

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

TSE KWONG LAM *Appellant*

AND

WONG CHIT SEN *1st Respondent*

CHING WAI SHORK (or SHOOK) *2nd Respondent*

CHIT SEN COMPANY LIMITED *3rd Respondent*

RECORD OF PROCEEDINGS

VOLUME III

HASTINGS & CO.,
Solicitors for the Appellant
JOHNSON, STOKES & MASTER
Solicitors for the Respondents

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

TSE KWONG LAM *Appellant*

AND

WONG CHIT SEN *1st Respondent*

CHING WAI SHORK (or SHOOK) *2nd Respondent*

CHIT SEN COMPANY LIMITED *3rd Respondent*

RECORD OF PROCEEDINGS

In the Supreme Court of Hong Kong

High Court

Action No. 2102 of 1966

*In the Supreme
Court of
Hong Kong
High
Court*

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

MISCELLANEOUS PROCEEDINGS NO.2102 OF 1966

Defendants'
Evidence

BETWEEN

TSE Kwong Lam

Plaintiff

and

No.6
D.W. 3
LIU Kwing-wah
Examination

WONG Chit-sen
CHING Wai Shok
(or Shook)

1st Defendant

2nd Defendant

CHIT Sen Co. Ltd.
(Counterclaim)

3rd Defendant

10

Transcript of the shorthand notes taken by
the Court Reporters of part of the evi-
dence in the above Proceedings.

DEFENDANTS' EVIDENCE (CONTINUED)

D.W.3 - LIU Kwing-wah Sworn in English:

XN. BY MR. JACKSON-LIPKIN

- 20 Q. Mr. LIU, you are quite content to give your
evidence in English?
A. Yes.
Q. And are those your full names, LIU
Kwing-wah?
A. Yes.
Q. Any other names?
A. No.
Q. Where do you live?
A. In 222, Prince Edward Road, 8/F., Kowloon.
Q. Are you in the employ of Messrs. Johnson,
Stokes & Master, solicitors?
30 A. Yes.
Q. And have you been in that employ since
April of 1941?
A. Yes.
Q. In what capacity are you employed now?
A. I am now the head of the conveyancing
department of Johnson, Stokes & Master.
Q. In the years 1963 to 1966, in what capacity
were you employed?
A. The same capacity.

Q. Can you remember when you first met Mr. WONG Chit-sen?
A. I remember in the early 1950s.
Q. Can you remember when you first started to act for him?
A. I remember a few years later, somewhere around 1955 or 1954. I don't exactly remember.
Q. And have you acted for him on and off since then?
10 A. Sometimes.
Q. Through the years from that time onwards?
A. Yes, if any transactions to be put through in the office, therefore he would come to see me in the first place. I mean, maybe sometimes he may have done through other offices.
Q. Anything through J.S.M. was cancelled through you?
A. Yes.
20 Q. You know that we are concerned here today with a mortgage of 52 and 54 Cheung Sha Wan Road?
A. Yes.
Q. Can you remember when you first consulted in relation to that?
A. Some time in November, I believe 1963.
Q. How far had arrangements gone by the time he consulted you?
A. I seem to remember it is a matter of one or
30 two weeks' time but I do not exactly remember the time.
Q. I'm sorry, Mr. LIU, you misunderstood me.
A. Yes.
Q. When he consulted you had the terms already been agreed?
A. Yes.
Q. So for what purpose did he consult you?
A. He asked me to draw up a building mortgage for 52-54 Cheung Sha Wan Road.
40 Q. And did you do so?
A. Yes, I did.
Q. Were you instructed on behalf of Mr. TSE Kwong-lam, that is the mortgagor?
A. He also came to our office for the purpose of the mortgage.
Q. Mr. LIU, just tell my Lord, is there anything unusual in Hong Kong in a firm of solicitors acting for both mortgagor and

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

10

20

30

40

mortgagee in drawing up the mortgage?

A. It is not unusual. It is quite normal. I may add that especially in paying off of the previous mortgages, therefore it would be convenient for the mortgagor to employ the same solicitor as the mortgagee for the purpose of payment off of the previous mortgages.

Q. I don't know if you can answer this, Mr. LIU. If you can't please say so. Did Mr. TSE give you any impression of being compelled to go to you as opposed to some other solicitor?

A. No.

Q. Now apart from the terms of payment and repayment is there anything particular about this mortgage?

A. No, because before I draw up the building mortgage I have to take instructions from both the mortgagor and the mortgagee.

Q. I mean in its form is there anything unusual about it?

A. No.

Q. Were you told through whom monies paid on the mortgage would be paid? Through whose hands would they pass?

A. I beg your pardon? I don't seem to - sorry.

Q. It is my fault. Was Johnson, Stokes & Master going to pay any part in the handling of the monies used for repayment of the mortgage?

A. Yes.

Q. Who instructed you to that effect?

A. You mean at the beginning of the building mortgage?

Q. At the beginning yes.

A. At the beginning the mortgagee will pay us the money regarding the building mortgage. Then we will see that the payment to be made or repayment, shall I say, of the previous mortgages, and the balance, if any, would be handed over to the mortgagor.

Q. By whom?

A. By Johnson, Stokes & Master.

Q. Was there anything unusual about that?

A. No.

Q. Now what about payments to building contractors under architect's certificates?

- Who was going to arrange for those payments?
- A. Also, Johnson, Stokes & Master.
- Q. Is there anything unusual about that?
- A. No.
- Q. Did Mr. TSE ever make any complaint to you about Johnson, Stokes & Master acting in that respect?
- A. No.
- 10 Q. Now what was the arrangement about pre-sales of units in the building that was going to be erected? What was the arrangement about receipt of monies from prospective purchasers?
- A. Before we draw up the agreement for sale and purchase, normally we adopt the land office form which is used for applying for consent to sell flat by flat. Therefore, if there is a building mortgage or any other kind of mortgages, therefore the deposit which we receive from the purchasers would be utilized for payment of the principal under the building mortgage.
- 20 Q. Are you describing normal practice or what happened in this case?
- A. Yes.
- Q. Which or both?
- A. What do you mean?
- Q. What you have just said to my Lord, is that normal?
- 30 A. Yes, normal practice.

COURT: Was there a land office form in 1963?

A. Yes.

COURT: There was?

- A. Yes, there was. I think the purpose of that form is to protect the purchasers.
- Q. What about the receipt of money, who was to receive the moneys from the perspective purchasers?
- A. The money would be paid by the purchasers to Johnson, Stokes.
- 40 Q. With whom was that arrangement made?
- A. With both the vendor and the purchaser.
- Q. Now, when you say the vendor and the purchaser, to whom were you referring as

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No. 6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- the vendor?
- A. The plaintiff in this case.
- Q. Mr. TSE?
- A. Yes.
- Q. Mr. LIU, his Lordship has asked us to call Mr. TSE the claimant, so would you mind, please, in your evidence refer to him as the claimant?
- A. I am sorry.
- 10 Q. May he be shown bundle A, please? Will you please look at page 16 to 30?
- A. Yes. 16 means page 1 of the agreement?
- Q. That's right. And it goes right up to 30?
- A. Yes.
- Q. If you look at 30 you'll see it is printed by the standard press and it's got the name of your firm on it.
- A. Yes.
- Q. Is that the type of form that you were telling my Lord about a moment ago?
- 20 A. Yes.
- Q. Anything unusual about it?
- A. No.
- Q. Will you please turn to page A26?
- A. Yes.
- Q. A26, that is clause 21 at the top of the page?
- A. Yes.
- Q. Somebody has amended that in typing?
- A. Yes.
- 30 Q. On whose instructions was that amended?
- A. Before the amendment I got instruction from both the claimant in this case and also the purchaser, and I also may add with the consent of the mortgagee prior to the entry of this agreement.
- Q. Is there anything unusual about the clause 21 as it appears there?
- A. The only thing unusual is for the receipt of certain amount of deposit and that
- 40 deposit instead of for repayment of the principal under mortgage it would be paid to the vendor in the agreement.
- Q. Will your Lordship give me one moment? I do believe we have exhibited before a schedule. Will you please look at J(D)? My Lord, I am so sorry, I have lost it ...

COURT: Does this document come from the Ronald

LI's report?

MR. JACKSON-LIPKIN: Yes, it is an extract, my Lord, an agreed extract.

Q. And Mr. LIU, I'll come back to this in a moment but in fact a number of such agreement was drawn up, was it not?

A. Yes.

Q. And each provided for a proportion of the purchased price to be paid direct to the claimant?

10

A. Yes. And may I add that before the sale and purchase agreement, it was agreed between the mortgagor and the mortgagee and the claimant, shall I say, and Mr. WONG that one thousand dollars.

Q. Yes. But in fact more was paid, was it not?

A. Yes.

20

Q. I'll come back to that in a moment, if I may. Mr. LIU, have you been told by somebody that Mr. TSE alleges that he instructed Johnson, Stokes & Master against his will?

A. No.

Q. Well, if I tell you that is so, that is the first time you heard of it, is it?

A. Yes.

Q. You said a little earlier that ...

30

COURT: Mr. Jackson-Lipkin, aren't you pitching the ball a bit too high? As I understand Mr. TSE's complaint, as I understand it, it was he who wanted to go to the Woo & Woo for the sale of the flats and Mr. WONG says no.

MR. JACKSON-LIPKIN: My Lord, I am obliged. I'll rephrase that question.

40

COURT: Isn't that so, Mr. Bernacchi? I don't think there is any complaint about that by the claimant that he went to Johnson, Stokes & Master. I think it was only in respect of sale of flats.

MR. BERNACCHI: Yes.

COURT: That is as I understand it.

MR. JACKSON-LIPKIN: I am very much obliged, my Lord.

Q. Mr. LIU, did you know before you heard what my Lord said that Mr. TSE was complaining that Johnson, Stokes & Master acted for both sides in the pre-sale of units?

A. No.

Q. Did he ever complain to you about it?

COURT: Again, that wasn't his complaint. His complaint was that he wanted to go to Woo & Woo but WONG says no. And I have already said openly in this court the reason of WONG's saying no was obvious to me.

MR. JACKSON-LIPKIN: My Lord, then I shan't ...

Q. Now, have you been told, Mr. LIU, that Mr. TSE has complained in this case that he was never given an account of his indebtedness to Mr. WONG Chit-sen?

20 A. No.

Q. Is such a complaint true?

A. Because in each and every transaction we gave him the account, because the account in fact was very simple. In each and every transaction he brought the purchasers in and then he gave us instructions and he knew quite well what money he received and that he also knew that immediately after receipt of deposit and other sums of money those moneys would be paid to the mortgagee.

30

Q. But what about his indebtedness to the mortgagee, did he complain to you that he didn't know how much that was?

A. I say he should know about that because only for dispersing, shall I say, the construction cost and also repayment of principal utilising the deposit and further deposits ...

40

Q. Yes?

A. ... Therefore he should know what amount Johnson, Stokes & Master had paid to the mortgagee and also to the contractors.

Q. How often did he call to see you, Mr. LIU?

- A. In each and every transaction and may be, shall I say, once or twice or even three times a month.
- Q. For what purpose?
- A. For the purpose of the accounts.
- Q. Yes?
- A. Signing of sale and purchase contracts.
- Q. Yes?
- A. And also he brought in the certificates of architects and also the contractor's vouchers so as to see that payment would be made.
- 10 Q. But what did you mean when you said for the purpose of accounts, could you explain that phrase?
- A. The account means that he should know how much he has received and how much Johnson, Stokes & Master paid.
- Q. Well now, you say he should know, did he know?
- 20 A. Yes.
- Q. How did he find out?
- A. Because each and every transaction he took the papers into Johnson, Stokes & Master.
- Q. What about disbursements, was he told of those?
- A. Yes.
- Q. By whom?
- A. By Johnson, Stokes & Master.
- 30 Q. By whom in Johnson, Stokes & Master, tell me?
- A. By me.
- Q. And both as to amount and purpose, the disbursement?
- A. Yes.
- Q. In what manner was he told, orally, in writing or both?
- A. Both in fact.
- Q. So far as writing is concerned, on what did you write?
- 40 A. In each transaction we just gave him at the time of the signing contract just for example, he signed the contract therefore we just gave him the amount which we received and in writing, shall I say, just on a piece of paper.
- Q. I see. And who is 'we'? When you say 'we'...
- A. I always mean my firm. May I just add,

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No. 6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- because apart from myself Johnson, Stokes & Master had an accountant.
- Q. Yes. Who is that?
- A. He is Mr. E. Ali. He is not in the firm now. He is Ebrahim Ali.
- Q. Was the accounting of this mortgage a difficult process?
- A. No.
- Q. Can you think of any reason why Mr. TSE would not be aware of how much had been advanced and how much disbursed?
- 1- A. I don't think so.
- Q. And with an abacus or a piece of paper, would it be difficult to calculate the interest?
- A. No.
- Q. Now, you told my Lord that - My Lord, it was G, not J. Will you please look at this agreed exhibit, G? Now, the amounts paid out to Mr. TSE out of the purchase price and sale of units was certainly in excess of the sum of a thousand dollars you mentioned?
- 20 A. Yes.
- Q. Did Mr. WONG raise any objection to those very large extra sums being
- Q. It amounted in all to some one hundred and forty thousand for the few units that were sold?
- A. Yes.
- 30 Q. Now, shortly after the completion of the mortgage, did Mr. WONG make any complaints to you? Don't say what they were but did he make any complaints to you?
- A. No.
- COURT: What do you mean 'completion of the mortgage'?
- MR. JACKSON-LIPKIN: Of the deed.
- COURT: Execution of the deed.
- 40 MR. JACKSON-LIPKIN: Execution, my Lord.
- A. No.
- Q. Later did he make any complaints?
- A. You mean regarding the mortgage or ...
- Q. Either principal or interest repayments.

- A. Yes, he did.
- Q. Did you speak to Mr. TSE about Mr. WONG's complaints?
- A. Yes.
- Q. Once or more than once?
- A. More than once.
- Q. Where?
- A. In the office of Johnson, Stokes & Master.
- Q. And then eventually in February of 1966 were you instructed to write a letter of demand?
- 10 A. Yes, I did.
- Q. Which you did send out?
- A. Yes.
- Q. After you sent out that letter did you see Mr. TSE?
- A. Yes.
- Q. Do you remember the letter or would you like to be shown it?
- A. Please show me the letter.
- 20 MR. JACKSON-LIPKIN: May he see B32, my Lord?
- Q. Just have a look at it to refresh your money, Mr. LIU.
- A. Yes.
- Q. After sending that did Mr. TSE come to see you?
- A. Yes, he did.
- Q. What about?
- A. He asked me to speak to the mortgagee for an extension of time for payment.
- 30 Q. Anything else?
- A. I remember he also told me he hoped that he can sell more flats in the building so as to enable him to pay off the mortgage.
- Q. And did you communicate those requests to Mr. WONG?
- A. Yes, I did. May I add that in some cases I asked the claimant, Mr. TSE, to speak to Mr. WONG direct rather than through me.
- Q. Yes?
- 40 A. Because I am tired of conveying all sorts of requests for extensions.
- Q. He came to see you very often, did he?
- A. Yes.
- Q. Can you just help me on another matter on this letter. I see that it has both Mr. McElney's initial and your initial on it. How does that come about?
- A. This letter?

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- Q. Yes.
- A. For easy reference. Normally we have an initial of the solicitor and also the initial of the clerk.
- Q. But who drafted the letter when you see those initials, was it your draft or his draft or your draft approved by him or what?
- A. I drafted the letter and Mr. McElney approved before sending it out.
- Q. When Mr. TSE came to see you about this particular letter did he say anything about the figure 76,548.95?
- A. I don't remember frankly because that was long ago.
- Q. If he had complained that the figure was wrong, would you have remembered that?
- COURT: He said he can't remember, Mr. Jackson-Lipkin.
- 20 Q. Mr. LIU, if a client had complained to you that the figures you were demanding and the terms of the exercise of power of sale, what would you have done?
- A. I would ask him to speak to the mortgagee because we are not responsible for the calculation of interest due.
- Q. Yes. Anyway, as a result of your conversation with Mr. WONG and sending Mr. TSE to Mr. WONG, were you instructed to defer exercising the power of sale?
- 30 A. Yes.
- Q. And then in April 1966 were you instructed to send out a formal letter demanding on a due date the repayment of the mortgagee and further charges?
- A. Yes.
- Q. Look at B38, if you want to refresh your memory.
- A. Yes.
- 40 Q. Was that letter drawn in the same way - drafted by you, settled by Mr. McElney and then sent out on instruction?
- A. Yes.
- Q. After you sent that out did Mr. TSE come to see you?
- A. Yes, he did.
- Q. What about?

- A. He simply asked for further extensions and that's all he said to me.
- Q. Nothing else?
- A. Nothing else. And may I add, I always asked him to communicate direct with Mr. WONG because that is not within my power for the extension.
- Q. Now, I know it is a long time ago but did he complain about the figures contained in the letter?
- 10 A. No. Because, may I add, in each and every case I asked him to refer to the mortgagee Mr. WONG.
- Q. So this was just a request asking for indulgence?
- A. Yes.
- Q. Now, I want to take you back to something said a little earlier after the first letter was sent out.
- A. Yes.
- 20 Q. You said that Mr. TSE expressed to you the hope that he could sell more units?
- A. Yes.
- Q. Did he say how he expected to do that?
- A. He said he would try his best to do it because occupation permit had been granted, he hoped that more purchasers would be interested in buying the units.
- Q. Did you say anything in reply to that that you can remember?
- 30 A. Just as a friend, I just said "I hope that more units can be sold".
- Q. Did he ever say anything to you about obtaining another mortgage from Wing On Life Assurance Company Limited?
- A. No.
- Q. Did he ever show you any documents from Wing On Life Assurance Company Limited?
- A. No. You mean before the sale?
- Q. Yes.
- 40 A. No.
- MR. JACKSON-LIPKIN: My Lord, may he see - I think the original is exhibit E1 in the bundle but I believe the original is with your clerk.
- Q. You read Chinese, do you, Mr. LIU?
- A. Yes.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No. 6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- 10 Q. Will you please just look at it? Have you ever seen that document before today?
A. No. May I just read it?
Q. Yes, please do.
A. Yes.
Q. Right. You have not seen that before today?
A. No.
Q. Thank you. Did he say anything to you at all about the Wing On Life Assurance Company Limited?
A. No.
Q. Did he say anything to you at all about trying to get another mortgagee to take over the mortgage?
A. I remember he had tried to find a second mortgagee.
Q. But can you remember when that was, Mr. LIU?
A. That was before the sale, before the sale. I don't exactly remember when.
20 Q. Can you give that original letter back?
A. Yes.
Q. Just look at B32 and B38 and tell my Lord, having looked at those two letters, if that helps your memory as to when that happened. If you can't remember, please just say so. Can you remember?
A. You mean the exact date? I don't remember.
30 Q. Would you be kind enough to turn to B25 and tell my Lord if you remember that letter? Will you look at the chop at the bottom there. Is that your name under the date?
A. Yes. The purpose of this chop is when Johnson, Stokes & Master received a letter, he just made an initial and passed it over to me.
Q. But is that your name LIU there or ...
A. Yes.
40 Q. I see. Do you remember receiving this letter?
A. Yes.
Q. Now, was this letter anything to do with the occasion you told us of when he said he hoped to get a second mortgage?
A. Yes.
Q. And you sent all the documents that C.C. LEE wanted to them, did you not?
A. I did.

- Q. Did you get permission of Mr. WONG before you did that?
- A. I did get permission from Mr. WONG.
- Q. Now, will you forget that incident for a moment?
- A. Yes.
- Q. And let us go back to B32 and B38. Between B32 and B38 did he say to you at all at all
- Q. Now, don't misunderstand me, Mr. LAU. The letter B25, I think, relates to a second mortgage, does it not?
- 10 A. Yes.
- Q. The question I was asking you between B32 and B38 related to somebody taking over the mortgage. Did Mr. TSE ever discuss with you somebody taking over the mortgage?
- A. No.
- Q. Did he ever discuss with you redeeming the mortgage in that year?
- A. No.
- 20 Q. Now, after you sent out B38, can you remember how many times Mr. TSE came to see you between the sending out of that letter and the public auction? Approximately.
- A. I think more than 3 or 4 times.
- Q. On any of those 3 or 4 occasions did he make an offer of repayment of principal or interest?
- A. No.
- Q. Or tender any money?
- 30 A. No.
- Q. Anyway, in due course you were instructed to proceed with a sale by public auction, were you not?
- A. Yes.
- Q. Now, why a public auction?
- A. Because it seems to me and also maybe other firms of solicitors - I think it would be a proper way in dealing with sale by auction rather than by private sale.
- 40 Q. Whose decision was it to hold a public auction, yours or Mr. WONG's?
- A. In fact Mr. WONG's.
- Q. Before he reached that decision did you give him any advice? Yes or no.
- A. Yes.
- Q. Anyway, you received instructions. Now, who prepared the auction particulars and conditions of sale?

