28/83

No. 39 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL HONG KONG

BETWEEN:

TSE KWONG LAM — Appellant

- and -

(1) WONG CHIT SEN
(2) CHING WAI SHORT (or SHOOK)
(3) CHIT SEN COMPANY LIMITED — Respondents

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CASE FOR THE RESPONDENTS

Record

1. This is an appeal from the order of the Hong Kong Court of Appeal (Huggins and McMullin J.J.A. and Garcia J.) dated 26th November 1980 which allowed an appeal by the present 1st Respondent and dismissed a cross-appeal by the present Appellant from an Order of Simmern J. dated 15th May 1979.

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OUTLINE

2. The appeal concerns the validity of a sale by a mortgagee at a public auction held on 24th June 1966 of certain mortgaged property. The present Appellant was the mortgagor; the 1st Respondent was the mortgagee; the 2nd Respondent was and is the wife of the 1st Respondent; and the 3rd Respondent is a family company of which the 1st and 2nd Respondents were and are two of the shareholders and directors, and was the purchaser at the auction (the bid being made on its behalf by the 2nd Respondent).

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3. The mortgaged property consisted of 2 pieces of land at 52 and 54 Cheung Sha Wan Road, Kowloon ("the property") each of which had a building on it with sitting tenants. The Appellant had been operating his own property company since June 1961. He bought No. 52 at some stage

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Vol. 1 page 29 line 28 to page 30 line 30

between February 1962 and September 1963, and he bought No. 52 on 22nd April 1963. Each purchase was made on mortgage, and at the time of or shortly after buying the property he decided to carry out a scheme to redevelop the property as a whole.

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4. The scheme involved getting rid of the sitting tenants, demolishing the existing buildings, and erecting a 15 storey building with shops on the ground floor, a commercial area on the 1st and 2nd floors, and 72 residential flats on the upper floors. 10

Vol. III page 138 lines 4 to 8

5. The scheme was undoubtedly speculative, and Zimmern J. at trial found that the Appellant did not in fact have either the experience or the wherewithal to enter into such speculative adventures. The Appellant estimated his total costs as being slighly under $2 million (in fact $1,935,650) made up as follows:

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(a) $74,000 for piling; 20

(b) $911,000 for building;

(c) $99,650 for lifts;

(d) $230,000 as compensation for sitting tenants;

and

(e) $621,000 to discharge the existing mortgages.

Vol. 1 page 76 line 46
Vol. 1 page 77 line 24

6. The Appellant needed finance, but he did not approach his existing mortgagees. Whether this was because he had admittedly been in at least technical default under those mortgages is not clear from the evidence. In any event he calculated that he would require a new mortgage of only $1.5 million. The balance was intended to come from the pre-sale of individual flats to their actual completion. 30

Vol. 1 pages 32 and 33

7. The Appellant and the 1st Respondent agreed in principle that the 1st Respondent would lend the $1.5 million. $730,000 was to be advanced at once, with the remaining $770,000 to be advanced in 10 equal instalments of $77,000 each. The term of the loan was to be 1½ years, with any earlier repayment being made in instalments of not less than $100,000 each. 40

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8. Accordingly, on 30th November 1963 the Appellant as the Mortgagor and the 1st Respondent as the Mortgagee entered into an Indenture of that date ("the Building Mortgage"). The 1st Respondent thereby agreed to lend the Appellant $730,000 forthwith with interest payable monthly at 1.2% and with provision for further advances totalling $770,000 payable by 10 equal instalments coinciding with the progress of the development over the period 30th March 1064 to 28th February 1965. All the loans were to be repayable on 29th May 1965 and with interest were secured by way of legal mortgage on the property. — Vol. IV pages 1 to 11

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9. The Building Mortgage contained various other provisions including:

(a) a covenant by the Appellant to complete the works expeditiously; — Vol. IV page 7

(b) power for the mortgagee to sell the property or any part either by public auction or contract (this provision is similar to the provisions of section 101(1)(i) of the Law of Property Act 1925); — Vol. IV page 5

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(c) a provision that the power of sale should not be exercised unless there were, inter alia, a breach of covenant or 30 days arrears in the monthly payments of interest, or default in complying with 1 month's notice to repay (c/f Section 103 of the Law of Property Act, 1925); — Vol. IV page 5

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(d) a proviso that upon any sale purporting to be made in pursuance of the power the purchaser should not be bound to see or enquire as to various matters including the propriety or regularity of such sale (c/f section 104 of the Law of Property Act, 1925); — Vol. IV pages 5 and 6

(e) a declaration that any such sale should, in favour of a purchaser, be deemed to be within the power notwithstanding any impropriety or irregularity, and that the mortgagor's remedy with respect to any breach should be in damages only; and — Vol. IV page 6

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(f) a provision that the mortgagee should not be answerable for any involuntary loss (c.f. section 106(3) of the Law of Property Act 1925). — Vol. IV page 6

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Vol. III page 139 lines 12 to 36

10. The Appellant paid interest for the first 4 months but then defaulted. The 1st Respondent refrained from exercising his power of sale but instead agreed to lend additional sums to the Appellant to enable the Appellant to complete his redevelopment. These additional sums were secured by three further mortgages of the property.

