeal Briggs, C.J. said:

"Frustration is a doctrine of the common law. It arises where it appears from the nature of the contract and from surrounding circumstances that the parties have contracted on the basis that a certain state of things shall continue, but through no fault of either party, an event occurs which makes performance of the contract impossible or only possible in a very different manner from what was contemplated when the contract was entered into. In the present case the event which the [Respondent] say frustrated the contract was the landslide. And this was found by the trial Judge to be "a frustrating event".

p.74 11.33-43

50

RECORD

It is necessary for the Court to look at the matter at the time of the occurrence of the frustrating event and not with hindsight or long afterwards. It must pay regard to the probabilities known to the parties at the time the landslip occurred ....

p.75 l.25-  
p.76 l.5

In the present case 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 building permit would remain in force so that it would not be illegal to build. These points are obvious from the terms of the contract itself.

10

Clause 12 of the contracts makes time of the essence of the contract "in every respect" and the parties expected to be able to complete the purchase in a reasonable time, at most within 2½ years, from the issue of the building permit and did not contemplate the very long period of delay which has occurred.

20

At the time of the landslid the parties could not know how soon the [Respondent] would be allowed to re-enter the site, how long the delay would be and whether they would be granted a new building permit, nor if one was granted, when it would be approved. The position of the parties was clouded in uncertainty. There are also two other points which must be taken into account. By reason of the landslide the [Respondent] has been put to enormous extra expense and the monies of the [Appellants] which were in the [Respondent's] hands were tied up on an idle site.

30

The trial Judge held that the landslide was a frustrating event and I see no reason to disagree with that finding .....

p.78 ll.1-8

Clause 22 gives an option to the [Respondent] to cancel the contract. It has no application to the [Appellants]. I do not see how this clause affects the application of the doctrine of frustration which operates as a benefit to or to the detriment of both parties.

40

The fact that there are provisions in a contract giving one party the option to terminate his obligations under the contract in certain circumstances does not in itself exclude the applicability of the doctrine of frustration.

This was the ratio decidendi of the Bank Line Case .....

[1919] A.O. 117

I do not think that Clause 22 of the contracts operates so as to exclude the doctrine of frustration. In my view on the facts of this case ..... these contracts were frustrated by the landslide .....

p.78 1.39  
p.79 1.3

18. Huggins, J.A. found that Clause 22 was drafted in very wide terms but, as he put it, :-

p.82 1.33

10 "I do not think they must be read as providing that no unforeseen circumstances beyond the Vendor's contract should frustrate the contract ..... by exercising the power of rescission under Clause 22 the Vendor might have avoided the present dispute as to frustration, but the fact that he did not exercise the power does not mean that frustration may not already have occurred .....  
20 The inclusion of a clause such as ..... Clause 22 of the Agreement in this case is, therefore, not inconsistent with the doctrine of frustration and does not show an intention that that doctrine shall not apply".

p.82 1.45-  
p.83 1.  
p.83 11.10-12

p.83 11.17-21

Further Huggins J.A. considered that Clause 3 (3) which allows the Appellants if they do not rescind under Clause 3 (2) to wait until the building is finished and provides "in that event" for the payment of interest, indicated that "frustration of the contracts was a contemplated possibility otherwise interest would be payable ad aeternum if building became impossible". Having concluded therefore that no provision of the contract excluded the application of the doctrine of frustration to the contract, he decided in favour of the present Respondent on the ground that the landslide was of such a nature that the continued performance of the Agreements would require one or both of the parties to do something so radically different from what was originally contemplated that it would be unjust to hold the parties still bound.

p.82 11.19-24

19. Pickering, J.A. agreed with the Chief Justice. He added the following:

p.85 1.20

"It was entirely possible that [the Respondent] would never gain access to the site or that if permitted access [the Respondent] would not receive permission to build anything like the number and type of flats [the Respondent] had contracted to build and to sell to the

p.85 11.27-35

RECORD

[1919] A.C.435  
at 445

[Appellants]. Yet had [the Respondent] been so debarred and had the [Appellants] chosen not to rescind their Agreements, the [Respondent] would have been liable under Clause 3 of the Agreements, to pay to each [Appellant] interest at the rate of one per cent per month upon the purchase price or deposit paid - and that in perpetuity. For my part I cannot conceive that, in the words of Lord Haldane in Bank Line Ltd. v. Arthur Capel & Co., it is "quite plain" that the [Respondent] had contracted for so bizarre a result". 10

20. The Respondent respectfully submits that there are other or additional grounds why the Court of Appeal of Hong Kong should have allowed the appeal, namely: 20

(i) the learned trial Judge erred in construing Clause 22 of the Agreements as legislating for the events which occurred (i.e. the landslip and its consequences as found by the learned trial Judge) because :-

(a) The event which occurred was not one 'whereby the vendor became unable to sell the said undivided shares'

Alternatively 30

(b) The event which occurred was not within the contemplation of the parties: it created a wholly unforeseen situation in which it became and remained wholly uncertain for a period lasting for at least 3 years whether or not the prosecution of the project was possible. As a matter of construction the clause ought not to be read as providing for that event. Such a clause "does not cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made": see per Lord Finlay L.C. in Metropolitan Water Board v. Dick Kerr and Company. 40