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- 10 A. I made use of the standard form to draft the conditions of sale and then had it approved by Mr. McElney.
- Q. Now, will you please look at pages B40 to B44, that is the English version?
- A. Yes.
- Q. Is that what you prepared and had approved by Mr. McElney?
- A. Yes.
- Q. Would you please look at conditoin of sale No.2?
- A. Yes.
- Q. You said you used the standard form. Is there anything unusual about clause 2?
- A. No.
- Q. Did you cause the advertisement of the sale to be put in the various newspapers?
- A. Yes.
- Q. Who drafted those?
- A. I also did.
- 20 Q. Was anything particular about those forms?
- A. No, no.
- Q. Now, after those went out did Mr. TSE come to see you?
- A. Yes, he did.
- Q. What about?
- A. He simply asked me to speak to the mortgagee Mr. WONG for another extention.
- Q. Did he make any complaint about the fact there was going to be an auction?
- 30 A. No.
- Q. Do you know if he had seen the particulars of sale, particulars and conditons of sale? Had he?
- A. Because in the office of Johnson, Stokes & Master there was a counter, we normally put the particulars on the counter; therefore everybody should have, if he wanted to get it, he should have a copy of the conditions.
- 40 Q. But are you able to say now whether or not he actually saw these particulars and conditons of sale?
- A. He did.
- Q. He did. How do you know that?
- A. Because he came to the office after we had printed the conditions of sale.
- Q. Yes. Go on.
- A. And he got a copy from the counter or even

- he made a request for a copy of the conditions of sale.
- Q. Now; do you know that or do you assume that?
- A. I know that.
- Q. Did he complain to you about any of the particulars of conditions?
- A. No.
- Q. Now, before the auction was anything said to you about a reserve price?
- 10 A. Yes.
- Q. By whom?
- A. By the mortgagee and Mr. WONG.
- Q. Yes. And were you told how much it was?
- A. Yes.
- Q. Can you remember how much it was?
- A. 1.2 million.
- Q. Just answer this question with a yes or a no, please.
- A. Yes.
- 20 Q. Was that reserve price ever communicated to Mr. TSE before the auction? Yes, no or you don't know?
- A. I don't know.
- Q. I don't think I asked you who fixed the reserve price. Who told you what the reserve price was to be?
- A. I have just said; Mr. WONG.
- Q. You did. I see. Is there anything unusual in the mortgagor fixing the reserve price?
- 30 COURT: Mortgagor?
- MR. JACKSON-LIPKIN: Mortgagee.
- A. No.
- Q. Can you remember how long before the auction you were told of it?
- A. I think only a matter of a few days.
- Q. Did you query it in any way?
- A. No.
- Q. Had you any reason to do so?
- A. No.
- 40 Q. I want you, please, Mr. LIU, to pass to the day of the auction itself.
- A. Yes.
- Q. Did you attend?
- A. Yes, I did.
- Q. With whom? Can you remember how many

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing wah
Examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- people there were?
- A. With Mr. McElney and Mr. WONG and Mrs. WONG, and also I remember also a Mr. YAU, maybe the foki.
- Q. Who is he?
- A. I think he's a foki of Mr. WONG.
- Q. I see. When you went to the auction room did you meet anybody there?
- A. Yes, I did.
- Q. Who?
- A. Mr. Kent Watson.
- Q. Before you met Mr. Kent Watson did you meet anybody else, can you remember?
- A. You mean in the room?
- Q. Before you went into Mr. Watson's room, can you remember meeting any staff of the auction room?
- A. Yes. And also the assistant, the Chinese assistant to Kent Watson.
- Q. Where did you meet him?
- 20 A. In the first place, in the hall, shall I say, or on the ground floor of the auction room and then he brought us to see Mr. Watson.
- Q. I see. Can you remember now, Mr. LIU, any conversation with the Chinese assistant before he took you to Mr. Watson?
- A. No.
- Q. Now, when you say 'he took us to Mr. Watson' - you said 'we were taken to see Mr. Watson', who was taken to see Mr. Watson?
- 30 A. I mean the Chinese assistant Mr. MAK.
- Q. But whom did he take? You?
- A. Oh, Mr. and Mrs. WONG, and Mr. McElney but not Mr. YAU. I seem to remember Mr. YAU was not in the room.
- Q. What about you?
- A. Yes, I myself, too, of course.
- Q. You were there as well?
- 40 A. Yes.
- Q. And what happened when you were taken in to see Mr. Watson, you four?
- A. Then Mr. Kent Watson spoke to Mr. WONG.
- Q. Yes?
- A. And then arranged the method of the sale.
- Q. With whom?
- A. With also Mr. McElney.
- Q. How long did Mr. and Mrs. WONG stay with

- Mr. Watson, can you remember?
- A. In the room?
- Q. Yes.
- A. I think somewhere around, maybe, 5 to 10 minutes at the most, I think.
- Q. How long did you and Mr. McElney stay with Mr. Watson?
- A. The same time.
- Q. I see. Did you and Mr. McElney have a discussion with Mr. Watson about the auction?
- 10 A. Yes.
- Q. Did you tell him anything?
- A. I just conveyed the message of Mr. WONG to Mr. Watson.
- Q. What message?
- A. Regarding the method of sale and the reserve price and what would be the amount for one bid.
- Q. I beg your pardon.
- 20 A. The amount for one bid.
- Q. Yes?
- A. I don't remember what was the amount; sometimes ten thousand or five thousand for one bid.
- Q. I see. Was anything said to Mr. Watson about who would do the bidding? Can you remember? If you can't remember, Mr. LIU, just say so.
- A. I don't exactly quite remember.
- 30 COURT: I would have thought hopefully the public.
- Q. Mr. LIU, had you been told before the auction whether Mr. WONG was going to bid or Mrs. WONG or Master WONG or Mr. YAU?
- A. Mrs. WONG represented the company.
- Q. Who told you that?
- A. In fact Mrs. WONG.
- Q. Where?
- A. Before the auction.
- 40 Q. No, where; not when.
- A. I am sorry. In the auction room of Lammert Brothers - no, no, I don't mean that in the auction hall, I mean - I don't mean the private room of Mr. Watson; in the auction room or in the auction hall, shall I say.
- Q. Now, can you help my Lord as to when that

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No. 6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

10

occurred? Was that before or after you went into Mr. Watson's room?

A. That was after.

Q. Can you remember if anyone else was told other than you after you came out of Mr. Watson's room?

A. I beg your pardon?

Q. Can you now remember if anybody else was told that Mrs. WONG would bid on behalf of the company after you left Mr. Watson's room?

A. I don't remember.

Q. You went back into what you described as the auction hall. Are you able to tell my Lord approximately how many people were there?

A. I seem to remember, I think, from 20 to 30.

Q. I see. And then what happened?

20

A. And Mr. Kent Watson read out the particulars and then the assistant interpreted in Chinese and then started the bid.

Q. Well, what did he read out?

A. He only read out the main clauses and that is quite normal, shall I say. I think clause 1, clause 2, clause 3, clause 4, clause 5 and clause 6.

Q. What about the particulars of the property, did he read that?

30

A. The particulars of the property, of course. Particulars of property and also normally, I think, clause 20.

Q. Yes. Can you remember now was anything said about the reserve price but the auctioneer before the auction began?

A. In the first place, Mr. Watson asked "Is there anybody going to bid for 1.2 million?"

Q. Yes. Did he say why he asked such a question?

40

A. No. I just said he announced.

Q. Yes?

A. He did not ask for the reserve price.

Q. Now, we know ...

COURT: What?

A. He was not asked for the reserve price.

Q. Now, we know there was no bid until Mrs.

WONG raised her hand.

A. Yes.

Q. What happened after she raised her hand? What did the auctioneer do?

A. The auctioneer, as usual, he just waited for 2 or 3 minutes and asked "Is there anybody going to give a higher bid?", and then asked for 3 times. And then on the third and last time he just knocked down.

10 Q. Did he say to whom the property was knocked down?

A. He just said "To this lady".

Q. I see. Can you remember any more about the auction than that, Mr. LIU?

A. And after Mrs. WONG successfully bidding the property and then she and Mr. Kent Watson

Q. Was Mr. TSE present at the auction?

A. Yes.

20 Q. Did he make any complaint that you could hear?

A. No.

Q. Did he make a scene? Did he quarrel with anybody?

A. No, no.

Q. When the property was knocked down for one million two hundred thousand dollars, did he make any complaint?

A. No, I didn't hear anything.

30 Q. It is suggested that he called out that the sale was unfair. Did you hear him do that?

A. No.

Q. Did he make any protest to the auctioneer?

A. No.

Q. Now, you say that your recollection is something in the region of 20 to 30 people.

A. Yes, somewhere around that. I don't exactly remember, but somewhere around that.

40 Q. Was that including the four of your of excluding the four of you?

A. Including.

Q. How near were you to Mr. TSE?

A. I don't now remember because I seem to remember there are, maybe, 5 or 6 rows or chairs.

Q. Yes?

A. Normally the mortgagee and myself and Mr. McElney will sit on the front row. I did

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- 10
- not remember where did Mr. TSE sit; very very near in any case.
- Q. But is it the auction room where sound carried easily?
- A. Yes.
- Q. And would you expect to hear complaints if complaints were being made?
- A. Yes.
- Q. Mr. TSE has told my Lord that you advised him in the spring of 1966 that he could redeem th property for one million four hundred thousand dollars. Is there any truth in that allegation?
- A. No, no. As I have said before, regarding redemption figures, I always asked him to speak direct to the mortgagee Mr. WONG.
- Q. Yes. Did Mr. TSE ever tell you about approaches to the Hong Kong and Shanghai Banking Corporation to help him redeem the property?
- 20
- A. No, no.
- Q. Did he ever tell you that he had approached the governor for assistance?
- A. No.
- Q. Did you know about those matters till I told you?
- A. I did not.
- Q. Now, you say, Mr. LIU, that you are head of the conveyancing department. How long have you been head of that department?
- 30
- A. Since 1955.
- Q. Are you able to assist my Lord with the state of the property market at the time of the auction?
- A. It was a very bad time because 1965 there was a bank-run.
- Q. Yes?
- A. And after the bank-run the property market was very bad and continues even until '67 even worse because of th riot. And the property market, I think, began to be better, I think, in the latter part of '68.
- 40
- Q. Yes. Did you ever make any promise to supply Mr. TSE with particulars of figures of principal and interest?
- A. No.
- Q. Did he ever ask you to make such promises?
- A. No.

MR. JACKSON-LIPKIN: Will your Lordship give me one moment? My Lord, may he see exhibit K?

COURT: This is not an extract of Ronald LI's report, is it?

10 MR. JACKSON-LIPKIN: It is partly that, yes, my Lord, and partly from other documents. You see, some of it are from bundle B which are the agreed documents; so is the architect certificate. The receipts are also from bundle B, my Lord.

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

COURT: Are these agreed documents?

MR. JACKSON-LIPKIN: Yes, my Lord. And the last column, your Lordship is quite correct, comes from Ronald LI's report.

Q. Mr. LIU, did Mr. TSE ever make any complaint to you about lateness in payment on architect certificates?

20 A. No. As long as, may I add, as long as the money are in the hands of Johnson, Stokes therefore we would make immediate payment.

Q. I am sorry. Could you say it again?

A. I am not sure. If you mean late payment it doesn't mean - if at any time the moneys are in the hands of Johnson, Stokes, therefore Johnson, Stokes will make the immediate payment.

30 Q. You see, there are a couple of occasions when the payments were a fortnight late. Was there any particular reason for that?

A. I don't remember. Maybe the mortgagee hasn't let us have the money or I don't exactly remember; but, I may add, as long as moneys are in the hands of Johnson, Stokes therefore Johnson, Stokes will make the immediate payment. I think you can see from the accounts, the receipts of payment.

40 Q. Yes, we have see all that, Mr. LIU. But did anybody complain about those two periods of fortnight time?

A. No.

MR. JACKSON-LIPKIN: My Lord, may that be a convenient time?

COURT: Right. 10 o'clock tomorrow morning.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No. 6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

4.30 p.m. Court adjourns.

26th March, 1979.

27th March, 1979.

10.08 a.m. Court resumes.

Appearances as before.

D.W.3. LIU Kwing-wah - O.F.O.

XN. BY MR. JACKSON-LIPKIN (continues):

- 10 Q. Mr. Liu, I want to ask you now about pre-sale of units.
A. Yes.
Q. What instructions were you given by Mr. Tse in relation to pre-sale of units?
A. In written instructions.
Q. Any instructions.
A. In written instructions in Chinese.
Q. I see. You were given written, yes.
A. Yes.
Q. What were they?
A. They were written in Chinese.
20 Q. Yes.
A. And then only a piece of paper in a printed form just by instructing the units to be sold and the amount of the purchase price and the deposit to be paid and also the costs; that is to say, who is going to pay the cost for the agreement and the assignment and the stamp duty, and also specified the time for completion, and also the name and address of the purchaser.
30 Q. I see. You got that in relation to each?
A. Yes, yes.
Q. Was there ever any suggestion that you should retain the whole of the purchase price towards construction costs?
A. That was already agreed before entering into any of the sale and purchase contracts, that's to say, the rental - shall we take \$1,000 in respect of each unit of the building because that was agreed between the vendor, shall I say, and the mortgagee.
40

- Q. Yes.
A. And the further deposit and the balance would be paid to Johnson, Stokes & Master as stakeholders.
Q. For what purpose?
A. For the purpose of repayment of the building mortgage; the principal due under the building mortgage.
Q. You are sure of that?
10 A. Yes. The balance also to be applied for payment of the principal due under the building mortgage.
Q. Was it ever suggested to you that that balance, instead of going to the payment of the mortgage, should go to the payment of construction costs?
A. No.

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- COURT: Likely to the repayment of principal?
- 20 A. Yes, of principal. May I also add that that was provided in the sale and purchase contract.
Q. Was it ever suggested to you that all monies received from these sales should be paid to Mr. Tse and not to Mr. Wong?
A. No.
Q. Now we have seen a ledger kept in the name of Mr. Tse to record the monies received. Who was in charge of the keeping of that ledger?
30 A. The ledger in fact all along kept by Johnson, Stokes & Master's accountant, and also, may I repeat, Mr. E. Ali. (Name spelt.)
Q. On whose instructions?
A. On the firm's instructions. I'm sorry, on my instructions or, shall I say, on Mr. Brian McElney's instructions.
Q. Now I want to ask you about repayments under the mortgage ...
40 A. Yes.
Q. ... from the proceeds of sale. Was there ever any suggestion made to you by anyone that no repayment should be less than \$100,000?
A. I beg your pardon?
Q. Did anyone ever suggest to you that there

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

- should be no repayment unless it was a \$100,000 or more?
- 10 A. I remember, although there was a provision in the building mortgage if the mortgagees agreed to accept less, therefore that question of repayment only between the mortgagor and the mortgagees agreement.
- Q. Yes. Would you just like to look at the mortgage and tell us to which provision you are referring? Bundle 'A'.
- A. Thank you.
- COURT: Mr. Bernacchi, is this matter in dispute?
- MR. BERNACCHI: My Lord, I don't know whether it is or not. The fact that the repayments were made in less than -- is not in dispute, but if this witness is suggesting that there was a positive agreement between the mortgagor and the mortgagee then, of course, no positive agreement has been either pleaded or referred to at present.
- 20 COURT: I'm sorry I interpreted you. I thought this matter need not really be examined in detail.
- MR. JACKSON-LIPKIN: My Lord, the only reason I asked is because Mr. Tse came out with this at page 5 of the transcript.
- Q. Have you got the mortgage?
- A. Yes.
- 30 Q. Which clause are you referring to?
- A. Page 7.
- Q. Yes.
- A. May I also add that this is an ordinary proviso to enable the mortgagor to only repay the principal under the mortgage or part of it so as to reduce the interest.
- Q. That is a redemption provision, is it not?
- A. It doesn't exactly mean redemption, just to
- 40 Q. ...
"... PROVIDED NEVERTHELESS AND IT IS HEREBY AGREED AND DECLARED that notwithstanding anything to the contrary hereinbefore contained it shall be competent for the

Mortgagor ..."

A. Yes.

Q. "... before the date of repayment to pay off the whole or any part (provided such part shall not be less than \$100,000.00 at any one time) ..."

10. A. Yes. If you are referring to \$100,000 that's not a redemption. If the mortgagor is going to pay off the whole therefore it would concern a redemption.

Q. I'm sorry, but you misunderstood me.

A. I'm sorry.

Q. Let me just tell you: Mr. Tse told my Lord tha he was informed that money from pre-sales could only be applied to the reduction of the mortgage in sums of \$100,000 or more.

A. No.

20 Q. Is there any truth in that suggestion?

A. No, no.

Q. Now, Mr. Liu, I want to pass to a different subject. I want to ask you about the further charge of \$200,000.

A. Yes.

Q. Do you know the reason why that was executed?

A. I don't quite exactly remember. I just took instructions from both the mortgagor and mortgagee and then prepared the further charge.

30 Q. You can't remember any more about it than that?

A. No, no.

Q. Did you give Mr. Tse advice on that further charge? Did you advise him that it should be executed?

A. No, no, no.

40 Q. You see, it's said to him - it's said by him that you advise him to execute it.

A. No.

Q. And that you said that 200,000 was only a security and it would be accounted for in the future.

A. No.

Q. And may I pass then, please, to the third charge? Did you advise Mr. Tse that he should execute the thrid charge?

A. No.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

Exhibit A.43

- Q. Can you remember how that come to be - now that came into existence?
- A. All along the further charge - the further charges according to the instructions of both the mortgagor and mortgagee.
- Q. Mr. Tse said to my Lord - my Lord, it's page 13 - that he would not agree to the third charge, then he consulted you and after that he agreed to sign it.
- 10 A. No.
- A. Not true, that is not true.
- Q. That's not true?
- Q. Have you still got bundle 'A' there?
- A. Yes.
- Q. Would you please look at page 43, I think it is?
- A. Yes.
- Q. Now do you remember that document, that's a tripartite document between Mr. WONG Chit-sen, Mr. TSE Kwong Lam and Lam Kee Construction Company?
- 20 A. Yes.
- Q. Do you remember that?
- A. Yes, yes.
- Q. Are you able to tell my Lord now the reason why that tripartite agreement was entered into?
- A. I remember that Mr. Tse was unable ...
- Q. Was what?
- 30 A. ... was unable ...
- Q. Yes.
- A. ... to pay a certain amount of building costs to Lam Kee Construction Company, and he asked Mr. WONG Chit-sen to render him help by entering into an agreement with the Construction Company to enable certain amount of building cost to be paid to Lam Kee Construction Company so as to complete the building.
- 40 Q. When Mr. Tse executed that document did he make any complaints to you about Mr. Wong?
- A. No.
- Q. Or about non-payment by Mr. Wong?
- A. No, no.
- Q. Or non-payment by Johnson, Stokes?
- A. No.
- MR. JACKSON-LIPKIN: My Lord, may he see bundle 'E'?

	Q. Have you got bundle 'E'?	
	A. Bundle 'E', oh, thank you.	
	MR. JACKSON-LIPKIN: E.133, my Lord.	
	Q. Will you please look at E.132, that's the Chinese?	
	A. Yes.	
	Q. Did you advise Mr. Tse that he should write that letter?	
	A. I don't remember.	
10	Q. Do you remember discussing a letter of that kind with Mr. Tse?	
	A. No, I don't remember.	
	Q. You see, he told my Lord that he only wrote it on your advice.	
	A. No.	
	Q. I want to take you back to something that you referred to yesterday, Mr. Liu.	
	A. Yes.	
	Q. At bundle 'B', page 25. Have you got bundle 'B' there?	
20		
	MR. JACKSON-LIPKIN: My Lord, it's the letter from C.C. Lee & Company.	
	A. What page, sir?	
	Q. At page 25 please, Mr. Liu.	
	A. Yes.	
	Q. I should have asked you this yesterday. Did Mr. Tse say anything to you before you received that letter? That's from C.C. Lee.	
30	A. I don't remember.	
	Q. Will you turn to the next page, 26? That's where you sent out all the title deeds. Did Mr. Tse know you were sending out the title deeds to C.C. Lee?	
	A. Yes. May I also add, in the second paragraph of that letter in fact we also got instructions from Mr. Tse to approve the proposed second mortgage.	
	Q. Was that true?	
40	A. Yes.	
	Q. I don't know whether you realise this but Mr. Tse has denied any knowledge of this.	
	MR. JACKSON-LIPKIN: My Lord, it's page 73 of the transcript.	

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

*Exhibit
E.133*

Exhibit B.25

Exhibit B.26

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah 10
Examination
(Continued)

Exhibit B.58

Q. Will you please turn in the same bundle to B.58?

MR. JACKSON-LIPKIN: My Lord, the translation is at 59A.

Q. Have you seen that letter before?

A. Yes.

Q. When? When I say before I mean before the course of these proceedings.

A. Yes, before the course - yes.

Q. When did you first see it and in what circumstances?

A. I remember I saw it, in fact, prior to the auction, prior to the day of the auction sale, maybe, but I am not quite sure, but I definitely remember that letter might have been shown to me by Mr. WONG Chit-sen.

Q. Mr. Tse has suggested that he wrote that letter on your advice.

A. No. I simply told him to contact the mortgagee in the event of he wanting to have an extension of the mortgage.

Q. Now there is no mention in - have you had a chance of reading that? Could you read it very quickly?

A. Yes, yes. (Pause.) Yes.

Q. Now Mr. Tse said that he accused you of altering the figure that he owed from 1.4 million to 1.6.

A. I did not.

30 Q. And that you said to him, "Don't mention anything in the letter about that or you will offend Mr. Wong."

A. No, no.

Q. Did you say anything like that?

A. No, I did not.

40 MR. BERNACCHI: I would be obliged if my learned friend can point out to where he, Mr. Tse, accused this witness of altering the figure. I agree that - I remember he did say that he didn't mention figures in the letter on this witness's advice, but I don't think he accused this witness of altering it.

MR. JACKSON-LIPKIN: My Lord, I believe it is page 75 and 76; I will just find it for

you. My Lord, it is the bottom of page 74 and then it runs into 75 and 76.

A. Page ..?

Q. Don't you worry, Mr. Liu, those were mere exchanges between counsel. I wonder if you can help us on something, having regard to the position you hold. Can you tell my Lord why, in your opinion, this project went wrong?

10 A. Because ...

MR. BERNACCHI: I'm sorry, my Lord, but where in that page is the expression used that he - that Mr. Tse accused this witness of altering the figure?

MR. JACSKON-LIPKIN: My Lord, may I just finish this question and come back to that?

COURT: Just do one thing at a time.

MR. JACKSON-LIPKIN: Yes, all right.

20 Q. Just forget that question and wait a moment, will you please?

A. Yes.

MR. JACKSON-LIPKIN: It starts at 74R, it then goes on to 75Q, and it then goes on to 76 at E.

Q. Now my question, Mr. Liu, was ...

MR. BERNACCHI: Where is it?

MR. JACKSON-LIPKIN: I have given you the reference.

30 COURT: How about giving the Court the reference?

MR. JACKSON-LIPKIN: My Lord, I'm so sorry, I thought I had done already. My Lord, it starts at 74 letter R"

"In April Mr. Liu told me that \$1,400,000 would be sufficient when I received the

In the Supreme
Court of
Hong Kong
High
Court

Defendants'
Evidence

No.6
D.W.3. 10
LIU Kwing-wah
Examination
(Continued)

letter I noticed that it would take
... \$1,600,000
When I was told by Mr. Liu that it
would take me \$1,400,000
I was prepared to raise the money ..
....."etc.

And then later on at 75Q:

"..... I went to see Mr. Liu
I told him that I would be suffering
a lot Mr. Liu said that I
would not have sufficient money
because I only had \$1.5 million but
the redemption would take \$1.6 million.

And then on the next page, 76 at letter E:

"I told him that I had already borrowed
\$1.5 ... and I blamed him for not
supplying me with the accounts, but
just sending me this demand."

And then G:

20 "....Mr. Liu suggested to me tha I
should write a letter to Mr.
Wong"

And then J:

"Why did you not say'I was told
that all I owe was \$1,400,000, now I
see it is \$1.6 million.'? Mr.
Liu told me not to mention anything
of the kind because that would be
offending Mr. Wong."

30 COURT: That doesn't amount to your question,
does it, Mr. Jackson-Lipkin?

MR. JACKSON-LIPKIN: My Lord, with respect,
yes.