Vol. IV pages 12 to 17

Vol. IV pages 34 to 39

Vol. IV pages 40 to 45

11. The first of these further mortgages was dated 17th July 1964 and, provided for a loan of up to $300,000 repayable on 29th May 1965 with monthly interest in the meantime at 1.4%. The second of these mortgages was dated 23rd July 1965 and provided for a loan of up to $200,000 repayable on 29th May 1966 with monthly interest in the meantime at the same rate. The third of these mortgages, was dated 10th November 1965, and provided for a loan of up to $220,000 repayable on 29th May 1966 with monthly interest in the meantime at the same rate. These mortgages expressly incorporated by reference the powers of sale and other provisions contained in the Building Mortgage.

Vol. III page 139 lines 12 to 36

12. The 1st Respondent, acting by his wife the 2nd Respondent, also agreed with the Appellant that arrears of interest would be capitalised and treated as if advanced by the 1st Respondent as part of the $770,000 loan under the Building Mortgage. Between December 1964 and August 1965 arrears totalling $142,651.30 were dealt with in this way. In his judgment Zimmern J. described this arrangement (and the advances made under the three further mortgages) as all being acts of grace on the part of the 1st Respondent, and stated that it must have been or become obvious to the Appellant that his cash flow budget at inception was just "wishful thinking".

Vol. III page 139 line 39 to page 141 line 5

13. At trial there was some dispute as to the terms of an alleged collateral arrangement permitting the Appellant to sell individual units to buyers free from incumbrances. Zimmern J. rightly held that nothing turned on this since the 1st Respondent did in fact release from the mortgages the 36 flats which were sold in this way, and part of the proceeds were applied in reduction of principal due thereunder.

14. The building works were completed on 30th December 1965 and an occupation permit issued on 12th January 1966. However, the Appellant failed to pay the bills of two contractors and

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they effectively prevented occupation by disconnecting lifts and removing locks. This state of affairs was remedied only in April 1966 when the 1st Respondent agreed with the Appellant that he, the 1st Respondent, would pay the contractors' bills, amounting to $87,450, by way of a further advance to the Appellant. — Vol. III page 141 lines 6 to 18

15. In the meantime the Appellant was in default in payment of interest under the mortgages, and on 28th February 1966 the 1st Respondent served notice on him calling for payment of arrears of $76,548.95 on or before 29th March 1966, and giving notice that in lieu of payment the power of sale under the mortgages would be exercised. On 28th April 1966 the Appellant was served with 2 further notices requiring repayment on 29th May 1966 of all principal due under the mortgages and giving notice that unless the said principal together with interest due in respect thereof were paid on that date there would be a sale of the property. In one of the two notices the amount due was stated to be $1,648,941.40 made up of $1,512,137.95 principal and $136,803.35 interest. The other notice simply calls for payment of what was due. — Vol. IV page 114; Vol. IV pages 116 and 117

16. A subsequent account established that the specified sums were more than the sums actually due. It appears from the Report dated 26th February 1968 of an Arbitrator that as at 29th June 1966 the total sum due in respect of principal and interest was $1,421,716.39. $1,216,960.10 of this was due in respect of principal (advances of $2,030,464.10 less repayments of $813,504), and $204,756.29 was due in respect of interest (a total of $428,979.59 less payments of $224,041.30). However, Zimmern J. rightly found that nothing turned on the fact that a greater sum had been demanded than was actually due: there was in fact no dispute at the time as to the accounts; the Appellant (whose duty it was to tender repayment on the due date) did not tender any sum let alone the amount claimed; and it has never been and could not be disputed that interest was substantially in arrears. — Vol. IV pages 133 to 143, esp. page 141; Vol. III page 142 line 28 to page 143 line 6

17. On receipt of the notices of default mentioned at paragraph 15 above the Appellant was not in fact in a position to tender anything. Zimmern J. rightly held:

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Vol. III page 141 lines 12 to 14	(a) that the Appellant's line of credit with the 1st Respondent had been exhausted;
Vol. III page 141 line 45 to page 142 line 2	(b) that the Appellant had been unable to sell further individual units both because of the contractors' lock-out and also because 1965 and 1966 were bad years for the property market; and
Vol. III page 142 lines 2 and	(c) that the Appellant himself did not have the money to redeem.

18. Zimmern J. also referred to the Appellant's unsuccessful attempts to re-finance the loans by an advance from a C.C. Lee & Co., and to a letter dated 5th April 1966 which the Appellant wrote to H.E. The Governor. In this letter the Appellant appealed for help after stating inter alia "...as a result of the failure of some local banks last year, I have in consequence been very much effected (sic) since the property had been mortgage to a private party in order to carrying on the completion of the building. As the premises are now ready for occupation and although some of the flats have been disposed of but due to the difficulty in obtaining buyers for the rest, I have been considerably embarrassed by my inability to liquidate the loan amounting to approximately HK $1,500,000 under mortgage. In view of this distressing situation I fear that if the loan falls due for payment in a few days the property will, inevitably fall into the hands of the mortgagees and may have to be auctioned. Under these circumstances my investment would be wiped out......". (Vol. IV page 115) (10, 20, 30)