[1918] A.C. at  
p.126

[1918] 4 Q.B.  
180

[1918] A.C. at  
p.140

In the words of Hannen J in Bailey v. De Crespigny cited in the speech of Lord Parmoor in the Metropolitan Water Board case. 50

10 "There can be no doubt that a man  
may by an absolute contract bind himself  
to perform things which subsequently  
become impossible, or to pay damages for  
non-performance, and this construction is  
to be put upon an unqualified undertaking,  
where the event which causes the  
impossibility was or might have been  
anticipated and guarded against in the  
contract, or where the impossibility  
arises from the act or default of the  
promissor. But where the event is of  
such a character that it cannot reasonably  
be supposed to have been in the  
contemplation of the contracting parties  
when the contract was made, they will  
not be held barred by general words  
which, though large enough to include,  
20 were not used with reference to the  
possibility of the particular  
contingency which afterwards happens".

30 (c) The events contemplated by Clause  
22 could not include an event on the  
occurrence of which the Respondent would  
be put in a position of doubt and  
uncertainty continuing for a period  
lasting as long as 3 years or more as  
to whether the contract had become  
incapable of performance since the  
clause required the Respondent to give  
notice forthwith upon the occurrence  
of the event.

(d) In the events which happened it  
was impossible for the Respondent to  
know either upon the occurrence of the  
landslip, or on the lapse of the  
building consent that the Agreement  
had become incapable of performance.

40 (ii) In so far as the learned trial Judge  
thought it unjust that the Respondent has  
benefited from the retention of the  
Appellants' deposits, he failed to take  
into account the Appellants' right to  
interest thereon at common law and under  
the Law Amendment and Reform (Consolidation)  
Ordinance (Cap. 23).

50 (iii) The learned trial Judge erred in law  
in awarding specific performance in that at  
the date of the trial only the superstructure  
had been completed and the finishing works  
remaining to be done were not specified by

RECORD

the Agreements or otherwise in sufficient detail to enable the Appellants the Respondent or the Court itself to determine what work required to be done pursuant to the specific performance decree. The finishing works remain in obedience pending the decision in the present appeal.

[1919] A.C.435  
at 445

21. In the course of his judgment in Bank Line v. Arthur Capel & Co. Viscount Haldane said:

"..... where people enter into a contract which is dependant for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so". 10

Thus for the doctrine of frustration to be excluded the parties must have specifically contracted to be bound in the new circumstances. It is submitted that Clause 22 ought not to be construed as providing for the events which have occurred if in so doing that provision has to be applied to circumstances which (as is expressly conceded in this Case) were wholly outside the contemplation of the parties. 20

22. The Appellants have argued below that sub-clause (4) of Clause 3 of the Agreement envisaged and provided for events such as Acts of God and other circumstances beyond the Vendor's control so as to exclude frustration in all those events, apart possibly from total destruction of the site. In so far as the Appellants rely on this argument, the Respondent will submit that Clause 3 (4) provides for and is confined to cases of limited interruption such as could reasonably be covered by the maximum permitted extension of 365 days, and that provision which the parties have made for the consequences of a limited interruption is not to be taken as applicable to unforeseeably long and potentially indefinite delay. It is submitted that the following passage from the speech of Lord Dunedin in the Metropolitan Water Board case accurately describes the effect of those provisions which 30 40

[1918] A.C. at  
p.130

"only deal .... with more or less temporary difficulties and do not cover a set of occurrences which would make the contract when resumed a really different contract from the contract when broken off".

Further if the Appellants contentions were right, it would lead to the bizarre result pointed out by Pickering J.A. in the passage cited from his judgment in paragraph 19 above.

10 23. An argument which the Appellants put in the forefront of their submissions below was that the Agreements created an interest in land and that the doctrine of frustration was inapplicable to such agreements. This argument was rightly rejected by Li, J. and the Court of Appeal on the ground that the Agreements were in substance building contracts.

p.60 11.7-13  
p.79 11.9-20  
p.80 1.31-  
p.81 1.19

24. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE as the Court of Appeal has rightly held the Agreements were frustrated by the landslip.
- 20 2. BECAUSE on the true construction of the Agreements none of the provisions contained therein had the effect of binding the Respondent to the Agreements in the totally new and unforeseeable circumstances which have occurred.
3. BECAUSE the judgments of the Court of Appeal were right and the judgment of the learned trial Judge was wrong.
- 30 4. BECAUSE even if the Agreements were not frustrated, specific performance thereof ought not to be awarded.

J. G. WILMERS

MICHAEL MILLER

DOREEN LE PICHON

No. 9 of 1979

IN THE PRIVY COUNCIL

---

---

O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

---

---

B E T W E E N :

WONG LAI YING and OTHERS Appellants

- and -

CHINACHEM INVESTMENT CO. LTD.  
Respondent

---

---

CASE FOR THE RESPONDENT

---

---

MAXWELL BATLEY & CO.,  
27 Chancery Lane,  
London, WC2A 1PA.