COURT: If you say so.

MR. JACKSON-LIPKIN: My Lord, your Lordship will
recall he was visiting this gentleman all
the time. My Lord, if the word 'altering'

is upsetting either of my learned friends I will change 'altering' to 'change'.

*In the Supreme
Court of
Hong Kong
High
Court*

COURT: Carry on.

MR. JACKSON-LIPKIN: Thank you, my Lord.

Q. Mr. Liu ...

A. Yes.

Q. ... are you able to give us your opinion of why this project were wrong?

A. In the first place ...

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Examination
(Continued)

10 MR. BERNACCHI: My Lord, I'm sorry. Is he - is Mr. Liu called as an expert or is he just giving an opinion off the cuff? My learned friend has not begun to lay the foundation of opinion evidence.

20 MR. JACKSON-LIPKIN: My Lord, (a) he was at the time head of the conveyancing department, (b) he was representing Mr. Tse, (c) he was seeing Mr. Tse practically daily, (d) he was handling and sending out the accounts, (e) he had to deal with the monies coming in and the monies going out: my Lord, who better to tell your Lordship why this went wrong?

COURT: Well, since you ask me this question I will answer you. A property market expert would be in a better position.

MR. JACKSON-LIPKIN: My Lord, this witness speaks English. To answer your Lordship should I ask him to leave?

30 COURT: No, certainly not.

MR. JACKSON-LIPKIN: Well, my Lord, then the answer to your Lordship is this may be nothing to do with a property market expert, it may be just bad calculation from the outset and bad handling of it thereafter.

COURT: Whether it's good, bad or indifferent handling of it doesn't that ultimately really depend on the property market,

whether it's a buyer's market or a seller's market, Mr. Jackson-Lipkin, isn't that the crux of the matter?

MR. JACKSON-LIPKIN: Well, my Lord, is it a causa causana or causa sine qua non? If sufficient money had been provided in the first place there would not have been such a dependence on sales at the time when sales weren't easy.

10 COURT: Whereas if the market had been good finance would not have been required to the extent it was.

MR. JACKSON-LIPKIN: Yes, my Lord, that's why I said to your Lordship which causa was it, causana or sine qua non.

COURT: I don't think this witness is in a position ...

20 MR. JACKSON-LIPKIN: Well, my Lord, if your Lordship feels that I shan't press him about that.

Q. Mr. Liu, you told us yesterday - I think, indeed, today as well - that so far as sales of the flats were concerned you received instruction.

A. Yes.

Q. ... and you prepared the various documents and so on. What about the advertising for sale?

A. That doesn't concern.

30 Q. It did not concern you at all?

A. No, no, it does not concern me at all.

Q. But in your experience in the conveyancing department at that time can you tell my Lord whether the sale of flats was a booming, thriving industry or not?

A. No.

Q. What state was it in?

A. Just say very, very calm, shall we say.

Q. What about commercial units?

40 A. That doesn't make much difference.

Q. What do you mean?

A. I think if the property market was not good therefore it would affect not only domestic

units but also commercial.

*In the Supreme
Court of
Hong Kong
High
Court*

MR. JACKSON-LIPKIN: Will your Lordship give me one moment? (Pause).

Q. Would you please got back to B.38 for a moment? After that letter was sent out did Mr. Tse come and see you and say, "But Mr. Liu, you told me it was only 1,400,000, why has it gone up to 1 million 6?"

A. No.

10 Q. Or anything like that?

A. No.

Defendants'
Evidence

No.6

D.W.3.

LIU Kwing-wah

Examination

(Continued)

MR. BERNACCHI: My Lord, before I commence my cross-examination I have an application to make which is not dependent upon the evidence of this particular witness. It is made at the first time available to me, namely, when I - I'm sorry, when the legal advisers to the plaintiff - I'm sorry, to the claimant have framed a proposed amendment at - after the evidence of Mr. & Mrs. Wong. Now could I hand up the evidence, and perhaps ...

20

COURT: Why not deal with this witness first?

MR. BERNACCHI: My Lord ...

COURT: Does it make any difference to you?

MR. BERNACCHI: No difference at all.

COURT: Deal with this witness first then, then make your application.

MR. BERNACCHI: It was only that I was ...

30 COURT: I do not know whether it's an application which will entail argument. There is no point in keeping the witness here so finish this witness first.

MR. JACKSON-LIPKIN: My Lord, may I ask if I could have the courtesy of being told upon what authorities my learned friend is going to rely? He has just handed me proposed amendments but I see a number of

authorities. I could have them sent for while Mr. Liu is being dealt with.

XXN. BY MR. BERNACCHI:

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination

- Q. Mr. Liu, just some general questions first.
A. Yes.
Q. You have been the head, you say, of the conveyancing department of Johnson, Stokes & Master ever since 1955.
A. Yes.
10 Q. Johnson, Stokes & Master is a big firm of solicitors in Hong Kong.
A. Yes.
Q. And their conveyancing work in an average year presumably is fairly enormous.
A. Yes.
Q. How many hundreds or thousands of land transactions do you put through in an average year?
20 A. I call myself head, it doesn't mean that all the transactions have done by me because we set up several groups of people in conveyancing works, therefore I am only the head or in charge of the conveyancing department in case any questions would be raised by the junior staff. If I cannot deal with it I have to refer to the solicitors concerned.
Q. I see. Do you mean that normally speaking you don't handle conveyancing work yourself, you just handle it if there are any difficulties?
30 A. Yes, yes, or, shall I say, supervise, sometimes just supervise and by helping the junior staff.
Q. What difficulties arose from the original mortgage in this case? The original mortgage between Mr. Tse and Mr. Wong: what difficulties arose?
40 A. No difficulties because Mr. WONG Chit-sen is my client, therefore if he gave me instructions therefore I have to deal with the building mortgage for that particular client.
Q. But I say - correct me if I'm wrong ...
A. Yes.
Q. ... that you handle transactions for good clients?

- A. No. I cannot say.
- Q. What do you mean by "As he is my client"?
- A. That is to say he came to see me first because he knew me.
- Q. He knew what?
- A. He knew me personally, therefore he approached me, and then he asked me act for him.
- 10 Q. When you say "He knew me personally", he knew you outside the office?
- A. Yes, in the first place.
- Q. Did he know you personally because you had acted in the capacity of solicitors' clerk for him before or did he - or did you know him personally completely outside the office?
- A. Outside the office as well as in the office. It doesn't make any difference at all.
- 20 Q. Well, apparently it does because you say that you generally only have do with complicated cases that are referred to you by the staff under you.
- A. Yes.
- Q. But in this case ...
- A. Yes.
- Q. ... and I might say in other cases for Mr. Wong ...
- A. Yes.
- 30 Q. ... you acted personally throughout ...
- A. Yes.
- Q. ... because you were a friend of his ...
- A. Yes.
- Q. I am saying a friend of his because you knew him quite apart from the office or a friend of his because you had done conveyancing work before for him?
- A. No, because before the war I understand that he was a principal in a school.
- 40 Q. You've known him before the war?
- A. Yes.
- Q. I see.
- A. Yes.

COURT: What counsel is getting at is this ...

A. Not very familiar, shall we say.

COURT: Will you listen to me?

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination 10
(Continued)

A. I beg your pardon.

COURT: He was a personal client of yours.

A. Yes.

COURT: That means if for some reason or the other you had left Johnson, Stokes at any time and gone to another firm of solicitors he was one of those personal clients who would have followed you over.

A. Maybe.

COURT: He was a client of Johnson, Stokes because of you.

A. Yes.

COURT: That's the point, isn't it, Mr. Bernacchi?

A. Yes, My Lord, exactly the point.

Q. And how many other personal clients had you? I am referring to the years 1963 to 1966.

A. More than hundreds.

20 Q. In the hundreds?

A. Yes.

Q. So you yourself then handled a considerable number of conveyances each year?

A. Yes.

Q. Assignments of sale?

A. Yes.

Q. Mortgages?

A. Yes.

Q. Those are the principal ones?

30 A. Yes.

Q. Would you say half and half or more mortgages than assignments or more assignments than mortgages?

A. Sometimes half and half, sometimes maybe assignments more than mortgages and sometimes mortgages more than assignments. That depends on the property market.

40 Q. Yes, all right. Now in that background, and I want you to be honest with the Court...

A. Yes.

Q. Forget at the moment your friendship for Mr. Wong from before the war.

A. Yes.

Q. Can you really remember very much about these transactions, these particular transactions that happened between November, '63 to June '66?

A. Yes.

Q. You can?

10 A. Yes.

Q. I mean you have a general impression? Yes?

A. A general idea.

Q. Yes, but when you get down to details you can't really remember, can you?

A. No, no. I cannot remember each and every details.

Q. You see, in the course of your evidence-in-chief you have said things like, "Mr. Tse did not say that to me," or "I did not say that to him." Well, really, can you remember? I mean, it may be true, it may be untrue, but really can you remember all that clearly?

20 A. The question of remember or not remember - of remember or remember or not, therefore all along in dealing mortgages I always suggested to the mortgagor to refer the matter to a mortgagee, because I am not concerned with the calculation of interest. For that reason I definitely remember because I don't want to be involved in the calculation of interest and also payments and repayments of principal and interest.

30 Q. So if a mortgagor...

A. Yes.

Q. ... asks you, as a firm of solicitors, for accounts...

A. Yes.

40 Q.your invariable practice is to refer him to the mortgagee?

A. Yes, regarding the calculation of interest because all along it is the practice of myself or even the firm. It doesn't concern the interest itself in calculating mortgages because it doesn't concern the firm at all.

Q. Presumably from time to time....

A. Yes.

Q. ...he, Mr. Tse, would have asked you for

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- accounts and you'd say, "Ask the mortgagee"?
- 10 A. Yes, regarding the interest, because in this particular case the interest would be reduced from time to time as and when part payment of principal was made to the mortgagee.
- Q. Well, now having been in a senior position in Johnson, Stokes & Master for a number of years....
- A. Yes.
- Q. ... you must have appreciated - I agree that it is the practice in Hong Kong, but in fact in this mortgage you were acting for the mortgagor as well as the mortgagee.
- A. Yes.
- Q. You were a friend of the mortgagee, but you were in fact acting for the mortgagor as well.
- 20 A. Yes.
- Q. Wouldn't you express your own opinion sometimes if, for instance, the mortgagor....
- A. Yes.
- Q. ...for whom you are also acting..
- A. Yes.
- Q. ...said "Well, what do I - " or "What interest do I owe, on your accounts?"
- A. Yes.
- 30 Q. You could give him an approximate figure, but then you would say, "For an accurate figure you must ask the mortgagee."
- A. Unless the figures were conveyed to me by the mortgagee therefore all along I suggested to the mortgagor to refer to the mortgagee...
- Q. Yes, but you...
- A. ... because I can say I was too busy, therefore I haven't got that time to deal with calculation of interest and repayments and all sorts of other things.
- 40 Q. You in your firm had an account....
- A. Yes.
- Q. ...with the mortgagor.
- A. Yes.
- Q. You also had an account with the mortgagee.
- A. Yes.
- Q. You say that the mortgagor...
- A. Yes.

Q. ... was supplied with your accounts, your firm's accounts - you mean, presumably, your firm's statement - from time to time.

A. Yes.

Q. Presumably you didn't supply him with WONG Chit-sen's statement, you had two, two statements yourself.

A. Yes, yes.

Q. Mortgagor and mortgagee.

10 A. Yes.

Q. And you said, "Well, the mortgagor" in your opinion "could have worked out approximately the interest because he was supplied with his statement of account..."

A. Yes.

Q. "...with my firm..."

A. Yes.

Q. ...from time to time."

20 A. Yes, and also of course the mortgagee's statement of account because the mortgagee's statement of account was for payment to the contractors.

Q. He wasn't supplied with the mortgagee's - you don't know whether or not he was supplied with the mortgagee's accounts. Your accounts with WONG Chit-sen showed so much payment to contractors, so much payment to the mortgagee. I mean, if you like...

30 A. Both accounts are relating to each other.

Q. I'm sorry, I don't want to lead you away into giving....

A. Yes.

Q. ...any answer that cannot be substantiated by the documents. You see A.71 to 71 to 73. I mean, perhaps to be fair to you, I would refer you also to A.70a, the letter, your covering letter.

A. A.78?

40 Q. A.70a. Read the letter to yourself. I don't want to in any way trick you into giving answers that aren't in accordance with the documents, do you see. (Pause.) The first part of the letter, where your firm object to his constant attendance on you.

A. Yes.

Q. Now when you say that "he had accounts from us from time to time"...

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*Exhibits
A71-73.*

*Exhibit
A.70a.*

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- 10
- A. Yes.
Q. Are you referring to A.71, A.72, A.73, or what accounts?
A. The account must have been referred to A.71 - A.70 and 71.
Q. A.71.
A. Because it would be similar, not exactly the same but it would be similar because these accounts were done by the accountant. If there are other form of accounts it would be the similar figure - if there are any other form of accounts that would be on a similar figure, and may I also add that the claimant normally requested the account in Chinese; therefore sometimes we just gave him the account in Chinese, just, for example, which flat had been sold and what money had been received and what money had been paid, sometimes even written in Chinese.
- 20
- Q. I see. That is, you said - well, the impression you gave - I don't know whether I am repeating your words entirely accurately - is that you gave him from time to time little slips of paper with figures written on them...
A. Yes, because during the past...
Q. ...concerning the sale of flats.
A. Yes, because the accounts, it appears to me, very, very simple because during the last two years therefore only involved 36 units, less than thirty transaction.
- 30
- Q. All right, and you are saying that from these slips of paper concerning the sale of flats...
A. Yes.
Q. ...he could have worked out approximately the interest and the unpaid capital on the mortgage?
- 40
- A. Yes because...
Q. Well, now, - I'm sorry. You were in a stronger position because of course you also had the accounts with the mortgagee.
A. Yes.
Q. So you certainly could work out approximately the interest and the capital, unpaid capital.
A. If I want to do it I think I can.
Q. Yes.

- A. If I want to do it, yes.
- Q. Well, he was your client as well, remember that. He wasn't an ordinary mortgagor and you were acting for the mortgagee.
- A. Yes.
- Q. You were acting for both parties.
- A. Yes, but in respect of the mortgages, regarding other questions, payment of interest for example, just agreed for a bank, it doesn't mean that we have to calculate on behalf of the mortgagor how much was owing to the bank. You just mentioned if I want to do it I can do it, but it's not my job and not my obligation to do it. We only charge the cost of a mortgage. I'm not his accountant. I have some many work to do in the office, I cannot just sit there and do some paper work or calculate interest and just forget the office jobs.
- 10
- Q. Well, I would suggest to you that at one time at least...
- A. Yes.
- Q. ...you did say to him approximately...
- A. Yes.
- Q. ...what was owed by way of interest...
- A. No, no..
- Q. ...and mortgage.
- A. ...I did not.
- 30
- Q. How can you say, in 1979, "No, no, I did not." when you have so many mortgages?
- A. But because I always remember that regarding not only this, even other mortgages because our firm, dealing with so many mortgagees, it is the practice of the firm or practice of myself, I am not involved in the interest or other method of calculation as between the mortgagor and mortgagee. It is my practice, I can say in each and every case...
- 40
- Q. I see, so..
- A. ...and for that reason I can definitely remember I did not say that.
- Q. You are surely giving evidence..
- A. Yes.
- Q. ...of what you normally do?
- A. Yes.
- Q. You normally refer the mortgagor to the mortgagee?

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- A. Yes.
- Q. Would you agree with me that Mr. Tse was a very persistent client of yours? He came up on numerous occasions and asked you to do things.
- A. Yes. Just to beg the mortgagee to extend time for payment.
- Q. No, not just to beg.
- A. Oh, I'm sorry.
- 10 Q. Now I'll refer to just several other examples of mortgages in which Mr. Wong was involved.
- A. Yes.
- Q. You remember 4 Peace Avenue?
- A. Yes.
- Q. Who did the mortgage?
- A. I have to refer to the document.
- Q. I see.
- 20 A. But I knew regarding the sale of flats it was put through in our office, but I don't remember whether the mortgages were or not.
- Q. Well, I'll tell you that it was. It's agreed actually.
- A. Yes.
- Q. Again you acted for both parties.
- A. Yes.
- Q. You yourself as the clerk in Messrs. Johnson, Stokes & Master.
- A. Yes.
- 30 Q. Well, can you remember off the cuff anything about the assignment? You say you remember that you did the assignment.
- A. Yes.
- Q. Can you remember the parties even?
- A. The parties, because that was long ago I can't definitely say, either Chit Sen Company or - individually I can't remember.
- Q. Or whom? Either Chit Sen Company or Mr. Wong personally?
- 40 A. Yes.
- Q. Do you remember No.67, Cameron Road?
- A. I don't exactly remember,
- Q. Your don't remember. Do you remember who was either the mortgagee or the mortgagor?
- A. I don't remember.
- Q. Do you remember when it was sold?
- A. No.
- Q. Do you remember to whom it was sold?
- A. No, I don't remember, 67 Cameron Road.

- Q. Do you remember even that you put through the assignment?
- A. I don't remember because I have so many dealings for the past years.
- Q. Would your answer be similar to Nos. 156/158, Tai Nam Street?
- A. I don't exactly remember.
- Q. Would your answer be similar as regards Nos. 218 to 220, Prince Edward Road?
- 10 A. Yes.
- Q. Would your answers be similar....
- A. I'm sorry. Regarding 220 I remember the mortgagor was PAK Lan Young.
- Q. I see. And do you remember that it was put through by your office?
- A. Yes.
- Q. Do you remember the mortgagee?
- A. The mortgagee, either Chit Sen Company or either WONG Chit-sen - Chit Sen Company or either WONG CHit-sen, I don't exactly remember.
- 20 Q. Do you remember that it was sold by public auction?
- A. Yes.
- Q. And would your evidence be that if the mortgagor was - I'm sorry, the mortgagee was WONG Chit-sen it would be sold by public auction to his limited company, or if it was ...

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

30 COURT: It is not a case of it would be sold by public auction to his company or it was sold to his company.

MR. BERNACCHI: I'm sorry, my Lord. It was.

40 COURT: Mr. Bernacchi, this line, as far as I'm concerned, you are merely testing the witness' memory. If you are to tackle him about these mortgages why don't you present the documents to him and then make the points you want to make?

MR. BERNACCHI: My Lord, there are two points I want to make. First of all, his memory without the documents and, secondly, the fact that ...

COURT: But you yourself have already made the

point that after 15 years it's virtually impossible to remember the details ...

MR. BERNACCHI: Yes.

COURT: ... and you are trying to test his memory as to who the mortgagees were, who the mortgagors were, how was it sold, who bought it.

MR. BERNACCHI: My Lord, I am also getting information from this witness as to if the mortgagee was Mr. Wong or his wife then probably it would be sold by public auction to the company, or vice versa.

COURT: It was bought.

MR. BERNACCHI: Yes.

COURT: These are facts.

MR. BERNACCHI: Yes, all right, my Lord.

COURT: I don't think it's open to say it would be sold.

MR. BERNACCHI: It was sold, yes, my Lord.

20 Q. Generally, Mr. Wong, if I referred you to - I'm sorry, Mr. Liu, if I referred you to other properties your answer would be exactly the same?

A. Yes.

Q. Now you have stated in evidence that you put through yourself ...

A. Yes.

30 Q. ... mortgages or assignments on sale of properties where the person is your personal client.

A. Yes.

Q. Now you are a very senior member of the firm.

A. Yes.

Q. And so you were employed before the Law Society brought out a regulation about in future future clerks not receiving a percentage of the money coming into the firm?

A. I don't know what exactly you mean.
 Q. I'm sorry, Mr. Liu, I'm not suggesting there was anything wrong, but I am suggesting that with your personal clients ...
 A. Yes.
 Q. ... you had a financial interest as well as a personal interest that in respect to your personal clients Johnson, Stokes & Master paid you a certain amount of money, quite legally, I'm not suggesting anything illegally.
 10 A. No. I can say that in addition to a salary I also got commission from Johnson, Stokes & Master, and that's right.
 Q. For your personal clients?
 A. Yes.
 Q. Now I am coming back to this particular mortgage.
 20 A. Yes.
 Q. You say that Mr. Wong asked you to draw up a mortgage deed. That was your evidence-in-chief.
 A. Yes.
 Q. You also said that the terms had already been agreed.
 A. Yes.
 Q. Presumably you meant agreed between Mr. WONG and Mr. TSE?
 30 A. Yes.
 Q. You also said, "Before I drew up the mortgage I had to take instructions from both of them."
 A. Yes.
 Q. So did Mr. WONG and Mr. TSE appear in your office and give you formal instructions?
 A. Yes.
 Q. Thank you.
 40 A. Although not at the same time. Maybe we got instructions ... You see, sometimes maybe the mortgagee turns up first and then the mortgagor. It doesn't mean that we have to insist on both the mortgagee to be present at the same time.
 Q. And presumably then, with your number of transactions, you don't remember whether they both turned up at the same time?
 A. No. Yes, that's correct.
 Q. Now as you said that the terms had already

*In the Supreme
 Court of
 Hong Kong
 High
 Court*

Defendants'
 Evidence

No.6
 D.W.3.
 LIU Kwing-wah
 Cross-
 examination
 (Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- been agreed ...
- A. Yes.
- Q. Presumably the instructions were very formal instructions. I mean you just asked Mr. TSE whether he had agreed ...
- A. One way or the other, if I receive instructions from a mortgagee in the first place, of course I have to wait until the mortgager comes up and then to confirm whether he agrees to the terms of the mortgage before I prepare the draft. Otherwise my time would be wasted if I prepared the draft first.
- Q. You remember that the terms had already been agreed, you said ...
- A. Yes.
- Q. You remember that you had to take instructions from both of them.
- A. Yes.
- 20 Q. You don't remember whether they appeared together or appeared separately?
- A. Yes.
- Q. But the instructions, his instructions ...
- A. Yes ...
- Q. ... is from your evidence that the terms had already been agreed, the instructions, as instructions, would presumably then have been very formal ones. Just, "Do you confirm these terms?"
- 30 A. Normally, Chinese clients, they wouldn't like just to turn up or sometimes give me a piece of paper setting out the preliminary terms, sometimes oral, sometimes in writing in broad terms. Then I have to take it down myself before the preparation of the draft documents. Normally, the instructions would be taken down by me.
- Q. Yes, but you remember in this particular case that the terms had already been agreed.
- 40 A. Yes, I do remember. I can say in each and every case, not only this particular case because I'm dealing with the transactions in the firm, therefore in each and every case it is sensible for me to ask all parties.
- Q. I ask you again because you so often refer in your answers to "in each and every case."
- A. Yes.