19. The appeal to the Governor produced no results, and the Appellant then apparently approached the Wing On Life Assurance Co. Limited "Wing On") and asked for a loan of $1.5 million for one year at 1.2% per month, with provision enabling him to redeem after 6 months or upon paying 6 months' interest. By a letter of 26th April 1966 Wing On stated that they accepted his proposal "in principal" (sic), but asked that the Appellant should give a definite reply and furnish deeds etc. within 7 days. This proposal came to nothing. (Vol. IV page 265) (40)

20. At trial the Appellant testified that he had shown this letter from Wing On to the 1st and 2nd Respondents and had asked for a transfer of the mortgage to Wing On, protesting that the 1st Respondent had demanded too large a sum, that his

debt was only slightly over $1.4 million, and that the $1.5 million obtainable from Wing On was ample to cover the transfer.

21. However, Zimmern J. disbelieved the Appellant's evidence on this point. He found that the letter had never been shown to either the 1st or 2nd Respondent, and also that no dispute had arisen at that stage as to the accounts.

Vol. III page 14 line 35 to page 143 line 6

10 22. The Appellant also gave evidence of an alleged offer of loan for $1.5 million which he received from a Mr. Kwok, but no explanation was given as to why this fell through. He also gave evidence that he had approached certain banks "but those approaches were all fruitless". There was also in evidence a letter dated 21st June 1966 to the Appellant's Company, from The Hong Kong and Shanghai Banking Corporation, in which they pointed out that an almost identical 20 request for finance had been made on a different letter heading to their subsidiary and that (like their subsidiary) they were not prepared to take over the existing mortgage.

Vol. I page 163 line 22 to page 164 line 12

Vol. I page 165 lines 10 to 12

Vol. IV page 129

THE SALE

23. The principal and interest due under the Mortgages remained outstanding after 29th May 1966 and the 1st Respondent proceeded to make arrangements to sell the property. Zimmern J. found that the 1st Respondent was highly 30 professional and timed the moment to exercise the power of sale to perfection, i.e. after the building had been completed, the occupation permit issued, and the last debt to the contractors paid. As Zimmern J. had already pointed out, the 1st Respondent had already extended several acts of grace to the Appellant and had, without any obligation, agreed to pay off the two outstanding contractors' bills (see paragraph 14 above).

Vol. III Page 143 lines 7 to 14

40 24. The 1st Respondent gave unchallenged evidence that he took advice from a Mr. Liv of his Solicitors, (Johnson Stokes & Masters) as to the proper method of sale, and was advised that a sale by public auction with a reserve was a fairer method of sale than a sale by private treaty.

Vol. II page 18

Vol. III page 143 lines 26 to 30

25. JSM caused particulars and conditions of

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Vol. IV pages 118 to 123	sale dated 9th June 1966 to be printed with a view to a sale by public auction on Friday 24th June 1966. Zimmern J referred to these particulars and conditions and also to the fact that the auction was prominently advertised in both the Chinese and English press, and correctly held that "All this was quite unimpeachable".
Vol. IV pages 127 and 128	26. On 17th June 1966 the Appellant wrote a letter to the 1st and 2nd Respondents. In it he stated "..... the flats are not saleable. Enormous amounts of money has been borrowed from you but the principal and interest cannot be repaid by due date.... the matter has been delayed repeatedly.... Now the properties shall be auctioned on the 24th June of this year... I beg you to extend your hand of sympathy ... Now I have a small request to make to you, that I will assign all the flats unsold to you. But I hope that after you have sold all the flats, the proceeds will be used to defray the principal and interest and the balance will be given back to me".
Vol. III page 143 lines 21 to 25	This letter was described by Zimmern J. as "a pathetic letter... in which /the Appellant/ begged the 1st Respondent to sell flat by flat", and was also referred to by Zimmern J. later in his judgment when he stated that "The /Appellant/ had begged the 1st Respondent to sell unit by unit but he had refused". The letter was not a
Vol. III page 149 lines 31 to 33	request to exercise the power of sale flat by flat, but rather a request to refrain from exercising the power of sale at all.
Vol. I page 138 line 11 to page 140 line 43	27. In cross-examination the Appellant stated that he had approached Mr. Liv and told him that he would suffer a lot from an auction as there would be nothing for him (left over). The letter was then written, apparently at the suggestion of Mr. Liv, to ask as a favour, that the plans for an auction be dropped. The 1st Respondent stated in chief that the Appellant came and asked him not to put the property up for auction and that he (the
Vol. II page 16	Appellant) be allowed to (continue to) sell the units but that he (the 1st Respondent) had refused this request on the basis that interest was in arrear, the principal unpaid, and the political situation was unsteady.
	28. There was no evidence that anyone at the time suggested or contemplated either that there should be a sale by auction of the individual flats, or that such an action might be practicable or produce more in the aggregate (over broadly the same timescale) than an auction of the lots as a whole.