Q. Are you really giving evidence of what happened in this case or are you giving evidence of what happens usually and, therefore, probably happened in this case?

A. If that is the case, therefore even in this case it would come to the same end.

Q. Mr. LIU, are you giving evidence of usual practice and, therefore, probably the practice in this case?

10 A. Not probably, but definitely in this case.

Q. Now you have said that you acted for both parties.

A. Yes.

Q. And it is clear you did.

A. Yes.

Q. You had acted for Mr. WONG.

A. Yes.

Q. Indeed, a lot of times in the past.

A. Yes.

20 Q. By 1963, Mr. WONG himself says that he had been dealing in properties since 1935.

A. '35? No. '55, shall I say, '35? No.

Q. Mr. WONG had been

A. Oh yes, I'm sorry. I thought you said I have been dealing with Mr. WONG since 1935.

Q. You have been dealing with Mr. WONG you say since 1955.

A. Yes, since 1955. Some time around then.

30 Q. And he came to you and with or without Mr. TSE, and said that the terms had been agreed.

A. Yes.

Q. Was it any surprise to you that Mr. TSE engaged you as well?

A. No, it was not a surprise.

Q. But presumably you could not tell why TSE came to you. I mean TSE's evidence ... It is not a reflection on your firm at all. TSE's evidence is that WONG insisted that your firm act for both of them. Now that you can't tell, whether it's true or untrue, presumably.

40 A. I can't say ... I don't know how or when did Mr. WONG speak to Mr. TSE.

Q. Now would you turn to Bundle A again at page 8.

A. Page 8?

Q. This is a copy of the original, but the original of course would be signed by Mr.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

In the Supreme
Court of
Hong Kong
High
Court

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

10

20

30

40

TSE and Mr. WONG.

A. Yes.

Q. And interpreted by you.

A. Yes.

Q. And the signatures were both in the presence of Mr. McElney.

A. Yes, McElney.

Q. Would you say - I mean frankly you can't presumably remember exactly, but would you say that it is very likely that they were signed on the same occasion? In other words, you interpreted to both of them and then they signed?

A. I don't exactly remember, frankly, for that long. In most cases they signed both, but I can't exactly remember whether they came at the same time or not.

Q. You say in most cases that is the position.

A. Yes. I can't exactly remember for that long ago.

Q. Now the next event, was that the question of sub-sales?

COURT: Are you coming to something new, Mr. Bernacchai?

MR. BERNACCHI: Yes.

COURT: Would that be a convenient moment? Fifteen minutes.

11.29 a.m. court adjourns

11.49 a.m. court resumes

Appearance as before

D.W.3 LIU Kwing-wah On former Oath

XXN BY MR. BERNACCHI CONTINUES:

Q. I now want just to ask you a very few questions on the sub-sales.

A. Yes. Not sub-sales, sales I said.

Q. Sales of the units.

A. Yes.

Q. Would you turn to A.16 to 28.

A. Yes.

Q. Now I would inform you that this is

admitted to be a standard formal Agreement.

10 A. Yes, normally adopted by the Land Office.

Q. Well, whether it was normally adopted by the Land Office, it was adopted in this case. All right?

A. Yes, because we have to protect the creditors.

Q. "Because" nothing. I am telling you it is an agreed fact, in effect.

10 A. Yes.

Q. That is the standard form that was used.

A. Yes.

Q. Now did you obtain Mr. WONG's consent generally to these contracts for sale and purchase?

A. There is no need for me to obtain the consent regarding this contract because he was not a party to the Agreement.

20 Q. I know that, but in the agreed documents further on there are cases where he assigned all the rights under the mortgage back to the purchasers of some of the units.

A. Yes.

Q. In other words, he voluntarily gave up his security in respect to some of these units.

A. No, no, it doesn't mean voluntarily gave up.

Q. No? All right.

30 A. Because as Johnson, Stokes & Master have to act for both the vendor and the purchaser and also for the mortgagee, therefore the reason why we adopt this one was because we have to see that the money to be applied for payment of the amount due under the mortgage, due under the Building Mortgage, and in due course the re-assignment would be obtained from the mortgagee.

40 COURT: I think you two are on different wavelengths altogether right now. Mr. LIU, listen carefully to the question.

A. Yes.

Q. The question is: Did you obtain Mr. WONG's consent to these contracts for sale and purchase generally?

A. I did tell Mr. WONG that - or the claimant, Mr. TSE, also did tell Mr. WONG that he is

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

going to enter into contracts for sale for various units in the building, and Mr. WONG also knew that we are doing the contracts, presumably consent has been given.

Q. When you say the claimant told Mr. WONG ...

A. Yes.

Q. ... are you telling that from hearsay or were you present when the claimant told Mr. WONG?

10 A. I understand that. I don't mean ... I'm informed by the mortgagee that the mortgagee agrees that Mr. TSE would receive \$1,000 in respect of each unit. Presumably that is the consent given by the mortgagee, Mr. WONG, in this Agreement.

Q. Now when approximately was that? Do you remember? If you can't remember ...

A. Before the drawing up of the contract?

20 Q. Before the drawing up of the contract, the first contract.

A. Yes.

Q. This is not the first contract.

A. Yes.

Q. This is just a contract.

A. Yes, a contract, yes.

30 Q. Now page 26 please. Now Clause 21 is a very long clause. If you would like to refresh your memory by reading it, by all means read it. If you don't think it is necessary, I'll ask you a question on it, but this has to do with the purchase money and what was to be done with the purchase money.

A. Yes.

Q. Would you like to read it or?

A. Yes, I know this clause. Even nowadays we adopt a similar clause for the same contracts.

40 Q. But presumably this clause was with the agreement of Mr. WONG?

A. Yes. I just want to mention that regarding the payment to be received by the vendor - as I just mentioned, regarding - as you can see from Clause 21 the addition "other than the sum paid to the Vendor as set out in the Schedule hereto."

Q. Yes, the Schedule is at page 28. \$5,000 out of a total of \$175,000 was paid to Mr. TSE and the balance to you, the balance of

\$170,000.

A. Yes.

Q. And this whole clause, I'm merely saying did you get Mr. WONG's, the mortgagee, consent to the wording of this clause?

A. It doesn't mean consent. Consent to the mortgagee, to the vendor to receive certain amount of deposit.

Defendants'
Evidence

COURT: Answer the question, Mr. LIU.

10 A. Yes.

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

COURT: Did Mr. WONG know of the existence of this clause? He did not sign any of these documents, but did Mr. WONG, before the first Sale and Purchase Agreement was signed, know of the existence ...

A. Yes, he knew about it.

Q. And do you say, in effect, that either he consented expressly or at least he impliedly consented to this clause?

20 A. He has no objection to this clause, just shall I say? The only thing he wants to know is whether a repayment can be made to him in deduction of the mortgage money.

Q. Mr. LIU, you have been a very senior clerk to a very highly respected firm of solicitors for many years.

A. Yes.

30 Q. You understand my question, surely? Did he expressly or impliedly consent to this clause? The answer, I would put it to you, is yes.

A. Maybe I misunderstood. The consent does not mean that he has to give the consent to that clause. He knew about that clause and he knew that we also act for both the vendor and the purchaser, and he only consented to the vendor to receive part payment of the deposit, because I adopted the Land Office ...

40 COURT: You still haven't answered a simple question. Did WONG knew of this clause and did he agree to it?

A. He knew about that.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No. 6
D.W.3.
LIU Kwing-wah 10
Cross-
examination
(Continued)

Q. And did he agree to it, expressly with his mouth or with his actions?

COURT: You know very well, Mr. LIU, as all counsel at the table know, as I know, that this clause is inconsistent with the mortgage, isn't it? Isn't it as simple as all that?

A. Not inconsistent.

COURT: Then you had better read Clause 21 carefully.

A. Because in this case we act for the vendor and the purchaser.

COURT: Yes, carry on, Mr. Bernacchi.

Q. Now Mr. LIU, how do you read (a) and (b)? Do you read it as first paying the cost of construction and secondly anything that's left over is repayment of principal?

A. Yes.

20 Q. Or do you read it that it is up to Mr. TSE to say whether he would repeat it in repayment of principal or first pay the cost of construction?

A. Because there is also a proviso in this clause. You can see the proviso.

Q. Look, did you read it as a whole that you as stakeholders had first to pay the appropriate cost of construction and then repay any balance to the mortgagee by way of principal?

30 A. That depends on the circumstances. If the mortgagor has not drawn any money out of the Building Mortgage, because some time the Building Mortgage will provide that the mortgagor shall not draw any money until after completion of certain stages of work, for example, the foundation, piling and all sorts of things; therefore, this particular clause, Johnson, Stokes & Master has to act according to the circumstances of the mortgage itself. If the mortgagor has already drawn the money - the amount of money on the mortgage, therefore the
40 deposit would be utilized for payment of

principal. That depends on the circumstances of the mortgage itself because this is a very general clause.

Q. Are you saying - I'm not certain what you are saying - but are you saying that in your opinion Messrs. Johnson, Stokes & Master had a discretion whether to pay the cost of construction or whether to pay it to Mr. WONG?

10 A. Yes.

Q. I see, that's the ...

A. Because we act for the purchaser. We have to protect the interests of the purchaser in this clause.

COURT: What has protecting the interests of the purchaser got to do with this?

20 A. Because we act for both the vendor and the purchaser, therefore, we have to see that the purchaser ultimately will get an assignment of the premises, and before getting the assignment he has to see that that particular unit has to be re-assigned by the mortgagee from the mortgage before the vendor can execute the assignment ...

COURT: Can you please explain? What has this got to do with the purchaser?

A. Because ...

30 COURT: B you say J.S.M. has a discretion whether to apply (a) or (b).

A. Yes. I meant the purchaser ... I mean because we also act for the purchaser in this case.

COURT: The only difference at the end of the day is whether you apply (a) or (b).

A. Yes.

COURT: As if you apply it to (a), then the mortgage is not exhausted that quickly.

A. Yes.

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

COURT: If you apply it to (b), then that mortgage is exhausted quickly.

A. Yes.

COURT: That's the only difference, isn't it?

A. And also we act for the benefit of the mortgager for the purpose of reducing interest, and that was told or instructed by the mortgagor as well.

COURT: What has it got to do with the interest?

10 A. Because the mortgager would like the amount of principal to be reduced so to save interest...

COURT: Yes. If it is paid directly, Mr. LIU, there are funds in the hands of Johnson, Stokes, to the contractors then there will be no drawing on the mortgage, will there, so would - what difference would it make to the interest, with great respect?

20 A. That was at the request of the mortgager for the reduction of the principal because he had the right to repay part of the principal to the mortgagee ...

Q. Mr. LIU, the mortgage in the end turned out to be insufficient and there were three further charges.

A. Yes ...

Q. And you say ...

A. ... if the principal has not been reduced it would be ...

30 Q. ... that you can remember in 1979 that ... in 1965 Mr. TSE requesting the money to be paid in reduction of the mortgage, the mortgage principal.

A. That was agreed as provided in this contract. If the deposit are not going to be paid to the mortgagee then interest would accumulate more, even more.

40 Q. I put it to you that you cannot possibly remember, in view of your earlier answers, about other mortgages, you can't remember anything at all.

A. I don't ...?

- Q. You can't possibly remember ...
A. It was in the accounts of Johnson, Stokes & Master and therefore he can see that the money has been paid to the mortgagee.

COURT: Because, Mr. Bernacchi, interest runs from the date shown in the Schedule, not from any drawing on the mortgage.

Defendants'
Evidence

- A. That is from the start.
Q. Well, that of course is the interpretation put on the mortgage by ...

10

COURT: It is not an interpretation, but that's the term of the mortgage.

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

Q. Mr. LIU, I put it again to you that if the money was applied in payment of the construction costs, then there would not be the same necessity for the further mortgages, the further charges.

A. I can't really say that. That depends on the prompt payment, whether prompt payment of interest or not.

20

Q. The third further charge, according to the evidence of Mr. TSE, was made because of outstanding interest and it was a paper transaction. The \$220,000, the subject matter of the third further charge, wasn't paid to him. He, Mr. WONG, just kept the money in payment of outstanding interest. Do you agree?

A. I don't know what arrangement was between the mortgager and the mortgagee.

30

Q. But the first and second further charges were genuine further charges.

A. As long as we got instructions from both the mortgager and mortgagee, therefore I just did the further charges.

Q. Did Mr. WONG ask for you to repay as much as possible of the principal under his mortgage?

A. You mean as much as ...

40

Q. As much as possible under these contracts for the sale of units.

A. Yes.

Q. Did Mr. WONG ask you to repay as much as possible ...

A. Yes.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- 10 Q. For the discharge of his mortgage?
A. Yes.
Q. Thank you. Now you know that - perhaps you don't know - that it was Mr. WONG who insisted upon your handling these contracts of sale and purchase of units.
A. No. The sale and purchase contract doesn't
...
Q. Similar to this exhibit that I've referred you to. The answer is, "No" or "I don't know" or "yes.."
A. I can say not insist, but of course every mortgagee would hope... I can say he hoped that I can also handle the sale and purchase of the units. It doesn't mean insist, anybody.
- 20 Q. Please listen to the question. It may be that you don't know. Do you know that in this particular case he insisted on you and your firm handling these contracts?
A. No, not insist.
Q. Now why do you say "no"? I can understand "I don't know" but ...
A. How can he insist Johnson, Stokes? He cannot insist Johnson, Stokes to do anything.
- COURT: Yes, Mr. Jackson-Lipkin?
- 30 MR. JACKSON-LIPKIN: My Lord, he was given three alternatives: "Yes", "no" or "you don't know" and he said, "No, I don't know."
- COURT: Well, let me provide an answer to that one, Mr. LIU. Although you say the mortgagee cannot insist, a mortgagee of course cannot control the sale and purchase agreements.
- A. Yes.
- 40 COURT: But there always comes a day when the building is completed.
A. Yes.
COURT: And the occupation permits issued.
A. Yes.

COURT: And obligation on the vendor, the mortgagee, to assign them.

A. To re-assign, yes.

COURT: To assign to the purchaser - units.

A. Oh, yes.

COURT: Without the mortgagee re-assigning, he can't assign them.

A. Yes.

10 COURT: So if there is still any ... Even if there is one cent of principal outstanding, there is no duty on the mortgagee to re-assign.

A. Yes, that is correct.

COURT: So unless the mortgagor can really pay off the whole thing before completion, he is at the mercy of the mortgagee as far as the assignments of the units are concerned.

A. Yes.

20 COURT: Therefore, to that extent the mortgager must literally do as he is told by the mortgagee. "You do it, you have these sale and purchase agreements done with J.S.M." and the mortgagor's really not to do it, and there is nothing wrong with it certainly, as far as I am concerned. That is so, but that's the reality of the situation, isn't it?

30 A. I'm sorry, I don't quite agree with that. Even the mortgager go to other firm of solicitors, I believe that the other firms of solicitors would also adopt the same form in order to protect the purchasers.

COURT: Look, Mr. LIU ...

A. Yes, I'm sorry, your Honour.

COURT: The mortgager may do anything he likes,

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

but he can't force the mortgagee to re-assign.

A. Yes.

10 COURT: Right? Or to assign or to re-assign individual units until and unless every cent of principal and interest has been repaid, so the mortgagee is always in a position to say, "You go to any other firm of solicitors, I'm not re-assigning." That's the end of the matter, isn't it?

A. Yes, that's correct.

COURT: Let me repeat, I see nothing wrong with it.

A. Yes, nothing wrong with it.

Q. Now I'm going on to another subject. You said this morning that the mortgage provisions referred to the repayment of principal in round sums of \$100,000.

A. Yes.

20 Q. Now you also said that there was no truth in TSE saying that he was informed by you, "Only these round sums." That's what you said, in effect TSE was telling a lie when he said that he was informed by you that it was only these round sums of \$100,000.

30 MR. JACSKON-LIPKIN: My Lord, I may be wrong, but I recollect that that was in relation to all sales of units, not the repayment of the mortgage. It was not the redemption clause, it was not out of the sales of units. Yes, I think in fact we put the pages of the transcript to him.

Q. You said, Mr. LIU, that this was contrary to the provisions of the mortgage.

A. I did not say "contrary." That was a provision in the mortgage if the mortgagee agreed to receive less. Therefore, this depends on the agreement as between the mortgagor and the mortgagee, although there was a provision in the mortgage.

40 Q. Do you now say or do you not say that TSE was right when he said that he was informed

- by you that these repayments of principal would only be done in round sums?
- 10 A. I did not say that. I said that we are also ... Regarding this proviso, at the time of the mortgage, that was the instructins to the mortgagor, when payment to the mortgager to effect early repayment, otherwise if he hasn't got that proviso then interest will acfrue until the expiry of the date of the mortgage - that is to say, 1 1/2 years time, although the mortgagor effected early repayment of the whole sum, shall we say? Therefore, this proviso I can say suggested by Mr. TSE the round sum of \$100,000.
- Q. All right, but surely the correct answer is "He suggested the proviso for ...
- A. ... early repayment.
- 20 Q. For early repayment.
- A. Yes.
- Q. And Mr. WONG said, "All right, yes, but only in round sums."
- A. That was agreed between the mortgager and the mortgagee. Yes.
- Q. Yes, thank you. Now you have also said this morning that the repayments not given in round sums was by the agreement of the mortgagor and the mortgagee.
- 30 A. Yes.
- Q. Was it not in fact that Mr. WONG said what he wanted in Clause 21 and Mr. TSE just accepted it?
- A. Clause 21 of this agreement, you mean?
- Q. Yes.
- A. If at the request of the mortgagor, therefore it depends upon the mortgagee whether he agrees to accept part payment or not in a lump sum.
- 40 Q. You have already said about 10 minutes ago that Mr. WONG said to you, in effect, "Well, pay me as much as possible in repayment of my mortgage."
- A. Yes.
- Q. And Mr. TSE just accepted that.
- A. Yes.
- Q. It wasn't an agreement so much as a request by WONG to you that was accepted by mr. TSE.
- A. That was an agreement.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- Q. Now as I said before, this particular property was subject to three further charges.
- A. Yes.
- Q. You know that, don't you? Do you know that?
- A. Yes.
- Q. Can you recollect that?
- A. Yes, yes.
- 10 Q. And presumably you have read through the papers before you came to give evidence.
- A. Yes.
- Q. And you have noticed these three further charges.
- A. Yes.
- Q. Again, if it was the mortgage of 4, Peace Avenue, you would not be able to say whether that was the subject of any further charges or not?
- 20 A. I don't remember.
- Q. No, you must recollect and refresh your memory by reading the documents and here the documents show that it was the subject of three further charges.
- A. Yes.
- Q. Now you have said that TSE was constantly coming to your office. Do you remember TSE coming to your office before he executed the second of these further charges?
- 30 A. Before, you mean?
- Q. Yes.
- A. He did. On a number of occasions, yes.
- Q. Yes, all right, and do you remember he asked for your advice?
- A. I don't remember.
- Q. Do you remember he explained the mortgage interest of 1.4 was excessive and he doubted whether he would require a further charge because he was expecting sufficient pre-sale of units.
- 40 A. I don't remember.
- Q. Now do you agree that the third further charge of \$220,000 was in respect of unpaid interest? Do you know that or not?
- A. I'm not sure of that.
- Q. Now again I think Mr. TSE consulted you, asked you some questions about the third further charge.
- A. No.

- Q. You say sometimes "no" and sometimes "I don't remember."
- A. Yes.
- 10 Q. Do you really remember that TSE didn't ask any questions of you about this third further charge as opposed to not remembering whether he did or not?
- A. I don't remember because all along I asked him to refer to the mortgage or speak to the mortgagee direct. I'm not a broker.
- Q. Do you remember that he said that on his calculatins he owed roughly \$120,000 interest so why was the charge \$220,000?
- A. I don't remember that.
- Q. Do you remember that you said presumably - I mean you said words to the effect, "Presumably this was to cover interest until the date of expiry of the mortgages."
- 20 A. It might be.
- Q. Thank you. Do you remember that the date of expiry had already been extended by one year to the 29th of May, 1966?
- A. Yes.
- Q. Now I want you again to turn to E.1. You sai you - in respect of E.1, that you had only seen it just now.
- A. Yes.
- 30 Q. And you added you had never seen this document befor today. That's the evidence in-chief.
- A. Yes.
- Q. When did you know that you were going to give evidence in this case for Mr. WONG? When did you know that?
- A. Yes.
- Q. When did you know that?
- A. Before the hearing of the case.
- Q. Before the hearing of the case in November?
- 40 A. Yes.
- Q. And presumably you made out an appropriate statement to be examined on?
- A. Yes.
- Q. Well, surely E.1 was at least shown to you then and you were asked whether you had seen it before or not?
- A. Oh, I thought before. I don't mean that ... You told me the original of this one. You said before. Of course before, because I don't know exactly the date, what you

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- meant, and for that reason I have never seen it before.
- Q. It was your own counsel to whom you gave the reply that you have never seen this document until today.
- COURT: Mr. Jackson-Lipkin and Mr. WONG are not Mr. LIU's counsel, Mr. Bernacchi.
- MR. BERNACCHI: I'm sorry.
- Q. Counsel asked you in examination in-chief about these documents and you said you had never seen it until today.
- A. I don't exactly mean that. May I correct that? Therefore, I thought that before the date of the mortgages. I don't meant before today. This is the original. In fact, I myself haven't seen the original myself, in fact.
- MR. JACKSON-LIPKIN: My Lord, I didn't put the copy of E.1. I put the original document itself.
- COURT: This document E.1 being one of the hot potatoes in this case, I think if somebody had taken a statement from you they would certainly have shown you this statement.
- A. Yes.
- COURT: Or rather, not statement, this letter.
- A. Yes.
- Q. So what do you mean by saying in answer to a question in examination in-chief, "I have only seen this letter today"?
- A. I thought he meant this original.
- Q. I see.
- A. Frankly, I haven't seen the original. It doesn't do any harm to me if I saw it today or even a few days or a few months before today.
- Q. All right. Now E.134 was shown to you. No, I'm sorry, E.132, and you said that you could not remember whether you had seen this document before or not.
- A. E13, is it?

- Q. E.132, you said you couldn't remember whether you had seen this document before or not.
- A. Yes, I can't remember.
- Q. How is it that a letter from - purporting to be from TSE and WONG you can't remember whether you have seen it before or not, but E.1 you said, "Ah, I haven't seen this letter until today."
- 10 A. Regarding this original, I say I thought the question was put to me on the original.
- Q. So ...
- A. You cannot say that "this document" means the original.

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- COURT: Wait for your question, Mr. LIU.
- A. Yes, I'm sorry.
- Q. Do you mean by that that if you had been shown a photostat copy you would have said, "I can't remember whether I have seen this document before or not" - E.1.
- 20 A. Because all along I thought that the counsel asked me regarding this original.
- Q. Look, Mr. LIU, I am now questioning you on the difference in your answer between E.132 which you can't remember whether or not you have seen this document before, and E.1 which you have only seen today. All right? Now I gather that you have seen the photostat copy of E.1 late last year. All right. Now why the difference in your answer? You can't remember whether you have seen one letter or not, another letter you have definitely not seen. Why?
- 30 A. The question is simple. Therefore, some time I can't remember, therefore I said I can't remember.
- Q. Look, if you can remember, of course, the question is simple. You say "Oh yes, I remember this."
- 40 A. Yes.
- Q. But if you can't remember it is strange that you say, "I definitely did not see this letter."
- A. I can't remember.
- Q. And does that apply to both E.1 and E.132?
- A. If you meant the photostat, therefore you can say that I can't remember.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- 10 Q. I see. Well, you see, Mr. TSE says that he handed you a photostat of E.1. I suggest to you that on your answers you can't remember whether that is so or not.,
- A. I can't remember.
- Q. Now you have agreed with me that Mr. TSE was rather a nuisance to you, that he was always coming to ask you for accounts and you always referred him to Mr. WONG.
- 10 A. Yes.
- Q. Would one of these times be in February, 1966? Might be?
- A. It might be, yes, might be. I can't remember.
- Q. Do you remember anything about asking for accounts so that he could make arrangements for redemption?
- A. Yes.
- Q. Thank you.
- 20 A. You mean office accounts, our offices accounts? Yes.
- Q. I mean anything, just accounts. Then you referred him again to Mr. WONG.
- A. Regarding interest accounts, shall I say, or the redemption account?
- Q. Yes. Now I come to these letters again, B.38 and 39.

COURT: Mr. Bernacchi, I'm going to rise a bit earlier today, about quarter to one.

- 30 MR. BERNACCHI: My Lord, that would be a convenient time.

(Short discussion concerning Mr. Bernacchi's application to amend)

COURT: Two-thirty.

12.41 p.m. court adjourns

2.32 p.m. court resumse. 27th March, 1979

Appearance as before.

D.W.3 - LIU Kwing-wah ofo.

XXN. BY MR. BERNACCHI: continues:

	Q.	Mr. LIU, would you refresh your mind as to B38 and B39, please. These were the two letters sent on the 28th of April, 1966.	<i>In the Supreme Court of Hong Kong High Court</i>
	A.	Yes.	
	Q.	You are acquainted with these two letters?	
	A.	Yes.	
	Q.	Now Mr. TSE went almost immediately up to see you on receipt of these letters, presumably?	Defendants' Evidence
10	A.	Yes.	
	Q.	And he enquired about the figures?	
	A.	Yes, he did.	No.6
	Q.	And again did you say that that has nothing to do with you, "Ask Mr. WONG"?	D.W.3.
	A.	Yes.	LIU Kwing-wah
	Q.	And did you tell Mr. TSE that the figures had been supplied by Mr. WONG?	Cross-examination (Continued)
	A.	Yes.	
20	Q.	Now I come to the preparation for the auction. You said that you prepared the conditions. It is in the A bundle, I think.	<i>Exhibits B38 B39</i>
	COURT:	B40.	<i>Exhibit B40</i>
	Q.	B40.	
	A.	Yes.	
	Q.	That was the actual conditons of sale. The English starts at B42, but there are also Chinese conditions similar to English.	<i>Exhibit B42</i>
	A.	Yes.	
30	Q.	You say that you prepared these conditions?	
	A.	Yes.	
	Q.	And that Clause 2 is not unusual?	
	A.	Not unusual.	
	Q.	Now you knew that you were preparing it for a sale by a mortgagee.	
	A.	Yes.	
	Q.	So what was the object of Clause 2? I mean, you know or, presumably you know that a mortgagee is not allowed to buy from himself.	
40	A.	Yes.	
	Q.	So what was the object of saying in Clause 2 "Vendor reserves the right to bid it generally by himself or his agents."? That is 2(a).	
	A.	Yes, that is a general clause.	
	Q.	What is the object of, in a sale by a	

In the Supreme
Court of
Hong Kong
High
Court

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- mortgagee, of inserting this provision?
- A. I just follow the usual form and that is all.
- Q. I mean, did you think that the mortgagee might bid so as to encourage other people to bid, something like that?
- A. I only say that this is a general clause. I only adopt this general clause in the conditions of sale and I also understand that other firms of solicitors - they also adopt this clause.
- 10 Q. By the time that you prepared the conditions of sale, did you know the existence of - now I think you know - the existence of the third respondents, Mr. WONG's family company?
- A. Yes.
- Q. And did you, I mean, from your experience in other auctions --
- 20 A. Yes.
- Q. There were two other auctions before that - it is in evidence already - where Mr. or Mrs. WONG was the mortgagee.
- A. And the family company bought the property. Did you consider that the family company was likely to bid? Did that enter in your mind or anything like that?
- A. Yes, they have the right to bid.
- 30 Q. Yes, I know. Look, I am not asking for law. I am asking what you had in mind, if anything, when you put that condition? Did you have in mind that perhaps the family company would bid for this property?
- A. Likely, likely, but this is a general condition.
- Q. Look, I'm sorry, if your answer is, "Yes, I had in mind that the family company was likely to bid," all right, that is that.
- A. Yes, yes, likely to bid.
- 40 Q. Now I come to the day of the auction. You said that --

COURT: Mr. Bernacchi, before you come to the date of the auction, I would like to ask a couple of questions at this stage. You were acting for both mortgagor and the mortgagee.

A. Yes.

COURT: The mortgagee was a personal friend of yours?

A. Yes.

COURT: No doubt you are hoping that the mortgagor one of these days will become a personal client of yours?

A. Yes.

COURT: Have a look at the price in the conditions of sale.

10 A. Yes.

COURT: You know the whole thing was a newly-developed building?

A. Yes.

COURT: Of which something like 36 domestic units had been sold.

A. Yes.

COURT: Leaving a balance of 36 domestic units?

A. Yes.

COURT: First and second floor flats?

20 A. Yes.

COURT: And Ground floor flats?

A. Ground Floor shops?

COURT: Ground floor shops.

A. Yes.

COURT: You are no doubt hoping to get the best price possible for the mortgagor?

A. Yes.

COURT: Tell me, won't you get a better piece if the auction had been flat by flat,

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

storey by storey, in the first and second floors and shop by shop on the ground floor rather than selling what is in fact an odd lot wholesale? You know what I mean by "odd lot wholesale"?

A. I know.

COURT: Did that enter into your head?

A. If it --

COURT: Did that enter into your head?

10 A. Yes, yes.

COURT: Did you advise either Mr. WONG or Mr. TSE of this?

A. I did not.

COURT: Why not?

A. When the stage came to the mortgagee exercising a power of sale, the mortgagee only gave me the instructions in a sale of the remaining units in one lot.

20 COURT: Did you advise then Mr. TSE, "Look, this mode of sale might be to your detriment. Insist on an auction ..." - I accept the fact and the law that the mortgagee has the power of sale and the mortgagee cannot postpone the sale, but as far as the mode of sale is concerned, did you advise Mr. TSE, "Look, insist on an auction of unit by unit, storey by storey, shop by shop."

A. In those days --

30 COURT: Answer my question. Did you or did you not?

A. No, I did not.

COURT: In your opinion, would a sale of shop by shop, storey by storey and unit by unit, at the end of the day, fetch a better price than an odd lot wholesale job?

- A. In general it would be.
- COURT: Thank you, that is all I want to know.
Sorry, Mr. Bernacchi, carry on.
- Q. I now come to the day of the auction. You say that you attended the auction together with Mr. McElney, Mr. and Mrs. WONG and Mr. YAU.
- A. Yes.
- Q. Was he Mr. YAU Kam-tong?
- 10 A. Yes.
- Q. And you mentioned that Mr. YAU was a foki of Mr. WONG?
- A. Yes.
- Q. Did Mr. WONG introduce him to you as his foki?
- A. Yes.
- Q. It would not be surprising to you, would it, if I were to tell you that this Mr. YAU Kam-tong very often took the minutes of the third respondents, Mr. WONG's company?
- 20 A. I did not know about that.
- Q. No, I know. It wouldn't surprise you, would it surprise you?
- A. I did not know - I can't answer this question because I don't know what exactly it means.
- Q. Now we have had various estimates from various witnesses as to the number attending this auction. Now whatever the actual number was, would you agree that the hall as a whole was rather empty?
- 30 A. You mean the hall?
- Q. The hall as a whole was rather empty?
- A. No. Rather empty? I do not know what exactly the word 'empty' mean.
- Q. Well from your knowledge of the auctions--
- A. Yes.
- Q. The auction was poorly attended?
- A. Not quite, not quite.
- 40 Q. What do you mean by 'not quite'?
- A. Now I have not exactly counted the number of seats. I think I don't remember the number of seats accommodated in that hall but it appears to me that more than half was full, more than half.
- Q. Again you have attended a number of auctions.

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

- A. Not quite a number; only a very few.
Q. Only a very few?
A. Very very few.
Q. What was the reason for you attending this particular auction? Was it your friendliness with Mr. WONG?
A. Yes, because he is a personal client of mind, therefore I have to do it.
Q. And you attended the auction on Mr. WONG's behalf, in fact?
A. Yes.
Q. I do suggest to you that the auction was badly attended.
A. I don't agree with that.
Q. Now you said in your examination-in-chief, "Normally Mr. Watson would read out the principal particulars."
A. Yes.
Q. So that wasn't referring to any particular auction. It was a general statement: normally this auctioneer Mr. Watson would read out the principal particulars?
A. Yes.
Q. So again I suggest to you that you are remembering what normally happened rather than what happened at this particular auction.
A. Yes.
Q. Now did not Mr. TSE at the auction complain of the reserve price?
A. No.
Q. You remember that he did not complain? You see, you are giving evidence --
A. Yes.
Q. You are giving evidence although you are a friend of many years' standing of Mr. WONG, you also have to remember that you are giving evidence, that Mr. TSE is also concerned.
A. Yes.
Q. And I would ask you to answer the questions frankly.
A. Yes.
Q. Not exaggerated at all.
A. Frankly.
Q. Really, do you remember?
A. I did remember. He did not make any complaint.
Q. You remember that he, Mr. TSE, did not make

any complaint.

A. No.

Q. You see, you don't --

A. Complained in the auction hall? Did not make any - he did not complain in the auction hall.

Q. Yes, I am referring to the auction hall space, auction room anyhow. You don't say, "I did not notice that Mr. TSE was complaining." You say Mr. TSE did not complain.

10 A. He did not complain. If he did, therefore I should remember in this particular occasion because there are so many people in the hall.

Q. Because there were what?

A. So many people in the hall, in the auction hall.

Q. Because there were so many people in the auction hall, therefore you should remember if he did complain? I'm sorry, but I do not understand the reasoning behind that.

20 A. If he did complain, therefore not only myself he was complaining to, he might have complained to other people.

Q. I'm sorry. I do not mean to say that he complained to you.

A. Yes.

Q. But he voiced his complaint.

30 A. I did not hear that.

Q. Did you hear him, when the property went for the reserve price, say, "Not fair. Not fair."?

A. I did not.

Q. Did you notice that he afterwards indulged in a shouting match with Mrs. WONG?

A. I did not know about that.

Q. You did not know?

A. I did not know.

40 Q. Now your evidence - you were asked from your experience as the head of the conveyancing department, whether the property market was low at the time of the auction, you said yes, or words to that effect.

A. Yes.

Q. You were asked your reasons and you said this, "1965, Bank run; 1967, riots; 1968, end of year improvement."

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

10

- A. Yes.
Q. Significantly enough, you did not then mention the Star Ferry riots of early 1966.
A. Do I have to mention that?
Q. No.
A. I was just thinking generally.
Q. No, you don't have to mention that, but I suggest that the reason is that that took part in the early part of 1966 and by June was a thing of the past and forgotten. Are you with me?
A. I don't exactly remember the time of the Star Ferry crisis. I do not exactly remember the date or the month.

COURT: Wasn't the property market climate better in June 1966 than say end of 1965?

20

- A. Not much difference. I can't say about that. I can't say on that because that was --

COURT: You don't know, you've forgotten or you disagree?

- A. I have forgotten.

COURT: You have forgotten?

30

- A. I haven't gone into details.
Q. But viewing the position from June of 1966, would you not agree with me that there was no reason why Mr. WONG should want to sell, that everything suggested that the property market would gradually rise in June of 1966?
A. I did not remember.
Q. You did not remember?
A. Very difficult for me to.
Q. Do you remember that Mr. TSE had sold some flats in May and I think in June too?
A. Yes.

40

COURT: I think, Mr. Bernacchi, those were assignments.

- A. The assignments.
Q. Yes. When was the last agreement for sale and purchase, do you remember or do you not

- remember.
- A. I do not remember.
- Q. But would you agree that there was every chance that the mortgage with the interest would be paid off in a few months if the position was left in status quo with Mr. TSE gradually selling the flats?
- A. Yes.
- Q. Thank you. Now could you get the E file out, E91?
- 10 A. Yes.
- Q. Now just - I am not asking you any question at the moment, but just read what E91 says. This was a letter from Johnson, Stokes & Master to Mr. TSE of the 24th of October, 1966. Would you turn to E14, E143 please, these two letters in Chinese: one sent to your firm and the other sent to Mr. WONG himself.
- 20 A. Yes.
- Q. Now would you say that it was as a result, having refreshed your mind from these documents - would you say that it was as a result of E141 and E143 that the letter E91 was sent?
- A. I do not remember.
- Q. Now a general question, Mr. LIU. You said that Mr. WONG was your personal client and I get the impression you are a friend of long standing.
- 30 A. A friend of whom?
- Q. That you are a friend of long standing?
- A. Yes.
- Q. Did you impress upon the respondents, that is WONG and his wife, and WONG's company, the duty to make full disclosure of all documents in this case?
- A. Yes.
- REXN. BY MR. JACKSON-LIPKIN:
- 40 Q. Have you got bundle E there?
- A. Yes.
- Q. Now E1 is a photostat, is it not, photostat copy of a letter in Chinese?
- A. Yes.
- Q. Now please forget the original that I showed you earlier. I want to ask you about that photostat.

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Cross-
examination
(Continued)

Exhibit E91

*Exhibits
E141 E143*

D.W.3.
LIU Kwing-wah
Re-
examination
Exhibit E1

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

Exhibit B42

10

20

30

Exhibits
B88 B87

40

- A. Yes.
- Q. When did you first see such a photostat copy?
- A. I do not exactly remember the date, but anyhow before the hearing of the case.
- Q. Mr. TSE has said that he gave you such a photostat copy back in 1966, is that true?
- A. That was not true.
- Q. Did he show you such a photostat copy back in 1966?
- A. No.
- Q. Now I want you, please, to look again please at B42.
- A. Yes.
- Q. Now you have been asked a number of question about that clause.
- A. Yes.
- Q. And you said that Mr. WONG knew about it. Did you discuss the wording of the clause with Mr. WONG Chit-sen?
- A. I did not discuss.
- Q. Did you ask the permission of Mr. WONG to use that wording of that clause?
- A. No, I did not.
- Q. When you said Mr. WONG had no objection to the clause, what did you mean?
- A. You mean this?
- Q. Yes.
- A. You mean these particulars in the condition of sale?
- Q. Yes.
- A. Since I told him that this is a general form, therefore he will have no objection to that because this is a very very general form or, shall I say, a usual form.
- Q. How I want to ask you about B88. I'm sorry. I should start at B87.
- MR. JACKSON-LIPKIN: My Lord, that is exactly the same as A70, but A70 is the one letter, B has a whole set of four.
- Q. I want you to look at B87 first.
- A. Yes.
- Q. By the time you got that from K.B. Chau & Co., I assume you were no longer acting for Mr. TSE?
- A. No, no longer acting.
- Q. And he was referring to a statement of

- account which you had given to Mr. TSE.
- A. Yes.
- Q. Can you now remember what statement of account that was that he referred to?
- A. I can't remember, but I can say that regarding the receipt of deposits and also the repayment of the principal under mortgages, I thought those are the two main figures.
- 10 Q. Well then you wrote the letter B88 which Mr. Bernacchi asked you to look at earlier.

COURT: Before you ask the next question, Mr. Jackson-Lipkin, did you find out from the witness - B88, the second sentence there: "So far as we can recollect, a signed copy of the Statement of Account was duly rendered to your client." Now such a document did exist before this Court?

MR. JACSKON-LIPKIN: Yes, it did at some time, my Lord. Not a signed one.

- 20 COURT: I am strictly speaking from memory. There has been no account to the claimant either from J.S.M, or from the respondents prior to this letter.

MR. JACSKON-LIPKIN: Not a signed one, no, my Lord.

COURT: Or even an unsigned one. That is strictly from memory. I just want to clear up this matter, that is all.

- 30 MR. JACKSON-LIPKIN: My Lord, this is the matter that I was going to ask this gentleman.

Q. Here you have Mr. K. B. Chau acting on behalf of Mr. TSE saying, "When you were handling the transaction on behalf of the client, you have given to our client a statement of account a photostat copy of which is herewith enclosed."

COURT: What account is that? Is it before us?

it is not, and that is why I asked Mr. LIU

*In the Supreme
Court of
Hong Kong
High
Court*

of it, and he says, as far as he can recollect, it is the one dealing with the payments out and the payments under mortgages.

Defendants'
Evidence

COURT: The ledger accounts of J.S.M?

MR. JACKSON-LIPKIN: I presume so.

No.6
D.W.3.
LIU Kwing-wah 10
Re-
examination
(Continued)

Q. At any rate, as a result of that letter you in fact sent signed accounts?

A. Yes, signed accounts signed by the accountant, shall I say.

Q. That is B88.

COURT: I know these are two ledger accounts.

Exhibit B88

Q. And you complained there something about - have you got B88?

A. Yes.

Q. You complained about Mr. LIU (TSE?). Then you've got another letter from K.B. Chau & Co. asking for a further statement of account in respect of deposits and purchase monies held by your stakeholders and suggesting that you call the police if Mr. TSE CHAU's client interfered with you any more. B89. Do you remember receiving that second letter? Are we looking at the same time B89?

20

Exhibit B89

A. Yes.

Exhibit B87

30

MR. BERNACCHI: My Lord, surely in December of 1970, B87, when they speak of a statement of account a photostat copy is enclosed herewith, they are referring to the accounts sent with A91, that is the October accounts, which in fact was never signed.

COURT: That's right. I myself made a mistake when asking you that question.

MR. JACKSON-LIPKIN: My Lord, of course, I'm not sure myself whether those were enclosed, that's why I was asking the question.

Q. You said that you often wrote out in Chinese statements for Mr. TSE. About how

often did you write any such Chinese accounts?

A. Upon his request.

Q. About how often did you do that?

A. I think in each and every transaction and sometimes even twice.

Q. Did you ever sign those?

A. No, no.

Q. Did you conceive any necessity to sign them?

10 A. No, because I just want to confirm to him what amount he had received and what amount had been paid so as to let him know the dates.

Q. Would you just leave B89 for a moment and look at Bundle E, at pages 92, 3 and 4.

A. Yes, bundle E.

Q. The pink one.

A. Yes.

20 Q. If you can't remember, just say so, please.

A. Yes.

Q. But are those three documents the documents referred to by Mr. K.B. Chau in his letter at B87, yes or not or you can't remember?

A. I can't remember.

Q. Could we get back, please, for a moment to B89? You were asked to give a further statement of accounts and then there were these remarks about the police. Now you did send those further accounts, didn't you?

30 A. Yes.

Q. And just help my Lord, will you: are those accounts A71 to 73? Yes or no or you can't remember?

A. Yes.

Q. Now I want to deal next please with the payments of monies received from the sale of units.

40 A. Yes.

Q. You have talked about having a discretion as to how you apply those monies.

A. Yes.

Q. Did you yourself receiving architect's certificates?

A. No.

Q. Were they ever shown to you?

A. I remember they were brought in by the claimant.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

Exhibits
E92 E93 E94

Exhibits
A71-73

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

10

20

30

40

Q. Did you ever pay out any money before he brought in from the proceeds of sale - before he brought in the architect's certificates?

A. No.

Q. Now in relation to that last answer of yours, did you ever make any repayments to Mr. WONG out of the proceeds of sale before Mr. TSE had brought in and shown you the architect's certificates?

A. No.

Q. Now just before luncheon, you were asked a question by Mr. Bernacchi and you did not answer it but you asked him a question. He asked you, "Did Mr. TSE ask you how much he required to redeem the mortgage" and you answered --

MR. BERNACCHI: I don't know what this question is because he answered this question very fully in my recollection.

MR. JACKSON-LIPKIN: My Lord, the answer was, "Do you mean the interest account or the redemption account."

COURT: Yes, and did Mr. Bernacchi give an answer pursuant to that?

MR. JACKSON-LIPKIN: No, we rose then. I think you will find that that question was posted by - at least on my note - posted by the witness and never answered. That is both our recollection. That is how we ended.

MR. BERNACCHI: As far as I can recollect - and it is confirmed by my learned junior - he, Mr. LIU, said Mr. TSE asked for the interest and the redemption accounts.

COURT: He did ask but I don't think the witness committed himself with an answer.

MR. JACKSON-LIPKIN: No, my Lord. The actual answer was, "Do you mean interest account or redemption account?" That is what he actually said in an interrogative term.

COURT: Anyway, this witness has said time and

time again, "I was not involved with the interest. I knew nothing about the interest whatsoever."

*In the Supreme
Court of
Hong Kong
High
Court*

MR. JACKSON-LIPKIN: Well my Lord, what I wanted to do if I may is to ask him for an answer to a question which Mr. Bernacchi posed, "Did Mr. TSE ever ask him how much was required to redeem the mortgage?"

Defendants'
Evidence

10 Q. Did Mr. TSE come to see you and say, "How much is required to redeem the mortgage?"

A. He did.

Q. When?

A. Before the auction sale and after we have written him a letter and I always asked him to refer back to Mr. WONG.

Q. Now is the letter you are referring to B38? Which is the letter you are referring to?

20 A. In the first place, the letter which we have written on Mr. WONG's behalf demanding interest and the second letter regarding the calling in of the mortgage.

Q. Well now can you remember after which letter he came in and asked you?

A. I can't exactly remember.

Q. The first or the second?

A. But if he did I would refer him to Mr. WONG.

30 Q. Now Mr. LIU, I'm sorry I forgot to ask you something in relation to clause B40. Could you look at it again?

A. Yes.

Q. I think it is on page B42, isn't it, clause 2? Now you were asked two questions by Mr. Bernacchi. The question was, "Did you personally have in mind that Chit Sen Company Ltd. was likely to bid at the auction?" Do you remember being asked that?