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The Appellant's approaches to the 1st Respondent in reality constituted a final and last-minute attempt to gain further time by requesting the 1st Respondent to refrain from realising his security. Zimmern J. rightly held that the 1st Respondent was entitled to sell and to refuse to postpone the sale and accordingly in the light of all the evidence ought to have held that the 1st Respondent was entitled to refuse the requests of the Appellant. (Vol. III page 143; Vol. III page 143 lines 15 to 25 and p. 149 lines 31 to 33)

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29. In his judgment Zimmern J. referred to the evidence given by the 1st Respondent as to how he calculated the value of the property to be $1.2 million and fixed the reserve at that figure. (Vol. III page 143 line 39 onwards) The learned Judge then referred to a board meeting of the 3rd Respondent company held on 20th June 1966. The 3rd Respondent was a company incorporated on 29th December 1964 and whose directors consisted of the 1st and 2nd Respondents and their eldest son, all of whom attended the first meeting of directors held on 20th April 1965 (by which stage the three directors each held on 20th April 1965 (by which stage the three directors each held 50 shares and a total of 40 shares were held by the other three children). (Vol. IV page 149; Vol. II page 39; Vol. IV page 229) Zimmern J. was thus incorrect in stating in his judgment that the shareholders were the 1st and 2nd Respondents and their eldest son, and indeed on 15th October 1966 it was resolved to issue further shares, namely 100 to ths 1st Respondent, 200 to the 2nd Respondent, 150 to their eldest son and a total of 360 to the other three children. (Vol. III page 144 lines 35 to 38; Vol. IV page 237)

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30. The board meeting was held 4 days before the date fixed for the public auction, which (as the learned Judge had already rightly held) had been prominently advertised in both the Chinese and English press and prepared for in a manner which was quite unimpeachable. The Minutes of the board meeting were in evidence, and they show that the 2nd Respondent was authorised to attend and bid up to $1.2 million for the property on behalf of the 3rd Respondent Company. (Vol. IV pages 234 and 235)

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31. On the day of the auction the auctioneer was informed of the reserve price. (Vol. III page 145) At the advertised time he mounted the rostrum, read the particulars and conditions of sale to those present, and announced the reserve of £1.2 million. The Appellant himself was present and Zimmern J. found that this was the first time he learned of the reserve.

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32. Despite the fact that other persons were present and that the auction had been prominently advertised, no bid was made other than the bid of $1.2 million which the Appellant described as being made "eventually" by the 2nd Respondent. This was the bid made on behalf of the 3rd Respondent. The sale was completed on 23rd July 1966 by an Indenture of that date made between the 1st Respondent as the vendor, in exercise of his power of sale as mortgagee, and the 3rd Respondent as the purchaser. The Indenture acknowledged the receipt of $1.2 million as the purchase price (and the Appellant as the mortgagor was duly credited with the receipt thereof). The purchase price was in fact left outstanding as between the 1st and 3rd Respondents.

Vol. I page 147 lines 11 to 27
Vol. IV pages 59 to 77

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THE PROCEEDINGS

33. The proceedings were commenced in 1966 and eventually came on for a hearing lasting 23 days in 1978 and 1979 before Zimmern J. The proceedings were conducted by the Appellant as the Plaintiff on his counterclaim, and the pleadings consisted of:

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(a) a Re-Amended Counterclaim of the Appellant; and

Vol. I pages 24 to 28

(b) a Re-Amended Statement of Defence to Counterclaim of the 3 Respondents.

Vol. I pages 21 to 23

34. The parties prepared for use at trial a document entitled "Agreed Issues", which is set out in full by Zimmern J. in his judgment. He stated that this document alone showed some of the unnecessary skirmishing that had taken place, and the Respondents accept that the only relevant Agreed Issue on this appeal is No. (1), namely "whether the sale was a proper sale or whether, in equity, it was a sale which can be set aside and/or damages awarded for collusion and bad faith (equitable fraud) and or negligence in relation to the sale".

Vol. IV pages 302 and 303
Vol. III page 137

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35. For the reasons set out in his judgment Zimmern J. answered Agreed Issue (1) in favour of the Appellant, but the other 4 Agreed Issues were answered in favour of the Respondents.

Vol. III pages 135 to 151

36. The parties had prepared a document entitled "Agreed Facts" relating to other sales involving the Respondents. The Appellant sought to rely

Vol. IV pages 304 to 309

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on this as evidence of actual fraud or common design.

37. However, as to actual fraud the Appellant applied for but was refused leave to Zimmern J. to amend his pleadings so as to allege actual fraud; and as to common design Zimmern J. found that there was no evidence to support it.

Vol. III page 97 line 8 to page 99 line 27 and page 136 lines 29 to 41

38. On appeal to the Court of Appeal the Appellant sought leave to introduce the question of actual fraud by introducing the Agreed Facts by way of a proposed amendment to paragraph 4 of his Notice of Appeal. However, the Court of Appeal in its judgment dated 8th October 1980 delivered by Huggins J.A. refused such leave, and this decision is not the subject matter of the present appeal.