A. Yes.

40 Q. And you said yes.

A. Yes.

Q. It is likely you say.

A. Yes, likely.

Q. And then you added the words in your answer, "This is a general condition."

A. Clause 2 yes.

Q. Now your whole answer read, "Likely, this

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)
Exhibit B38

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

- is a general condition."
- A. Yes.
- Q. What I want to ask you is this: was that likelihood anything to do with your including clause 2 in the conditions for sale.
- A. No.
- Q. Now, at the auction itself, how near were you to Mrs. WONG?
- 10 A. We are on the same row.
- Q. Yes. But how near?
- A. I don't remember, maybe one or two spaces.
- Q. Yes. So if there had been a row between Mr. TSE and Mr. WONG, would you have been likely to hear it?
- A. Yes.
- Q. After the auction was over did you leave alone or with anybody?
- 20 A. I left with Mrs. WONG and also - I can't exactly remember but anyhow Mr. McElney, of course, I have to accompany him back to the office. I don't exactly remember whether Mrs. WONG accompanied me or not. I don't exactly remember. But I am sure Mr. McElney.
- Q. Now, you were asked a question about the repayment of the mortgage by Mr. TSE gradually selling off the units.
- 30 A. Yes.
- Q. Did you have any reason to believe in the autumn of 1966 that Mr. TSE would have any greater success in selling units than he did in the spring or summer?
- COURT: Mr. Jackson-Lipkin, did this witness know that Mr. TSE was having difficulty in selling? Is there any evidence of that?
- MR. JACKSON-LIPKIN: My Lord, he knew how many had been sold.
- 40 COURT: Would he also know the difficulty? Would he also know why he was not in a position to sell? In early 1966, because of the trouble with the construction, the trouble with the lifts, the trouble with the doors ...

MR. JACKSON-LIPKIN: My Lord, I'll leave that.

Q. Will you please look at bundle E? Just tell my Lord did you ever receive page 143?

A Yes.

COURT: What is 143?

MR. JACKSON- LIPKIN: My lord, that is a Chinese letter from Mr. TSE addressed to Johnson, Stokes & Master.

10 Q. Can you remember if you received it or not? Better read it.

A. Yes, from this chop of course we should receive this letter.

Q. You should have done but can you remember?

A. I don't remember, but on the face of it of course I should receive this.

Q. I want you, please, to look at E141 and tell my Lord when was the first occasion that you saw that letter. The English is on the next page.

20 A No, I just want to look at the chop, the Johnson, Stokes & Master chop.

Q. No, that is not addressed to Johnson, Stokes; that is addressed to Mr. WONG Chit-sen.

A. I don't know what's the word 61 mean here. You can see the chop of the label by Johnson, Stokes. There is a chop. I don't know why. 61 in the letter itself, you can see the ...

30 Q. Could you just show me what you are - my, Lord, may the witness show me what he is...

A I am sure. The chop here, the round chop. (Witness indicates)

Q. You are looking at the wrong one, you are look at the wrong letter.

A. No, I just want to compare the date because the date of the letter is 66 and the chop itself 61. Is this supposed Johnson, Stokes & Master's receipt?

40 Q. Don't you worry about that.

A. Yes.

Q. Just be kind enough to look at E141.

A. 141?

Q. Yes. Tell my Lord, will you please - look at it first.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

- 10 A. Yes.
Q. When did you first see that letter or a copy of it?
A. I don't remember. I can't say.
Q. Well, can you help us to this extent, can you remember ever having seen it before the preparation of this action?
A. Frankly, I don't remember.
Q. Thank you very much. How, Mr. LIU, you've been asked a number of questions about your recollection of this particular transaction.
A. Yes.
Q. I want to ask you a somewhat personal matter. Did something happen between your and Mr. TSE in relation to this case?
A. Yes.
Q. What happened?
A. He just came to the office and made a nuisance and that is all.
20 Q. Did anything happen to you?
A. No.
Q. Or to any of your staff?
A. No. He just shouted in the office. If you want to go into details, I can summarise it in three stages.

COURT: How does this arise in cross-examination?

MR. JACKSON-LIPKIN: On his memory, my Lord.

30 COURT: Memory on what?

MR. JACKSON-LIPKIN: My Lord, it was suggested that he didn't really remember any more about this than any other matter. I wonder if there were any particular incidents in this which may be different from the others and that is why I want to ask him.

COURT: Then he might have memory of a particular incident only which did not arise in cross-examination.

40 MR. JACKSON-LIPKIN: My Lord, if that affects the memory of the whole transaction ...

COURT: How could that affect the memory of

the whole transaction? He's been asked about it, he's given his answers. What was there ambiguous about his answers?

*In the Supreme
Court of
Hong Kong
High
Court*

MR. JACSKON-LIPKIN: My Lord, if something particular transaction, one would remember that transaction better than others that happened 13 years ago.

Defendants'
Evidence

COURT: Then why was that not brought out in the examination in chief?

10 MR. JACKSON-LIPKIN: My Lord, I was asking questions straight forwardly, I wasn't challenging his memory.

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

COURT: All right. If he has memory of that incident or various incidents, how does it - I still ask - how does it arise in cross-examination if there was no cross-examination directed at those incidents?

MR. JACKSON-LIPKIN: My Lord ...

20 COURT: If you want to persist, by all means ask.

MR. JACKSON-LIPKIN: My Lord, I shan't persist in view of what your Lordship said. I'll pass on to Prince Edward Road, if I may.

Q. When you were asked about Prince Edward Road, you immediately remembered the mortgagor was a Mr. Pak-lan YOUNG.

A. Yes.

30 Q. What happened to Pak-lan YOUNG in the course of the mortgage?

A. In fact Mr. Pak-lan YOUNG and I knew for more than 3 odd years and he always visited me frequently in th office and ultimately he died and then I met his children and ...

Q. Wait a minute. He died at what stage, can you remember? Did that affect the mortgage?

40 A. No, no, that doesn't affect the mortgage - yes, it affected the mortgage itself because I remember prior to the date of the

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.3.
LIU Kwing-wah
Re-
examination
(Continued)

- redemption.
- Q. He died?
- A. Yes, he did.
- Q. And did Mr. WONG try to recover from the estate the balance?
- A. Yes.
- Q. Of the mortgage?
- A. Yes. And I also remember we did write to the official administrator.
- 10 Q. Yes. So in relation ...
- A. And I also remember, shall I say, his son also would like to take the out the grant of probate or the letters of administration. And for those reasons, I remember the name of the mortgagor.
- Q. Yes, I see. Well, in relation to these various mortgages there were incidents which stick in your memory, is that right?
- A. Yes.
- 20 Q. Unless your Lordship has any question of Mr. LIU.
- MR. WONG: My Lord, befor the next witness is called, I think I do owe this honourable court and my learned friends an explanation in relation to exhibit 'N'. I was first instructed to act in this case, I think, 2 or 3 weeks before the initial trial date. And by that time, I wasn't led by Mr. Miles Jackson-Lipkin and I was - well, I had a conference with client and it was during one of those conferences that that book was shown to me. I had a casual glance. And at that stage there were many things which piled upon me and I did not appreciate the relevance of it. After the adjournment and I think it was on Wednesday last when Miles Jackson-Lipkin, my leader, was on leave and my solicitor was also having his holiday that something dawned upon me that it should be disclosed. And in fact it was in first consultation with my leader on Monday, the day before the resumed hearing, this matter was brought up and it was on the advice of my leader that the document be disclosed.
- 30
- 40

COURT: Mr. WONG, I certainly accept and I am quite certain Mr. Bernacchi does also.

MR. BERNACCHI: Of course.

D.W. 4 - Kenneth Albert WATSON Sworn in
English

*In the Supreme
Court of
Hong Kong
High
Court*

XN. BY MR. JACKSON-LIPKIN:-

- Q. What is your full name?
A. Kenneth Albert Watson.
Q. Where do you live?
A. In Hong Kong, 23 Shek O.
10 Q. And are you among other things an
auctioneer with Lammert Brothers?
A. Yes.
Q. And have been for many years past?
A. Yes.
Q. Mr. Watson, I want to ask you about a sale
by auction of property at 52 and 54 Cheung
Sha Wan Road. Do you recollect that
particular sale?
A. No. I know that we conducted it. I
conducted all the sales but I cannot
20 remember the details of that particular
one.
Q. I see. I'll show you the particulars in a
moment; if I may. Did you know Mr. WONG
Chit-sen?
A. I don't think so.
Q. You see, it has been suggested that in the
course of this case that you knew him very
well.

Defendants'
Evidence

No.6
D.W.4.
Kenneth Albert
WATSON

MR. BERNACCHI: No, I....

30 COURT: I don't think anyone said that.

A. Certainly not ture.

MR. BERNACCHI: My Lord...

COURT: Nobody suggested that, Mr.
Jackson-Lipkin. Mr. WONG met Mr. Watson
prior to the sale on that day...

MR. JACKSON-LIPKIN: My Lord, I am glad to hear
your Lordship say that. The word in fact
used was slightly different. That's
probably what was intended.

40 MR. BERNACCHI: In fact I remember I asked the
question: "Why did you say Mr. Watson was

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.4. 10
Kenneth Albert
WATSON
(Continued)

introduced to you in 1966 when you had already used Mr. Watson for the sale of some property in 1965?".

MR. JACKSON-LIPKIN: My Lord, I am not going to go into it in greater detail over what words were used. I think we now know the sense of it.

Q. Will you please look at B40. Would you be kind enough to look through pages B40 to B44. Just read through them very quickly, please, Mr. Watson. Do you see the conditions of sale?

A. Yes.

Q. Anything unusual about them?

A. No, there doesn't seem to be anything unusual. These are apparently fairly a set standard form which appear in very many of them.

20 Q. And have you in fact brought with you two other sets of particulars and conditions of sale for comparison?

A. Yes, I have.

Q. One is a property at Tai Kok Tsui and the other in Nanking Street?

A. Yes, I have these two.

Q. Would you hand them to my Lord, please. Have you another set with you, Mr. Watson, or if not, just look at B42, will you?

A. No, I am afraid I haven't got another set.

30 COURT: You want these exhibited?

MR. JACKSON-LIPKIN: Yes, please, my Lord. May that again be '0'?

CLERK: 01 and 2.

COURT: Yes.

A. Which one, Sir?

Q. Is there anything unusual about clause 2?

A. Clause 2, "The Vendor reserves the right to bid generally by himself or his agents"...

40 Q. Yes.

A. "To withdraw the property at any time before the same is actually sold and

Defendants'
Evidence

No.6
D.W.4.
Kenneth Albert
WATSON
(Continued)

either after or without declaring the reserved price." I read this out every time I have a sale, whether it is mortgagee or any other kind or sale. I think it is pretty standard in all conditions of sale for sales by auction.

Q. Now, are you able to assist my Lord that the position so far as auction sale was concerned in June 1966?

10 A. I have got copies of sales in 1966, I think late '66.

Q. First of all can you tell my Lord what the conditions were in relation to auctions? Were they going well, badly, frequently, infrequently?

A. In June 1966 - I have a list of 59 sales that I conducted in 1966.

Q. Yes?

20 A. I am of the opinion that the sales in that month were affected by various climatic conditions before and by possibly the Kowloon Riots which, I think, were in - earlier on.

Q. Now, we've heard a lot about the riots, we haven't heard anything about the '66 climatic conditions. Can you help us on that?

Q. I think it was in....

30 COURT: I think we all know about that year. I lost my hope.

A. I have an extract of one of my letters which described it which may have had something to do with it. There was a rain storm in June the 12th and subsequent days which was described in the annual report for 1966.

Q. Well, It was pretty bad, was it not?

40 A. It was pretty bad, yes. I think it was the worse one I can remember in Hong Kong for the last 38 years.

COURT: Was 12th of June the exact date?

A. 12th of June, yes.

MR. JACKSON-LIPKIN: 6.1 inches in an hour in

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.4.
Kenneth Albert
WATSON
(Continued)

the morning.

- Q. You mentioned 59 sales. Can you tell us what happened in relation to those 59 sales? Were all the properties sold?
- A. No. I think that 50 were sold. I have a list of them here. I think 50 of them were sold and 9 were not sold; either they were withdrawn or they failed to reach the reserve.
- 10 Q. Now, out of the remaining 50 how many went to the reserve price?
- A. A very large number. 17, I make it, including this particular one.
- Q. I am sorry. Including what?
- A. Including this one, the one on the 24th of June.
- Q. Yes. When you say that you don't remember this particular auction, what actually do you mean? You don't remember the details of it or...
- 20 A. I remember the details as given in our papers but the actual circumstances or the people who were there; I can't remember who represented Johnson, Stokes & Master, for example. And I don't know who was there. I mean, I was, possibly, introduced to people without knowing who they were and without remembering who they were.
- 30 Q. Are you able to remember approximately how many people were present?
- A. Absolutely no. This was 12 years ago, I think 13 years ago.
- Q. Yes. Can you remember this though, Mr. Watson. Did anybody raise a complaint when the reserve price was bid?
- A. No. This I would certainly remember if anybody raised a complaint.
- 40 Q. Did anybody call out that the sale was unfair?
- A. No.
- Q. Would you remember that?
- A. I think I would, yes. Certainly.
- Q. Did anybody have a row with the successful bidder?
- A. No, unless it happened afterwards. I don't remember anything of what sort at the time.

- Did you have at that time a Chinese assistant?
- A. Yes.
- Q. And what was his function?
- A. He - the procedure is for me to read the particulars of the sale and then certain of the conditions of sale and he then reads the Chinese translation, so that the main things, especially the particulars, everybody should know what they are.
- 10 . Q. What about before the auction begins, what functions did he have then?
- A. I don't think he would have any at all other than be contacted by the particular solicitors firm who say they would like an auction at a particular time or date or have we got a date available.
- Q. And on the day of the auction before the auction commenced, what would he be doing?
- 20 What should he be doing?
- A. Well, this particular man died, I think, in 1974.
- Q. Yes?
- A. The present man certainly just appears - what happens is that the solicitors come into my room and we discuss the reserve price and what the minimum bid should be. But my Chinese assistant has nothing to do with that at all. I don't think this particular one did either.
- 30 Q. Who would bring them into your room?
- A. There is a girl who keeps in contact with them.
- Q. No, I am sorry. In those days who brought them into your room?
- A. It could be the same girl. She's been there for years and years and years.
- Q. Now, you said something about the solicitors coming in and discussing the reserve price. Are you always told the reserve price before you begin?
- 40 A. Yes, otherwise I can't hammer. I can't hammer if I don't know the reserve price.
- Q. I know this may sound a foolish question but I am obliged to ask you, Mr. Watson. Do you ever express an opinion as to whether a reserve price is high or low?
- A. Yes I do.
- Q. Can you remember if you expressed any

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.4.
Kenneth Albert
WATSON
(Continued)

opinion in this particular case?

MR. BERNACCHI: My Lord, Mr. Wason has said all that he can remember was the notes before him, such as the conditions of sale, etc. He, Mr. Watson is my learned friend's witness, is not under cross-examination. He should be content with that answer.

MR. JACKSON-LIPKIN: My Lord, my question was merely: Can you remember? Did you say anything about the reserve price? It is a perfectly proper question.

COURT: Mr. Watson said he can't remember anything about this particular lot. However, you can carry on. By all means answer.

A. May I?

20 COURT: Yes.

A. I didn't say anything about the reserve price because I had not done a valuation of that particular building and it was not for me to argue whether this was too high or too low.

COURT: Exactly the answer that I expected.

MR. JACKSON-LIPKIN: My Lord, it was exactly the answer I expected as well.

30 Q. Mr. Watson, when you actually knock a property down, do you as a matter of course indicate to whom the property is knocked down or do you just say "gone for so much"?

A. No. I usually knock the property down and point to whoever it is, so that there is no argument because in - not particularly property sale - but in other sales there may be two people who both think that they bought the same article.

40 Q. Yes, I see. Are you ever told in advance if somebody is bidding on behalf of, say, a company or a firm or someone else.

A. No. Usually they - if they are going to do something like that, they'd keep it to

- themselves. I think they prefer that the auctioneer not to know that, in other words.
- Q. I see. So what you say is "Gone to the gentleman"?
- A. In other words, the firm itself tries to keep it secret.
- Q. Yes. That has been your experience over....
- 10 . A. Yes. Not necessarily the property sales, this is just general.
- Q. Just general. Yes.

Defendants'
Evidence

No.6

XXN. BY MR. BERNACCHI:-

- Q. Mr. Watson, you have very fairly said that you can't remember the details of this particular sale and if there was evidence that one of the persons attending the auction did complain at the selling price, presumably you wouldn't say he was wrong or he was right?
- 20 A. This would have been so rare because I cannot remember any other occasion in 30 years of auctioning where somebody has complained about the reserve price being wrong or unfair.
- Q. No, not complain to you. Complaints, in other words - I think you are thinking about complaining to you?
- A. Yes, yes.
- 30 Q. That is not the evidence at all. The evidence is just that he complained.
- A. No. The first time that I heard about this was I received a letter from Johnson, Stokes & Master saying that there was a court case about it.
- Q. Yes. So you couldn't say in effect whether he was right or wrong when he said that he complained, not to you....
- A. No.
- 40 Q.But he complained to somebody else?
- A. No, I couldn't. I couldn't give evidence.
- Q. Thank you very much.

D.W.4.
Kenneth Albert
WATSON
Cross-
examination

BY COURT:-

- Q. I have got a question to ask you, Mr. Watson. Mr. Watson, you produced two

In the Supreme
Court of
Hong Kong
High
Court

Defendants'
Evidence

No.6

D.W.4.
Kenneth Albert
WATSON
Cross-
examination
(Continued)

- exhibits, samples of particulars and conditions of sale. Would you agree with me exhibit o1, the first one, is really wholesale, comprises of property or buildings thereon?
- A. Yes, it has got buildings thereon. Yes.
- Q. The next one you produced, o2, is only one flat?
- A. Yes.
- 10 Q. That almost is retail, retailing of one flat?
- A. I suppose so.
- Q. Yes. Would you have a look at B40?
- A. Yes.
- Q. Will you agree with me that is really selling of an odd lot wholesale?
- A. This is - yes, I would say so. Yes.
- Q. You would say so. And in June of 1966 the market was bad, it was more of the buyer's market than the seller's market?
- 20 A. Yes, it was.
- Q. And in this sort of an auction in 1966, odd lot wholesale is really called the investor's market?
- A. Yes, I suppose it was not for the individual owners of the flats.
- Q. Now, if you owed this property, would you yourself offer it wholesale in one lot or would you offer it auction flat by flat?
- 30 A. We do sell a lot of flats together because...
- Q. No, my question is : If you were the owner, you want to get back money, would you offer the whole lot at once or would you sell it flat by flat?
- A. I am trying to think this out. I think there would be circumstances where it would be better to sell them separately, other circumstances where it is better to sell them in one lot. Now, we are having both kinds when we have had a condition of sale which says they may be sold in one lot or in several lots. And we sometimes tried to sell one lot and then found that we couldn't get the price and then sold them separately. So it is very difficult for me, I think, really to say "This is the better way of doing it than the other".
- 40

Q. But I ask you to bear in mind this is not a composite whole, this is an odd lot, one building so many had been sold, only so many left for sale. It was not a composite whole, was it?

A. No, it was not.

Q. So I call it an odd lot wholesale. Which do you think would be better - offer it to the market, taking into consideration the circumstances prevailing in 1966, offer it to the market flat by flat, unit by unit or sell it....

A. I think one of the main problems in that case would be that you might not get the overall reserve price. You might get individual ones but you'd still be left with possibly half a dozen or so on your hand. It would't - and I think this would be for a seller an important thing, he wants to clear himself of the onus of owing that particular - I am talking now of just vendors generally, not necessarily mortgagees. And that is one of the disadvantages of selling them flat by flat.

Q. Is there any harm not to sell flat by flat with a hope of getting a better price?

A. Yes.

Q. But would one really get a better price...

A. As I say...

Q.In retail than wholesale?

A. As I say, possibly not; because a single buyer may under certain circumstances prefer to have a very big holding in a particular building.

Q. I am taking about non-composite whole.

A. A non-composite whole...

Q. Like this.

A. It would be like this. There would be 6 shops on the ground floor, 6 offices on the - and so on. It's a fairly substantial number. Once he's got that, then possibly he would be able to buy what is left. And if he wanted to - if it's an old building - he may then be able to satisfy them all and knock the building down. I wouldn't like to say that this is always invariably the best way of doing it either all in one lot or separate.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6

D.W.4.
Kenneth Albert
WATSON
Cross-
examination
(Continued)

- 10 Q. You wouldn't think it would serve one way or the other?
A. I wouldn't say either is necessarily the better way.
Q. But would one usually get a better price in selling retail rather than wholesale?
A. Yes. I am not used to this term in as far as flats are concerned and buildings are concerned - wholesale and retail. It is a new concept to me. I understand exactly what you mean. I think there are times when you would get a better price if a lot of flats were sold together. There are circumstances. If, for example, the owner had plans or the buyer had plans to do something about the building, such as demolishing it; if he had sufficient control over the number of flat owners so that he could get rid of it.
- 20 Q. I am not talking about old buildings.
A. No, no. Well, possibly...
Q. This was then a brand new building.
A. It is very difficult to tell. There is a tendency for people to say, "Okay. We'll see how it goes". And they will say "Right. You are putting up shop number 1 on the ground floor". And nobody would go for it because they want to see what other people are going to do. They come to the second and the third and it could have a depressing effect on the market. So it is not naturally better to sell each thing individually.
- 30 Q. One doesn't know?
A. One doesn't know.
- D.W.4.
Kenneth Albert
WATSON
Re-
examination
- 40 RE-XN. BY MR. JACKSON-LIPKIN :-
Q. Mr. Watson, If you heard a complaint voiced from the floor of the auction room, not necessarily directed at you; that sort of thing, would you likely remember?
A. I would, very definitely would.
Q. Or an allegation voiced loudly that the sale was unfair?
A. I would, I think; yes. It would be almost equivalent to being a riot.
MR. JACKSON-LIPKIN: Has your Lordship any questions of Mr. Watson? My Lord, may he be released?
COURT: Thank you, Mr. Watson.

MR. JACKSON-LIPKIN: I wonder if tonight I may borrow 01 and 02 for photograph.

COURT: By all means.

MR. JACKSON-LIPKIN: Thank you, my Lord. My Lord, before I call my next witness, I understand my learned friend has an application to make.