Vol. III pages 169 to 173

Vol. III pages 174 to 175

39. At the same time as seeking leave to introduce the question of actual fraud, the Appellant also sought leave to challenge the finding of the learned Judge that the manner in which the public auction had been advertised was "quite unimpeachable". This was done by way of a proposed amendment to paragraph 5 of his Notice of Appeal; and in the same judgment as that referred to in paragraph 38 above the Court of Appeal refused such leave on the basis that it raised a point not pleaded or opened or investigated at trial. This decision is not the subject of appeal.

40. Accordingly, it is common ground first that Zimmern J.'s finding that the public auction was advertised in a quite unimpeachable manner stands, and, secondly, no case of actual fraud can be relied on.

41. For reasons which will be analysed later, Zimmern J. came to the conclusion:

(a) that the 1st Respondent had acted in bad faith and unfairly to the Appellant;

(b) that the 1st Respondent was accountable to the Appellant for the difference between the sale price of $1.2 million and the sum of $2,150,000 which he found to be the "true market price"; and

(c) that the sale was not a proper sale.

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42. However, Zimmern J. held that it would be wrong to set aside the sale after the lapse of 13 years, By his Order dated 15th May 1979 Zimmern J. dismissed the claim against the 2nd and 3rd Respondents, but gave judgment for the Appellant against the 1st Respondent for :

Vol. III pages 152 and 153

(a) $950,000;

(b) interest thereon at 1.2% per month as from 1st July 1966; and

(c) 50% of his costs.

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Vol. III pages 157 and 168

43. The 1st Respondent appealed against this Order on the grounds set out in his Supplementary Notice of Appeal, and each of those grounds is adopted.

44. The Appellant cross-appealed against the refusal to hold the sale void, or to set it aside, and against the award of only 50% of his costs.

45. Although the Appellant's proposed Amended Notice of Appeal (introducing other matters) has been included in the present Record, it has already been pointed out at paragraphs 36 to 40 above that most of these proposed amendments were not allowed and are not the subject matter of the present appeal.

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46. The substantive appeal and cross-appeal having duly come on for hearing before the Court of Appeal, the leading reserved judgment was delivered by Huggins J.A. on 26th November 1980. The Court of Appeal dealt fully with the various grounds of objection taken by the Appellant to the sale, and allowed the appeal of the 1st Respondent with costs there and below.

Vol. III pages 176 to 194

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Vol. III pages 195 and 196

47. The Appellant's cross-appeal was dismissed, but on 15th January 1981 the Court of Appeal granted the Appellant leave to appeal.

GROUNDS OF OBJECTION

Vol. III pages 135 to 151 and p. 176 to 194

48. The specific grounds of objection made by the Appellant to the sale are fully set out in the judgments of Zimmern J. and of the Court of Appeal and can be summarised under the following headings.

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(1) No Sale

49. The first ground of objection was that there

was never any real sale at all. The 3rd Respondent, it was said, was acting solely as agent for the 1st Respondent, who was therefore selling to himself and not to the company in which he admittedly had an interest.

50. However, the Respondents respectfully submit that:

(a) it is impossible to ignore the separate corporate identity of the 3rd Respondent, since a sale by a mortgagee to a corporation of which he is member is neither in form nor in substance a sale to the mortgagee himself (Farrar v. Farrars Ltd. (1889) 40 Ch. D. 395, 409);

(b) such an allegation, in order to succeed, must be based on an allegation and proof of actual agency going beyond the mere fact of partial beneficial ownership or control of a private or indeed of any company Ebbw Vale U.D.C. v. South Wales Traffic Licensing Authority /1951/ 2 K.B. 366, 371-2;

(c) although agency was admittedly allowed in paragraph 7 of the Re-Amended Counterclaim, no particulars in support thereof were given, and this allegation was rightly omitted from the statement of Agreed Issues upon which the trial was conducted; and

Vol. I pages 25 & 26

Vol. III page 137

Vol. IV pages 302 & 303

(d) Huggins J.A. was right in the reasons he gave for rejecting this particular ground of objection, which was not supported by any evidence.

Vol. III pages 177 & 178

(2) Desire of the 1st Respondent to purchase

51. The second ground of objection to the sale was one which was not pleaded but which Zimmern J. raised in his Judgment, namely, an allegation that the 1st Respondent desired the property for "his" company. In his Judgment Zimmern J. referred to the 1st Respondent's admission under cross-examination that "he wanted the property at that price for his company", and that "he was minded to acquire the property for his company for the purpose of retail i.e. selling unit by unit" and relied in part on that evidence for his finding that the 1st Respondent had acted in bad faith.

Vol. III page 149 lines 44 to 46

52. However, apart from confirming the fact that

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it was for the 3rd Respondent and not himself that the 1st Respondent desired the property, the Respondents respectfully adopt the reasoning of Huggins J.A. in his Judgment that such a finding in no way indicates that the 1st Respondent was acting otherwise than bona fide in the exercise of his power of sale; and that provided his actions were proper his motives were immaterial.

Vol. III page 179 lines 1 to 8

(3) Selling as a whole

53. The third ground of objection to the sale was that the 1st Respondent did not take professional advice as to whether a better price might be obtainable by auctioning unit by unit as opposed to auctioning the property in one lot as a whole. Again, this ground of objection was not one which was raised in the pleadings or in the statement of Agreed Issues, but nevertheless Zimmern J. in his Judgment stated that the Appellant "... had begged the 1st Respondent to sell unit by unit and he had refused. Why did the 1st Respondent not at the very least take professional advice to see in the circumstances then prevailing whether a better price was obtainable by auctioning off unit by unit as against what was in fact the sale of an odd /sic/ lot of a building wholesale. There was here a conflict of interest between the Mortgagor and the Mortgagee and in my view he intentionally sacrificed the interests of the /Appellant/ for his own gain ..."

Vol. III p. 149 lines 31 to 42

54. The Respondents' submission on this particular objection can be summarised as follows.

55. First, it was not raised by the pleadings or Agreed Issues and involves allegations both as to fact and as to valuation and expert evidence which were not (and in the circumstances could not have been) properly investigated at trial, and which would not have in any event been established as well-founded.

56. Secondly, the conclusion drawn by Zimmern J. (namely that there was a conflict of interest whereby the 1st Respondent intentionally sacrificed the interests of the Appellant for his own gain):

(a) does not follow from the premise, which consists of mere speculation as to why the 1st Respondent did not take professional advice as to the desirability of selling in lots; and

(b) must be largely coloured by Zimmern J's feeling that it was wrong for the 3rd Respondent to bid, even though the sale was properly timed, the auction was prominently advertised, and no-one else was prepared to bid.

57. It might be added that one reason why one can only speculate as to why the 1st Respondent did not take professional advice as to the desirability of selling in lots was because he was not asked since the matter was not in issue at trial.

58. Thirdly, it was common ground that the Appellant's own policy of selling in lots had proved unsuccessful and had led to substantial arrears and delays.

59. Fourthly, as mentioned at paragraphs 26 to 28 above, the request made by the Appellant on about 17th June 1966 for a sale of individual flats was not a request that the flats should be auctioned individually. It was an appeal for a yet further extension of time on the basis that the 1st Respondent should refrain for the time being from realising his security at all.

60. Fifthly, the only contemporaneous documentary evidence as to the desirability of selling the flats individually was that contained in the letter dated 5th April 1966 from the Appellant to the Governor (referred to at paragraph 18 above) in which he referred to the difficulties in obtaining buyers for the individual flats. He stated that if there were an auction his investment would be wiped out, and there was no suggestion that an auction of individual lots would be desirable or produce any better result.

61. The only other contemporaneous documentary evidence is the Appellant's letter of 17th June 1966 to the 1st and 2nd Respondents (already referred to at paragraphs 26 and 59 above) in which it is stated that "...the flats are not saleable".

62. Sixthly, although Zimmern J. found (on what the Respondents contend to be wholly insufficient evidence) that the "true value" of the property was $2,150,000, the fact remains that the Appellant's own (unsuccessful) proposals at the time were to re-finance the loans as a whole, given the unsaleability of the individual units.

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63. Seventhly, the burden lay upon the Appellant to allege and to prove:

(a) that sales unit by unit could have been achieved within a reasonably short time and would be likely to have produced a greater aggregate price than could be achieved by a sale as a whole;

(b) that a competent adviser or mortgagee would have appreciated this at the time; and

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(c) that the 1st Respondent was not merely mistaken but was at the least negligently mistaken in not appreciating this or in not taking specific advice.

Vol. III page 184 line 44 to page 186 line 18

64. However, there was no allegation or indeed evidence sufficient to support any such contentions on the part of the Appellant; and Huggins J.A. was right in the reasons which he gave for rejecting the objection taken on this ground.

(4) Reserve price too low

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Vol. III page 149 lines 3 to 24

65. The fourth ground of objection to the sale was that the reserve price was fixed capriciously and too low. It is true that the reserve price of $1,200,000 HK (the price at which the property was in fact sold) was fixed by the 1st Respondent, and in his Judgment Zimmern J. referred to the evidence that the 1st Respondent wanted the property at the reserve price for his company; stated that a reserve price "must bear some relationship with the property's true value and not /be/ capriciously fixed otherwise it serves no purpose"; and held that the reserve price had been capriciously fixed.

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66. Quite apart from the fact that the fixing of the reserve price was not a matter which was specifically raised either on the pleadings or in the Agreed Issues, this line of reasoning is open to several objections.

Vol. III page 150 lines 16 to 21

67. In the first place, it may to some extent have been based on the view of Zimmern J. (unsupported by any evidence) that the price at which property is sold at a properly advertised public auction is not evidence of the "true market price" of the property.

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68. However, this objection is inconsistent with :

(a) the evidence of the 1st Respondent that he was advised that a sale by public auction with a reserve price was fairer than a sale by private contract (which evidence was recited by Zimmern J. and not rejected);

(b) the finding of Zimmern J. that the auction was properly timed and advertised in an unimpeachable manner;

10 (c) the (correct) finding of Zimmern J. that "A sale by public auction is a mode of sale whereby intending purchasers may fairly equally and openly compete by bidding for the subject matter of sale. If the sale is subject to a reserved price that must be announced but whether the price is to be announced or not at the onset of the auction is a matter for the vendor"); and

Vol. III page 148 lines 21 to 28

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(d) the fact that there was not and could not have been any suggestion either in the pleadings or in the Agreed Issues that a sale by a properly and prominently advertised public auction was in itself an improper mode of sale.