10 MR. BERNACCHI: My Lord, I will not be very long on this application. The answer is either allowed or disallowed. In the original pleading, the plaintiff to the counter-claim, i.e. the claimant, pleaded under-value, collusion, bad faith and equitable fraud and this is reflected in issue 1 before you. When just before the beginning of the trial I applied for further amendments, your Lordship disallowed them but at the same time you clearly indicated that should the evidence have actual fraud being forthcoming at the trial, I was at liberty to renew my application for appropriate amendments. It is a question of whether the evidence so far adduced discloses actual fraud or could be interpreted as actual fraud as opposed to merely equitable fraud which has already been pleaded. In my submission, the boundaries between equitable fraud and actual fraud are relatively vague in some cases. And in this particular case, the evidence could be interpreted as that of actual fraud and the claimant says through counsel that it is evidence of actual fraud. Now, I would had up the proposed amendments adding paragraph 7A and I would particularly draw your attention to the particulars in the proposed amendment. Now, my Lord, I am not going to go through the authorities that have already been cited to you, including the famous Medway (?) case which you already know so well. I would, however, rely upon a passage from the judgment of Mr. Justice Chitty in Farrar v Farrars, Limited, 40, Chancery Division, which starts at page 395 but it is at page 406, top of the page,

20

30

40

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.4.
Kenneth Albert
WATSON
Re-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.4.
Kenneth Albert
WATSON
Re-
examination
(Continued)

10

"As to the argrument that a decision in favour of the Defendants will open the door to fraud, the answer is, that every transaction of the nature disclosed by the facts of this case must be carefully inquired into and jealously watched, and that each case as it arises must be decided on its own merits."

The Court of Appeal - he, Mr. Justice Chitty, held that there was no fraud in that case and that was upheld on appeal but I would ask you just to note a passage in the judgment of Lord Justice Lindley at page 410, 8 lines down from the top of the page,

20

"But although this is true, it is obvious that a sale by a person to an incorporated company of which he is a member may be invalid upon various grounds, although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an undervalue or it may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction, and the company may be unable to prove it. Fraud in the present case is not now alleged; it was alleged in the Court below, and was then clearly disproved."

30

And then he goes on to consider the other allegations in the Court of Apeal. So I rely particularly upon Mr. Justice Chitty's judgment at page 406,

40

"...every transaction of the nature disclosed by the facts of this case must be carefully inquired into and jealously watched, and that each case as it arises must be decided on its own merits."

10 . Now, in this case, my Lord, I submit that the time has been reached where on the facts disclosed so far a reasonable deduction - and I am not asking you to judge until the end - a reasonable deduction may well be that there has been actual fraud committed. And for these reasons I would ask for your leave to add this paragraph. If allowed, of course, the agreed issues would have to be slightly altered by adding the word 'fraud' to paragraph 1 of the agreed issues.

COURT: Let me read this first.

MR. BERNACCHI: On the second page, third line, the word 'or' has crept in.

COURT: Where is this?

20 MR. BERNACCHI: Second page, third line, "from the mortgagor or after" - no, no, it is "from the mortgagor after the right of sale". There is an error.

COURT: Mr. Jackson-Lipkin, I do think I have to call upon you to answer this one. Leave is refused and it will be quite wrong for me at this stage to give the reasons why I refuse leave but I'll certainly cover it in my judgment.

30 MR. JACKSON-LIPKIN: My Lord, may I ask your Lordship's direction? Do you wish me to start a new witness?

COURT: I think better not. How many more witnesses have you got

MR. JACSKON-LIPKIN: We'll certainly finishtomorrow, my Lord. I have 3 but 2 are very very short.

COURT: You don't commit yourself as to the third?

MR. JACKSON-LIPKIN: No, my Lord. He'll be short in chief.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.5.
YAU Kam-tong
Examination

COURT: I see. Right. I see that you have got a witness here. We'll deal with it.

D.W.5 - YAU Kam-tong Affirmed in Puncti

XN. BY MR. JACKSON-LIPKIN:-

Q. What is your full name, sir?

A. YAU Kam-tong.

Q. Where do you live?

A. No.5, Austin Road, first floor, Kowloon.

Q. Who is your employer?

A. Mr. WONG.

Q. As what?

A. General supervisor.

Q. General supervisor of what?

A. The tenancy.

Q. Whose tenancy?

A. Chit Sen Company.

Q. How long have you been so employed?

A. Since 1964, for 14 years.

10 Q. Now, you were employed by Mr. WONG before the company was incorporated?

A. Yes.

Q. Do you know who pays your wages now?

A. Chit Sen Company.

Q. Have you ever met Mr. TSE Kwong-lam?

A. Yes.

Q. Can you see him here?

(Witness points.)

MR. JACKSON-LIPKIN: My Lord, he is pointing at the claimant.

30 Q. Can you remember when you first met him, Mr. YAU?

A. Something in the beginning of 1965 when I first met him.

Q. Where?

A. In the office in Pedder House?

Q. How often did you see him in the office in Pedder House?

A. I don't quite remember.

Q. Well, once or more than once?

40 A. More than once, several times.

Q. I want to ask you something quite different. It is in relation to directors' meetings.

A. Yes.

- Q. Did you attend directors' meetings for any purpose?
- A. Well, I only attended as a recorder, I did not give any opinion.
- COURT: You said no first, did you not? In answer to your learned counsel's question, you were asked whether you attended directors' meeting, did you not say no first?
- 10 A. I meant I did not give any opinion of myself.
- Q. You attended as a recorder?
- A. Yes.
- Q. Look at C86, please. Is that your writing?
- A. Yes.
- Q. Look at item 4, Chairman: WONG CHENG Wai-shuk. See that?
- A. Yes.
- 20 Q. If you look at item 7(2) you'll see Mr. WONG Chairman. Can you tell my Lord why you put Mr. wong Chairman down there with Mrs. WONG at the top?
- A. I can't remember why.
- Q. All right. Thank you.
- MR. JACKSON-LIPKIN: My Lord, I am now passing to the auction.
- COURT: All right. I'll adjourn now. 10 o'clock tomorrow morning.
- 30 4.30 p.m. Court adjourns.
27th March, 1979.
28th March, 1979.
10.08 a.m. Court resumes.
- Appearances as before. Mr. B. Bernacchi, Q. C., absent.
- D.W.5. YAU Kam-tong - O.F.A.
XN. BY MR. JACKSON-LIPKIN (continues);
- MR. WOO : Your Honour, I apologies for my leader who is not here.
- 40 COURT: You are here, Mr. Woo.
- Q. Mr. Yau, I want to ask you now please about the auction you attended with Mr. & Mrs. Wong.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.5.
YAU Kam-tong
Examination
(Continued)

- A. Yes.
- Q. Can you remember how many people you went with?
- A. About 30 or 40 people.
- Q. That's strictly true, I'm sorry. What I meant was...
- COURT: How could that be strictly true: how many people he went with? It was perfectly clear, Mr. Jackson-Lipkin.
- 10 MR. JACKSON-LIPKIN: He went to the auction with 30 people, but not towards the auction, my Lord.
- Q. Mr. Yau, from the office to the auction rooms with how many people did you go?
- A. Mr. and Mrs. Wong.
- Q. Yes?
- A. Mr. Liu and Mr. Liu's solicitor.
- Q. Do you remember his name?
- A. No, I can't remember.
- Q. When you got to the auction rooms did you speak to anybody before the auction?
- 20 A. No.
- Q. Just tell my Lord if you don't remember, did Mr. or Mrs. Wong speak to anybody before the auction began?
- A. No, I don't remember.
- Q. Did you meet the auctioneer?
- A. I saw him at the time of the auction, he was on the stage.
- Q. Very well. About how many people were present during the auction - about?
- 30 A. About 30 or 40.
- Q. Did you see Mr. Tse among those people.
- A. Yes.
- Q. And you remember the auctioneer making some announcements and somebody translating for him?
- A. Yes.
- Q. Can you remember if the reserve price was announced?
- A. Yes.
- 40 Q. Was it?
- A. Yes.
- Q. Did anybody raise any objection to it?
- A. No.
- Q. Now you remember Mrs. Wong bidding?

- A. Yes, Mrs. Wong.
Q. Do you remember her bidding for the property?
A. She held up her hand announcing 1.2 million dollars.
Q. Now the property was then knocked down at that price, was it not?
A. It was knocked down because no one else offered any better bid.
10 Q. Did Mr. Tse voice any complaint about it having been knocked down for 1,200,000 at the auction?
A. I did not notice.
Q. Where were you seated in relation to Mr. Tse? I mean near or far?
A. Far away. Well, three or four rows away.
Q. Yes. Did you hear anyone call out that the auction was unfair?
A. No.
20 Q. Was there any dispute after the auction between Mr. Tse and Mrs. Wong in the auction room?

Defendants'
Evidence

No.6
D.W.5.
YAU Kam-tong
Examination
(Continued)

10.15 a.m. Mr. B. Bernacchi, Q.C. enters
courtroom.

- A. Nobody caused any rows, quite quiet.
Q. When you left did you leave with Mrs. Wong?
A. Yes, I left with her.

XXN. BY MR. WOO:

- 30 Q. Mr. Yau, I just want to clarify a few things. First of all, when you said you were employed by the chit Sen Company...

D.W.5.
YAU Kam-tong
Cross-
examination

COURT: No, no. He said he was employed by Mr. WONG.

- Q. When you say you are employed by Mr. Wong and paid by Chit sen, where was your office at the time when you were first employed?
A. Pedder House.
40 Q. That was in what year? What year was that?
A. 1964.
Q. So you were employed only in 1964?

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.5.
YAU Kam-tong
Cross-
examination
(Continued)

- A. February, 1964.
- Q. And in 1965 where were you? Where was your office?
- A. Also Pedder house.
- Q. In 1966?
- A. Well, since April '66 I moved to Great China House.
- Q. Now whereabouts did the Company, Chit Sen Company, usually conduct its board meetings or anything else?
- 10 A. I don't remember. Several addresses: Pedder House, Great China House; I don't remember.
- Q. Now you have been asked to give evidence of something happened a long time ago, over 10 years.
- A. Yes.
- Q. Am I right to say that your memory of events may not be that clear?
- 20 A. Correct.
- Q. And you are asked to come up today to give evidence on a specific matter, for instance, the auction?
- A. Yes.
- Q. And am I right to say that you have to be reminded of certain events happened in the auction before you come up to give evidence.?
- A. It was not reminded.
- 30 MR. JACKSON-LIPKIN: Let that be translated.
- A. It was not reminded.
- Q. You were not told about it at all by anyone? You were asked to come up here?
- A. Yes.
- Q. No one said that, "You will be asked about an auction which took place some 10 - over 10 years ago concerning a property?"
- A. I was told that probably I would be required to give evidence in court, but it not mentioned in respect of what.
- 40 Q. I see. So when you walk into the witness-box you haven't got the faintest idea as to what you would be asked? That's what you are saying? Is that true?
- A. Yes, I did not know.
- Q. No one reminded you, saying that, "In that auction there were about 30 to 40 persons attending this auction; can you remember that figure?" or words to that effect?

- A. Nobody mentioned.
- Q. No one said to you, "You will be asked, 'Perhaps you will cast your mind back to over 10 years whether the auction was attended by Mr. Tse?'"
- A. No.
- Q. So when you are asked whether Mr. Tse was in the auction that day it just - this question was posed to you this morning only and you have no idea it was coming?
- 10 A. It never occurred to me.
- Q. I see, and whether the reserve price was mentioned, for instance, at the auction you have no idea that was coming too?
- A. No.
- Q. And you gave evidence in saying that the reserve price was announced at the auction.
- A. Yes.
- 20 Q. And that was from your own memory?
- A. Yes. Well, that was my first time in the auction, that's why I can remember.
- Q. If I tell you that even an auctioneer, Mr. Ken Watson, who gave evidence yesterday did not say he announced the reserve price, would you agree with me? The auctioneer couldn't remember the reserve price was announced or not, and you are quite certain that it was announced?
- 30 A. He did announce.
- Q. And no one asked you, "Can you remember Mr. Tse, while he was in the auction, made any protest" or any words to that effect that the auction was unfair? No one asked you that before you come?
- A. No.
- Q. Until you were asked this morning?
- A. Yes.
- Q. Thank you.
- 40 MR. JACKSON-LIPKIN: Have you any questions of this gentleman, my Lord?
- COURT: No.
- MR. JACKSON-LIPKIN: Thank you. May he be released?

Defendants'
Evidence

No.6
D.W.5.
YAU Kam-tong
Cross-
examination
(Continued)

Defendants'
Evidence

No.6
D.W.6.
LAU Chun-wah
Examination

COURT: Yes.

MR. JACKSON-LIPKIN: Mr Lau.

D.W.6 LAU Chun-wah - Affirmed in English.

XN. BY MR. JACKSON-LIPKIN:

Q. What is your full name, sir?

A. LAU Chun-wah (Spelt).

Q. Thank you. Where do you live?

A. I am living in Oi Man Estate. You are asking for my residence, is it?

10 Q. Yes, please.

A. I am living in the Kowloon side, Room 909, Oi Man Estate, Ho Man Tin.

Q. And you are now a Judiciary Clerk?

A. Yes, I am clerk to His Honour Judge de Basto.

Q. And in 1966 were you a sworn Court Interpreter?

A. Yes, I was.

20 MR. JACKSON-LIPKIN: My Lord, may he please be shown claimant's affirmation in these proceedings of the 25th November, 1966? My learned friend has very kindly said I may lead him on this.

Q. Is that your signature on the last page?

COURT: What document is that?

MR. JACKSON-LIPKIN: It is the affirmation of the claimant, my Lord, of the 25th November, 1966.

30 COURT: Let me just make a note of this. Affirmation of claimant; sworn or affirmed?

MR. JACKSON-LIPKIN: Affirmed.

COURT: Affirmed when?

MR. JACKSON-LIPKIN: 25th of November, 1966, and filed on the same day, my Lord.

Q. Is that your signature on page 3?

A. Yes, I identify my signature.

Q. And did you translate that affirmation to the affirmant before you put your signature there?

A. I did.

Q. Mr. Lau, you must have done hundreds of these in your time, have you not?

A. Yes.

COURT: Thousands?

10 A. I can't remember.

Q. You cannot remember any particular one?

A. No, I cannot.

Q. Just tell my Lord this: in all your career in the Government Service have you ever put your name to a jurat like this unless you have in fact translated it beforehand?

A. Never have I done that before the translation or interpretation having been made to the deponent.

20 Q. And looking at that document in your hand, are you quite sure that you did translate it to Mr. TSE Kwong-lam?

A. I should say from my practice that the contents must have been translated to the deponent, TSE Kwong-lam, before I signed my name.

XXN. BY MR. BERNACCHI:

30 Q. Mr. Lau, you are, from your last answer, speaking from your general practice, not that you remember this particular document?

A. I cannot remember this especially after long lapse of time. I can speak from my practice.

Q. Thank you.

COURT: You may go.

A. Thank you, my Lord.

40 MR. JACKSON-LIPKIN: Mr. Llewellyn Davies. My Lord, the names are David Llewellyn Davies with an 'e'.

David Llewellyn DAVIES.

MR. BERNACCHI: I do protest, not at this - my

Defendants'
Evidence

No.6
D.W.6.
LAU Chun-wah
Examination
(Continued)

D.W.6.
LAU Chun-wah
Cross-
examination

David
Llewellyn
DAVIES

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
David
Llewellyn
DAVIES
(Continued)

learned friend calling this witness but now, for the first time ever, he has disclosed that this is a professional witness, an accountant, and we have had our accountant here. We had our accountant here throughout the evidence of Mrs. Wong; we haven't got him here today because we were never notified that he would be called.

10 COURT: Is that so, Mr. Jackson-Lipkin?

MR. JACKSON-LIPKIN: Yes, my Lord. We didn't reach him until today; we have had all sorts of other evidence.

COURT: But when it comes to expert evidence don't you generally warn the other side?

20 MR. JACKSON-LIPKIN: My Lord, I know of no necessity because if there had been such a necessity to do that no doubt such a courtesy would have been afforded me. Your Lordship will remember I saw the report for the first time when it was produced in court.

COURT: What report?

MR. JACKSON-LIPKIN: Mr. Choy's.

30 COURT: You do appreciate that the other side had an accountant in court and counsel is entitled to advice, to their professional advice, in a matter of this nature.

MR. JACKSON-LIPKIN: My Lord, this evidence is directed to Mr. Choy's evidence, it is in fact along the lines of cross-examination of Mr. Choy.

COURT: But should Mr. Choy be here now if the other side wanted him to be?

MR. JACKSON-LIPKIN: If they wish to be here.

COURT: Without warning how could they get him here?

MR. JACKSON-LIPKIN: My Lord, I hope your Lordship is not considering this to be discourteous, but I must say that is never occurred to the three of us to have to identify any of our witnesses beforehand, and if we have done something discourteous then I can only apologise for an unintentional discourtesy.

Defendants'
Evidence

COURT: This is a professional witness.

10 MR. JACKSON-LIPKIN: Yes, my Lord.

No.6
David
Llewellyn
DAVIES
(Continued)

COURT: You have no duty to warn the other side about any other sort of witness but when it comes to a professional witness surely the practice is you tell the other side, "Look, I'm bringing up an expert witness on a certain matter." I might be wrong, Mr. Jackson-Lipkin, but that's as I understand it and it must be for the better administration of justice.

20 MR. JACKSON-LIPKIN: I would with diffidence, my Lord, suggest that you are wrong but I would accept the latter comment that you have made, most certainly. There is no such practice or we would have been informed, but for the better administration of justice if my learned friend wants to get Mr. Choy here I am sure he can be brought very quickly and we could perhaps take an early mid-morning adjournment until he arrives, but is it
30 really necessary that Mr. Choy should be here? I would ask my learned friend ...

COURT: Well, I really do not know, neither does Mr. Bernacchi, I suppose, at this stage.

MR. JACKSON-LIPKIN: My Lord ...

COURT: But the purpose of calling this witness you might have a word with Mr. Bernacchi on this one.

40 MR. JACKSON-LIPKIN: Perhaps I had better tell Mr. Bernacchi in your Lordship's presence

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
David
Llewellyn
DAVIES
(Continued)

that this witness will deal with how interest should be calculated on loans; he will comment on the somewhat, in my submission, singular system advanced by Mr. Choy, and talk about general practice in calculation, particularly of interest, and he will produce, I am told, some calculations that he has done himself as illustrations.

10 COURT: In respect of this case or as examples?

MR. JACKSON-LIPKIN: Well, some as - one set as mere examples, and some in this case because he has seen Jd and Je and Mr. Ronald Li's report and Mr. Choy's report, and he will be commencing on the appendices to Mr. Choy's report and his method calculation. My Lord, I apprehend that his evidence will be along very similar lines to my cross-examination of Mr. Choy.

20

COURT: Mr. Bernacchi?

MR. BERNACCHI: Could I ask at present for 5 minutes' adjournment to take instructions on the matter and then I may or may not ask for a longer adjournment after that? I hope I won't.

30 COURT: Very well, let me know when you want me. Your 5 minutes might be slightly extended - notably extended, Mr. Bernacchi.

10.37 a.m. Court adjourns.

10.52 a.m. Court resumes.

Appearances as before.

David Llewellyn DAVIES.

COURT: Sit down, Mr. Davies.

MR. JACKSON-LIPKIN: Your Lordship will recall I was going to call Mr. Davies from Peat

Marwick but my learned friend, Mr. Bernacchi, tells me that he is not going to rely in this case on the evidence of Mr. Choy or on Mr. Choy's report or calculations. My Lord, in those circumstances it becomes quite unnecessary for me to call Mr. Davies.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

10 COURT: Very well. Mr. Davies, you are released.
A. Thank you, my Lord.

No.6

20 MR. JACKSON-LIPKIN: My Lord, throughout the course of this case reference has been made to a Mr. McElney of Johnson, Stokes & Master who did attend the auction with Mr. & Mrs. Wong, etc. My Lord, I was not proposing to call him unless my learned friend felt that he would wish to cross-examine him in view of the numerous mentions of Mr. McElney in the course of the case. My learned friend has informed me that he does not wish to cross-examine Mr. McElney.

MR. BERNACCHI: Perhaps I should explain that I have been assured that Mr. McElney cannot remember these events and it is pointless in calling him.

COURT: Mr. Bernacchi, you confirm that you are not relying on the evidence of Choy? You confirm that you are not relying ...

30 MR. BERNACCHI: Yes.

COURT: ... on the evidence of Choy?

MR. BERNACCHI: No, no, I confirm that.

40 MR. JACKSON-LIPKIN: My Lord, my learned friend's last remark is not wholly correct. Mr. McElney has certainly an impression of the number of people who were present, but you have had quite enough evidence on that already and, my Lord, as you know, Mr. McElney has attended a very large number of auctions.

COURT: That I do not know, certainly not
of a property kind.

MR. JACKSON-LIPKIN: No, my Lord, that I would
accept at once but, my Lord, all he has is
a recollection of the number of people.
My learned friend does not wish to
cross-examine him, and in those
circumstances there is no point in calling
him. My Lord, that puts me in a very
great difficulty in that I had anticipated
that the Peat Marwick evidence would take
until the luncheon adjournment and, my
Lord, the last witness that I have who is
a valuer, a Mr. Raymond from Jones, Lang,
Wootton & Co., my Lord unfortunately he
cannot be here until half past two. My
Lord, I know it is a grave inconvenience
to your Lordship but would you consider
rising until then?

20 COURT: I will adjourn until 10 o'clock
tomorrow morning.

MR. JACKSON-LIPKIN: That is very generous of
your Lordship.

10.56 a.m. Court adjourns.

29th March, 1979

10.07 a.m. Court resumes

Appearances as before Mr. Bernacchi absent

30 Mr. WOO makes an application for adjournment of
cross-examination of D.W. 7 who will be giving
expert evidence.

COURT: Very well. We will have examination
in chief of the expert this morning and
then we will adjourn until ten o'clock on
Monday.

MR. WONG: Yes, my Lord. I call Mr. Raymond.

- Q. Sir, your full name please?
A. Nigel Claud Raymond.
Q. Where do you live?
A. Flat 6, No.9 Mount Kellett Road, the Peak.
Q. And what is your occupation?
A. I am a valuer and estate agent.
Q. Yes, with which concern?
A. Jones Lang Wootton.
Q. How long have you been with Jones Lang
10 Wootton, Hong Kong office?
A. 5 1/2 years.
Q. Prior to that were you connected with
Jones Lang Wootton, England?
A. Briefly in England. I primarily worked in
England with a firm called Cluttons.
Q. And sir, what is your professional
qualification?
A. I'm an associate of the Valuers and
20 Auctioneers Society and the Rating and
Valuation Society.