69. Insofar as Zimmern J. based his finding as to the "capricious" way in which the reserve price was fixed upon his finding that the First Respondent
30 wanted the 3rd Respondent to acquire the property at such price, the learned Judge (having disallowed any allegation of actual fraud) did not reject, and gave no reasons which justified rejecting, the evidence of the 1st Respondent as to how he had in fact come to fix the reserve price.

Vol. III page 143 line 39 to page 40 line 9

70. Insofar as Zimmern J. held that the fixing of the reserve price was "capricious" in that it did not bear any or any sufficient relationship to the "true value" of the property, the learned Judge
40 did not explain how the fixing of the reserve price prevented the true market value from being achieved at the auction. The auction was properly timed and advertised, and anyone was free to bid.

71. It was never alleged and in the Respondents' submission it is not the law that there was any duty to fix a reserve price at all. The Respondents

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Vol. III page 179 line 22 to page 181 line 17

accordingly respectfully adopt the reasoning of Huggins J.A. on this aspect of the matter in support of their contentions that:

(a) there was no evidence to justify the finding that the reserve price was capriciously fixed;

(b) it is a reasonable inference from the fact that no one else bid, that the reserve price was not fixed too low; and

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(c) there was no evidence of any impropriety or negligence on the part of the 1st Respondent in fixing the reserve price.

(5) Disclosure of the reserve price

72. The fifth ground of objection was that the reserve price was known to the 3rd Respondent in advance of the sale whereas others (including the Appellant) were not informed of it until the start of the auction.

Vol. III pages 148 to 150

73. In his judgment Zimmern J :

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(a) held that in the commercial world "advance knowledge is knowledge indeed";

(b) remarked that the Appellant should have been informed in advance if anyone was to be; and

(c) held that the 3rd Respondent went to the auction in a privileged position, knowing the amount of the reserve in advance.

74. The Appellant himself was not in a financial position to have bid at the auction, nor had he inquired what the reserve price would be. No criticism could reasonably be or was made of the fact that the reserve was disclosed at the auction; nor was it explained how the advance knowledge of the 3rd Respondent (thereby allegedly giving it a privileged position) resulted in a lower price being obtained than if the 3rd Respondent had simply attended like the other potential bidders and learned at the auction itself.

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Vol. III page 181 line 19 to page 182 line 23

75. The auction was a prominently and properly advertised public auction, and there was no suggestion that the amount of the reserve should have been announced in advance. This being so,

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it is difficult to see what detriment to the success of the auction or to the interests of the Appellant could have been caused by the advance knowledge of the Third Respondent. The Respondents therefore respectfully submit that Huggins J.A. was right in the reasons he gave for rejecting this particular ground of objection, which was not specifically pleaded or mentioned in the statement of Agreed Issues.

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(6) Bid by Second Respondent

76. The sixth ground of objection to the sale related to the fact that the 2nd Respondent acting on behalf of the 3rd Respondent bid at the auction.

77. Although this objection was not specifically pleaded or mentioned in the Agreed Issues, Zimmern J. in his Judgment stated "Let me also add this, the sight of a wife bidding at an auction sale ordered by the husband Mortgagee might well deter others from entering".

Vol. III page 150 lines 21 to 24

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78. The observation was mere speculation and had no factual basis in the evidence. During the course of the trial Zimmern J. had asked how those present at the auction could have known that the vendor was the 1st Respondent, and the Appellant's Counsel had accepted that (apart from the mortgagor) they would not have done. The Appellant's Counsel expressly stated that the only point sought to be made was that the Appellant himself would have known that the 2nd Respondent was bidding; but since the Appellant had himself no intention of bidding, the Respondents respectfully submit that the observations of Zimmern J. on this point were wholly unsupported by any evidence.

Vol. II page 63 line 44 to page 64 line 16

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79. The Respondents further respectfully adopt the reasoning of Huggins J.A. on this aspect of the case.

Vol. III page 186 line 20 to page 187 line 24

(7) Payment by 3rd Respondent

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80. A seventh ground of objection to the sale was that the 3rd Respondent was in a privileged position since it knew that the mortgagee/vendor would not insist on actual payment but would allow the purchase to remain outstanding.

Vol. III page 150 lines 13 and 14

81. Again, this objection was not specifically pleaded or mentioned in the Agreed Issues. A

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mortgagee is, in law, entitled to leave the purchase money outstanding (as against the purchaser) provided that he gives proper credit in taking the accounts as against the mortgagor.

82. Furthermore, the fact that a bidder knows that he himself (unlike other bidders) will not have to produce ready cash for increasing his bid rather than depressing it.

Rescission or damages

83. The 3rd Respondent submits that there was no sufficient case shown to justify setting aside the sale in the absence of (a) a finding that the sale was not in fact a sale at all or (b) an allegation and finding of actual fraud on the part of the 3rd Respondent. In the absence of such findings, the 3rd Respondent submits that it is entitled to rely upon the provisions for the protection of purchasers contained in the Mortgages, and that there is no reason why the Appellant should be entitled to depart from his express agreement that his remedy would be in damages only (i.e. as against the 1st Respondent). 10 20

84. Insofar as the question of rescission is a matter of discretion, the Respondents respectfully adopt the passages in the Judgments of Zimmern J. and of Huggins J.A. and would only add that no indication has been given by the Appellant why damages would not be an adequate remedy in any event.

Vol. III page 150 lines 29 to 31 and pages 191 and 192

85. The appeal ought in any event to be dismissed as against the 2nd Respondent since actual fraud is not alleged against her; the claim for damages for fraud and conspiracy was excluded from the Re-Amended Counterclaim; and it was not alleged that she owed the Appellant any duty of care. 30

Vol. III page 28

86. In paragraph (1) of the prayer for relief at the end of the Re-Amended Counterclaim, an Order is sought setting aside the sale and for an account of the rents and profits which the three Respondents have derived from the property. There is no suggestion that the 2nd Respondent has or could have received any rents or profits save in her capacity as one of the shareholders of the 3rd Respondent, and the 2nd Respondent submits that this claim is a further instance of the Appellant's disregard of the separate corporate identity of the 3rd Respondent. 40

Vol. I page 28

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Measure of damages

87. The learned Judge, having directed himself that the price paid at a properly advertised public auction was not evidence of the true market price of the property, went on to hold that the "true value" at the time was $2,150,000 HK. — Vol. III page 150 line 32 to page 151 line 9

88. The Respondents respectfully adopt the criticisms of this finding made by Huggins J.A. in his Judgment, and submit that the Appellant has in any event failed to discharge the onus upon him of proving either the existence or extent of any damage. There is no such thing as the "true value" of property in the abstract without regard to market conditions, and in disregarding the market price actually achieved at a properly and prominently advertised public auction the learned Judge misdirected himself. Further he failed to pay sufficient regard to the fact: — Vol. III page 187 line 26 to page 189 line 23

(a) that 1965 and 1966 were, as he had found, bad years for the property market;

(b) that the Appellant had had ample opportunity to sell the property (either by lots or as a whole) but had failed;

(c) that the Valuation dated 1st June 1970 prepared by Harriman Realty Co. Ltd. ("Harriman") and supported in evidence by a Mr. Hsu was prepared simply by adding up the estimated vacant possession value of the individual units as at 24th June 1966, as if they could all have been sold at such a price as at that date, without proper regard as to whether and when such an aggregate price could in fact be obtained; — Vol. IV pages 266 to 273

(d) that Harriman had stated in a letter dated 4th May 1970 that due to the decline of real estate dealings in 1966 they had prepared their retrospective Valuation without the support of any records; and that Harriman did not even know that 36 of the units had in fact been sold in 1965 and 1966, or the prices; — Vol. IV page 144

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(e) that the letter dated 26th April 1966 (referred to at paragraph 19 above) from Wing On had in fact come to nothing, and Wing On themselves did not trouble to make any bid;

(f) that the Appellant himself had rightly concluded that individual sales of Units could not be arranged in the short term and that a sale by auction would result in the loss of his investment; and 10

(g) that the best evidence of market value is what the market actually pays at a properly advertised auction, at which the market can make its own assessment as to value (taking into account the saleability and value of the individual units comprised in the lot).

89. Alternatively, the Respondents submit that any question of the quantum of damages should be referred to an Inquiry. 20

90. In any event the Respondents submit that the rate of interest was unreasonably high and the period for which it was ordered unreasonably long and that the said rate and the said period ought to be reduced or at least referred to an Inquiry.

Vol. III page 194 lines 8 to 24

91. As regards the question of costs, if this appeal were to succeed, the Respondents respectfully adopt the remarks of Huggins J.A.

92. The Respondents therefore humbly submit that this Appeal should be dismissed for the following amongst other 30

R E A S O N S

(1) BECAUSE the sale to the 3rd Respondent was a genuine sale and the 3rd Respondent is, if necessary, entitled to rely upon the provisions relating to the protection of purchasers contained in the Mortgages;

(2) BECAUSE the Appellant failed to allege and prove any breaches of duty on the part of any of the Respondents or any consequential loss suffered by the Appellant; 40

(3) BECAUSE the evidence, on the contrary, established that there were no breaches of duty on the part of any of the Respondents or any consequential loss suffered by the Appellant;

(4) BECAUSE the findings of Zimmern J. adverse to the Respondents were wrong and unsupported by/or contrary to the weight of the evidence;

10 (5) BECAUSE the adverse findings of Zimmern J. were wrong for the reasons set out herein and in the 1st Respondent's Supplementary Notice of Appeal to the Court of Appeal; and

(6) BECAUSE the unanimous reserved Judgment of the Court of Appeal was right.

RICHARD SCOTT

OLIVER ALBERY

No. 39 of 198[illegible]

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL HONG KONG

B E T W E E N :

TSE KWONG LAM — Appellant

- and -

(1) WONG CHIT SEN
(2) CHING WAI SHORT (or SHOOK)
(3) CHIT SEN COMPANY LIMITED

Respondents

CASE FOR THE RESPONDENTS

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