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

- COURT: What are those in short?
A. A.S.V.A. and A.R.V.A.
Q. When were you first instructed in relation
to this matter?
A. Last Saturday morning.
Q. And what was your instruction?
A. My instruction was contained in a letter
30 from Johnson, Stokes & Master to comment,
if I could, on Mr. HSU's approach to
valuing and the property at 52-54 Cheung
Sha Wan Road.
Q. Were you supplied with a transcript of the
evidence of Mr. HSU?
A. Yes.
Q. Would you like to get out your copy of the
transcript? This is pages 110 to page 127
of the transcript. Now would you like to
turn to page 114 of the transcript first,
40 letter M. Can you see the question posed
by my learned leader: "Was there a decline
in real estate dealings in 1966?" Can you
see that question?
A. No.
Q. 114, letter O, I'm sorry ...
A. I can see that.
Q. And the answer was, "There was."
A. Yes.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

- Q. And Mr. HSU was further asked : "Was it serious?" Answer, "Quite serious."
- A. Yes.
- Q. Now before you answer any questions, may I remind you of certain events in 1966.
- A. yes.
- Q. The dates that I am going to give you are extracted from a Commission of Enquiry report.
- 10 A. Yes.
- Q. Okay? Now according to the report there were riots on the 4th to 9th of April, 1966.
- A. Yes.
- Q. And according to the report the Commission of Enquiry was appointed on 3rd of May, 1966 and this report was not completed until December, 1966. Now having been reminded of these dates, would you agree with the evidence of Mr. HSU at page 114, letter O?
- 20 A. Yes, I would agree.

COURT: Please tell me how this witness can agree with a statement of this nature as an answer to the question when he did not have personal knowledge of the market as all?

MR. WONG: Well, my Lord, perhaps ...

30 COURT: Based on a premise. With respect, it's really quite untenable.

MR. WONG: Yes, my Lord. Perhaps I will clarify that further.

- Q. Mr. Raymond, were you in Hong Kong in 1966?
- A. Yes, I was.
- Q. And basing on your experiences with Jones Lang Wootton, are you in a position to describe the market conditions in 1966?
- 40 A. I wasn't in property in 1966. I was in Hong Kong. I was actually in the Police, but ...
- Q. But based on your experience with Jones Lang Wootton, are you in a position to describe the property market in 1966?

A. I can only talk in very general economic terms. I couldn't describe the property market in 1966.

Q. Now Mr. Raymond, I understand that you have obtained some charts from records of your office.

A. Yes, that's the Rating & Valuation Department records.

Q. I see. These are extracted from the Rating & Valuation records?

A. Yes.

Q. Would you produce the chart in court?

10 A. Yes.

MR. WONG: Exhibit P.

COURT: Yes, Exhibit P.

Q. Now basing on ... Could briefly explain to us these four pages of Exhibit P?

A. Yes. Basically they are extracted from the Rating & Valuation Property Review of 1972, and they give back-dated figures for domestic accommodation in terms of units provided by main sources of supply, built in the metropolitan areas during 1965 and 1971 with estimates for 1972 and 1973.

20

Mr. Bernacchi enters court room 10.27 a.m.

Q. You have marked each page of Exhibit P, P.1, P.2 ...

A. P.1 ...

Q. P.1 is what you have just described.

A. Right.

Q. And what is P.2 then?

COURT: One moment. P.1 is really a number of premises built during those two years.

30 A. Right.

COURT: Nothing in monetary terms.

A. No.

Q. And P.2, Property Review 1972. Could you explain that chart?

A. Yes. It's a graph showing the domestic accommodation built by private developers. It shows that in 1966 there was a large supply of buildings, domestic

In the Supreme Court of Hong Kong High Court

Defendants' Evidence

No.6
D.W.7.
Nigel Claud RAYMOND
Examination
(Continued)

Exhibit P

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

- accommodation built. It also shows the number of vacancies.
- Q. And that chart indicates that 1966 had the largest number of domestic flats built.
- A. That's correct, yes.
- Q. Would you turn to Exhibit P.3. Would you please explain that?
- A. This again is a graph drawn up by Government showing pressure of domestic accommodation. Again, you will notice in 1966 the pressure i.e., the demand, was low.
- Q. I see. In other words, P.2 and P.3 should be read together?
- A. Yes.
- Q. And finally, P.4 ...
- COURT: Wait a moment. P.3 - why is 1965 not shown?
- A. I don't know. The Government graph didn't show it, didn't go back that far.
- COURT: Well, in the others '65 is shown, but not in P.3.
- A. It's an extract from the review of 1972 which for some reason didn't shown on P.3 '65.
- Q. And finally P.4?
- A. P.4 which shown the exclusion orders gazetted during the sixteen years '56 to 1971 shows in '66 there were very few, which indicates that to me that not many developers wanted to re-develop properties.
- Q. Now Mr. Raymond, would you go back to the transcript please. Would you now turn to page 111 of the transcript, letter C?
- A. Yes.
- Q. There Mr. HSU explained his method of valuation. Would you like to refresh your memory by reading his answer there from letter D right up to letter N?
- A. (Witness reads through evidence of Mr. HSU) Yes?
- Q. Now what comments do you have vis-a-vis this valuation method of Mr. HSU?
- A. Well, I agree with him that one should rely on one's own records, comparable sales evidence, if any, and failing that

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

- 10 to rely to some extent on the assignments registered in the Land Registry or the Land Office. What I slightly disagree with - and I'm not saying whether he comes up with a right or wrong answer - I don't think it's the right approach to take a straight discount on the pricelist. It would be more appropriate to apply the rate per square foot on the individual flats or commercial content, bearing in mind the floor and the view etc. I think also when one is doing these retrospective valuations, which are difficult, one should attempt to try and assess the market conditions at the time although it often can be difficult. I think also one ... I don't know what his instructions exactly were, but I think that if he was asked to value the 36 flats and 18 commercial units he might have wanted to know what had happened to the other units that had been sold, if they were, and if they weren't why the shops in particular are not sold. I think also, assuming that this sale at auction was registered in the Land Office which I assume it was by 1970, I think one would have taken a good look why this price was so much lower than possibly the comparable sales evidence he was arriving at. Assuming that the auction was adequately advertised and marketed, it does provide some sort of evidence of a much lower price per square foot than the three or four sales he got.
- 20
- 30
- Q. Would you now turn to page 116. You appreciate from the evidence of Mr. HSU that when he made the valuation he only had Land Office records of three units.
- A. Yes.
- 40 Q. And at page 116 letter F, he was asked if there were other units sold, whether it made any difference to the valuation of the building, and he said, "It would if we had a record of it at the time." Do you agree with that?
- A. I think it might, yes.
- Q. Now you also commented on Mr. HSU's method in valuing by making a discount against the pricelist. Now you can find further

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

- statements of this method, for example, at page 117 letter O.
- 10 A. Yes.
Q. "What we have done is - take an example, No.2 is \$50.69 and this is 63.68 per cent of list price and then apply this percentage to the rest of the list price, the unit price will vary." Now can you expand as to why this method is unsatisfactory from your point of view?
- COURT: Not "unsatisfactory" - he said he slightly disagreed with it.
- 20 Q. Why do you slightly disagree with it?
A. Because you are basically - although you are adopting a discount on the developer's pricelist, you are rather relying on what he thinks the individual units are worth, and you're just taking a sort of straight-line approach right across the commercial and the shops on the ground floor. Really, I think one would be more accurate if one, having done your investigations, adopted an actual square foot rate on the different units.
- 30 Q. Would you now turn to page 119, letter J. He was asked by my leader whether he knew before that date that the figures in the pricelist was discounted at the rate which rose from 10 - 15 to 20 to 25, and he said, "I know now, but I did not know before." He was then asked, "If you had known that, would that not also have affected what you said in your valuation of 1970?" He said, I don't think so because when I said the valuation is 63.68 per cent, it is from the original figures. If you discount the original figures then the percentage would be higher." Do you agree with this answer?
- 40 A. I think if he had known that they had been offering bigger and bigger discounts it would have affected his judgment as to the extent that he would assume they were more difficult - they were difficult to sell, and therefore he might be more conservative in his approach.
- Q. Would you now turn to page 123, letter B.

My leader asked him, "Now the next thing I want to ask you is this. The value of a building at a forced sale is almost invariably different from a value at a voluntary sale, is it not -- a forced sale, you mean sale under mortgage?" Now if that question were posed to you, what would be your answer?

10 . A. I would say if it was publicly known that it was a forced sale that, knowing sort of Hong Kong market conditions over the last five yers, I think if the general public or the people he circulated it to knew it was a forced sale, it is likely that they might be looking for a bargain and be prepared to pay less.

20 Q. Finally with the transcript, would you turn to page 123, letter M. He was asked, "Did you know that the price list published by the mortgagor before the auction sale had reduced the price of the shop units in some cases as much as \$50,000 a unit?" He answered, "I did not." He was asked, "If you had done, would that not also have affected your valuation?" Answer, "It would." Do you agree with this evidence?

30 A. Yes.
Q. Now Mr. Raymond, do you know the area Cheung Sha Wan from your experience as a valuer in Jones Lang Wootton?

A. Yes.
Q. From your experience is there any marked difference in prices for offices and prices for domestic units in Cheung Sha Wan?

A. You're talking about now or back in 1966?
Q. Well, firstly about now.

40 A. It's not a recognised office area at all, Cheung Sha Wan. It's primarily a residential, industrial area. There is commercial space there occupied by schools, restaurants and this sort of thing, not many offices. I'm not saying they don't exist, they do, but it's not an office area.

Q. Nowadays is there a marked difference then between the price of office units and the price of domestic units in Cheung Sha Wan?

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

A. I think one should differentiate between offices and commercial, if one can. Offices, as I say, there are very few there. If there were, I would say they had no more value than residential, possibly less at the moment. On the other hand, a restaurant in today's market conditions might have the same value, possibly more.

10 COURT: These were actually restaurant premises, were they not?

MR. WONG: They were approved for use as restaurants.

COURT: Approved for use as restaurants.

MR. WONG: Not the ground floor, the 1st and 2nd floor.

COURT: That's what I'm talking about.

20 A. I'm talking about the 1st floor, about the ground floor, of course. I'm not talking about the ground floor.

Q. Does that comment apply back in 1966?

A. Well, as I say, I don't really know. I wasn't in property then, but I would be surprised that commercial about the ground floor had a higher value than residential then.

Q. Now Mr. Raymond, you told the court that you had experience in England and you also had 5 1/2 years experience in Hong Kong.

A. Yes.

30 Q. As compared with the property market in England, how would you describe the property market in Hong Kong?

A. Generalizing, I would say that Hong Kong property market is much more volatile than England.

40 Q. Now finally, what do you consider would be a fairer reflection of the value of a particular piece of property on a particular date: a valuation 4 years after that date or the price fetched at an auction?

A. Well, the valuation 4 years later has the

benefit of hindsight, and you see really how the market went with the benefit of hindsight. If one always had this one would would make a lot of money in property, but it ... an auction, provided it was adequately advertized, should expose the property well and is, you know, an arms-length open market transaction.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

MR. WONG: That's all in-chief, my Lord.

10 COURT: Do you still want to adjourn?

MR. WOO: My Lord, may I have your indulgence for about five minutes?

COURT: Do you want me to adjourn?

MR. WOO: May I have a short adjournment?

COURT: I'll adjourn for fifteen minutes.

10.42 a.m. court adjourns

10.55 a.m. court resumes

20 Appearances as before

MR. WOO: My Lord, in view of the evidence of this witness, I don't think we need to have a very long adjournment. May I cross-examine tomorrow morning and it will be very short. I can cross-examine now, if you want, my Lord, but I understand that it would be better for all concerned if I do it tomorrow morning.

MR. JACKSON-LIPKIN: I have no objection.

30 COURT: Very well, adjourned until ten o'clock tomorrow morning.

10.57 a.m. court adjourns

29th March, 1979

30th March, 1979

No.6
D.W.7.
Nigel Claud
RAYMOND
Examination
(Continued)

10.08 a.m. court resumes

Appearances as before

D.W. 7 Nigel Claud RAYMOND On former Oath

Defendants'
Evidence

MR. WONG: My Lord, I have two more question.

XN BY MR. WONG CONTINUES:

No.6
Exhibit P

Q. Mr. Raymond, Exhibit P, are those charts specially prepared for this case or were they extracted from some other documents?

10 A. They are extracted from the Rating & Valuation Property Review, 1972.

Q. I see, and these are the reviews, are they not?

A. Yes.

Q. Would you produce them in court?

MR. WOO: That is not necessary. I accept that. We accept that these are extracts from it.

20 COURT: That is what I understood was the evidence all along. There was nothing to clear up, really.

MR. WONG: There is just one further question, my Lord.

Q. From these publications, is there any chart that corresponds to Exhibit P.3 for the year 1965?

A. No, Exhibit P.3 starts in 1966.

MR. WONG: I have no further questions, my Lord.

D.W.7.
Nigel Claud
RAYMOND
Cross-
examination

XXN BY MR. WOO:

30 MR WOO: May it please you, my Lord.

Q. Mr. Raymond, from your evidence yesterday I got the distinct impression that you were given the transcript of Mr. HSU's evidence and asked to comment upon it.

A. Yes.

Q. And that is the length and width of your

A. instructions. Is that right?
Well, I have the letter of instructions,
if that's the sum total.

Mr. Bernacchi leaves court room 10.10 a.m.

Q. That's the sum total?
A. Yes.
Q. And that is what you are asked to do and
nothing else.
A. Correct.
10 Q. And you were given only the transcript.
A. Yes, I was given the transcript.
Q. To read...
A. And a copy of the certificate of value,
yes, and the pricelist.
Q. And as a careful and experienced valuer,
you realized the difficulty of such a
matter or assignment.
A. Yes.
20 Q. That you were asked to read between the
lines at the time as to what was said
before in court.
A. Yes.
Q. And at times you have to make certain
assumptions which may or may not be
relevant.
A. Well, I read, as I say, based on the
transcript and although I didn't do a
valuation myself, I just adopted what I
consider would have been the appropriate
30 approach had I done so.
Q. Now coming to this, that appropriate
approach, you agree substantially with Mr.
HSU's approach and you were very careful
in choosing your words, saying that you
had a slight disagreement.
A. Yes, I did say so.
Q. Now this slight disagreement apparently -
and correct me if I am wrong-from your
evidence ws that there is apparently a
40 straight deduction from the pricelist.
That is the reason for your slight
disagreement, as it were.
A. That, as well as, I think, notes should
have been taken of the actual sale at
auction.
Q. Actual sale of auction?
A. Yes, I believe it was ...

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Cross-
examination
(Continued)

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Cross-
examination
(Continued)

- Q. You were not given anything about the auction, were you?
- A. No, but it came out in ...
- Q. I'll come to that later. Your slight disagreement is that a deduction in this case may be wrong - may be wrong - because the valuer has not applied the rate of which to the premises concerned.
- A. Right.
- 10 Q. You have no quarrel with that, but this is the crux of the slight disagreement. Is that right?
- A. On the way he valued it. On the actual technical - no, that's the only ..
- Q. So I don't have to bother you with anything else except this, but if you look at the pricelist you will see that the footage of each floor has been calculated in the pricelist. Would you not agree? It's not just 1st floor, \$16,000, for instance, without reference to the footage.
- 20 A. No, he's taken into account the footage, but he has relied on the developer's pricelist.
- Q. Ah, but would you agree with me, as a reasonable and if I may say extremely fair value, you don't want to commit yourself which I think is right in this case, but if you take his, that the valuer went to visit the premises, the valuer has, apart from the pricelist, the plan of the floors concerned, the location, and the developer also based his pricelist on the size, height, location of the flat, and he agrees with that ...
- 30 A. As long as he agrees with it ...
- Q. Yes, he agrees with that. So if that is the case, surely your so-called "slight disagreement" will not exist, will it?
- 40 A. As long as he agrees with the developer's pricelist I agree with you, but what I ... the other thing that I disagree with is, as I say, that I think possibly he should have, when he took the instruction, asked a few more questions.
- Q. Asked a few more questions, yes, if those questions could be answered.
- A. Of course, yes.

- Q. Yes, only if those questions could be answered. But you are asked to interpret this, so am I right to say, Mr. Raymond, that if that is the position, this so-called "slight disagreement" of yours will disappear completely from your mind?
- A. On the actual, yes, technical grounds - how he arrived at that. Yes.
- 10 Q. And were you told in your instructions that the deduction on the pricelist was due to various reasons, for instance, that the developer wanted a quick sale and reduced the price?
- A. Yes, I drew that inference, yes.
- Q. If that is the case, really the deduction has very little, if any, bearing on the actual valuation of the premises - that is the market value of the premises. Would you not agree?
- 20 A. Well, accepting he adopted a pro-rata rate.
- Q. Yes, accepting he adopted a pro-rata rate, and that's indeed what he did, he adopted a pro-rata rate, and also you agree with him that a sales comparable was used as far as it is within his means to obtain it at the time.
- A. Yes, on the ones he obtained, fair enough.
- 30 Q. Yes, fair enough. Now you also said that - well, or you expressed your feelings by saying that you would be surprised that the 1st and 2nd floor was a commercial unit - and that is what you used - commercial unit would be more valuable or expensive than a domestic unit upstairs.
- A. Yes.
- Q. This is the trend in Hong Kong today. Am I right?
- A. Yes, I would say that.
- 40 Q. But you can't say that it was not a trend in 1966?
- A. Well, I wasn't practising ...
- Q. In Cheung Sha Wan, yes. You can't say it ...

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Cross-
examination
(Continued)

COURT: The trend today is that commercial units of this nature is less than domestic units.

A. In that area, yes.

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Cross-
examination
(Continued)

COURT: In that area.

- Q. But would you agree with me that if there is office - and I have used the word "office" in this sense - that there are units for offices, companies using it as offices, but as restaurants that would require some other considerations, would you not agree, as a valuer?
- 10 A. In my opinion it would probably be worth more than an office, but whether it would be worth more than residential ...
- Q. That depends.
- A. Yes.
- Q. On the locality.
- A. Yes.
- Q. Now Cheung Sha Wan Road is one of the three main roads, in fact a very large road, in that area.
- A. Yes.
- 20 Q. Would you not agree?
- A. Yes.
- Q. And that particular area, there are in fact restaurants. It's an area where restaurants thrive. For instance, like in Hong Kong there are special restaurants where restaurants flourish.
- A. Yes, that's reasonable.
- 30 Q. And were you told or rather by reading the transcript, were you or would you have seen that it has been approved as being restaurant premises?
- A. I don't know whether I saw it was approved. I noted that it was going to be a restaurant.
- Q. So the valuation, to value it as a unit, as office, would not do justice to that two floors, would it?
- A. No.
- 40 Q. Now you deprecate the idea - in fact, you would be appalled, would you not - that, and that is what you said, if one had a straight valuation, floor by floor, office floor by office floor and shop floors, in one go.
- A. I don't remember saying that ...
- Q. Well, let me put it this way. Without any basis at all, without assuming, a person or a valuer or a person who conducts the

- valuation, without any basis at all, arbitrarily for instance, for no reason at all, no comparables, nothing, no reason for it except for saying that the market may be stagnant, for instance, the market may not be as good as he would have wished it to be. So, "I value - and for example, and I agree with this example - I value the property for the domestic units, for instance, at 20,000 each. I value the domestic units, as units, \$15,000 each. I value the ground floor shops at \$50,000 each." If you read a report like that, would you be astonished?
10. A. I'm not ... If I read a report like that, I mean it depends, you know, whether there had been some explanation of how this report had arrived at these figures.
20. Q. That is the explanation, because of the situation in 1966, because of the conditions, the building - and you have got the pricelist - you have seen it ...
- A. Yes.
- Q. "I value flat rate 20,000 domestic, 15,000 for commercial units, 50,000 for shops."
- A. If he itemized the units, provided he explained it, I would say that's fair enough.
30. Q. I'm not asking an explanation. Reading that, do you think that is reasonable?
- A. What, reading his valuation?
- Q. No, no, a valuation of that nature. If you were given a transcript and said, "Look, that's the valuation" what would your opinion be?
- A. On the transcript?
- Q. No, I'm asking you a hypothetical question.
40. A. Are you asking me if I get a valuation which just said ...
- Q. Yes, just set out like that. Yes, nothing else.
- A. I wouldn't think it was particularly good.
- Q. Now particularly good?
- A. No. If it's a straight out, "I value this at X, Y, Z" I wouldn't think it was a very good valuation. The figure might be right - who knows?
- Q. I'm not asking you - wouldn't you say a

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Cross-
examination
(Continued)

- person who does that would be ... wouldn't it be the height of folly to say that? As a valuer, I'm asking you, as an honest valuer who criticizes methods of valuation, and that is what you are here, and I'm asking you to assist this court, or myself.
- 10 A. I wouldn't think it was a good valuation, but if the figures were right, you can't argue too much about it.
- Q. How can you say the figure might be right without comparables, without any ...
- A. Well, I'm assuming that he took comparables to arrive at this figure.
- Q. No, no, don't assume anything.
- A. Well, if someone just says, "I think X, Y, Z ..." and you know, he's done no research, then obviously that's a bad valuation.
- 20 Q. It's wrong, in fact.
- A. Yes.
- Q. As a professional person would you say that is the practice?
- A. Yes.
- Q. You are a professional auctioneer.
- A. Yes.
- Q. And may I refer you to this document in E - in bundle B, I would like to show you the document 40 in bundle B and ask your assistance.
- 30 A. Yes?
- Q. Would you be good enough to read it first?
- A. The whole particulars?
- Q. Yes, no, no, just the particulars of the conditions of sale. Now, I believe it was advertized as such to be - if you look at page 49 of bundle B, if you turn to page 49. On page 49 if you look at the bottom it would help, I think. That is the sale as advertized, I believe. Now looking at this page, looking at this document 40, it strikes you, does it not, that it's selling not a whole building, but certain floors and offices and shops.
- 40 A. Yes.
- Q. Ground floor shops 1 to 6, office 1 to 6 on the 1st floor, office 1 to 6 on the 2nd floor. Can you see that?
- A. Yes.

- Q. As an auctioneer and as an experienced valuer, would you say that it would be more prudent if property was meant on the 1st and 2nd floors for restaurant uses that that should be specified? That would stimulate more competition?
- A. Yes, I think it might have stimulated more interest.
- 10 Q. At least a restaurant operator may not have to buy the rest of that restaurant. He may be able to just buy the restaurant or that he may also buy the whole lot if he so wished.
- A. Right.
- Q. Now this is an advertisement, in fact, for the whole of the odd lot, that means the remaining unsold portion of the building.
- A. Yes.
- 20 Q. As an experienced auctioneer, would it be more prudent if you were asked to advise your client, to say, "Well, it's better to sell flat by flat, shop by shop, so to stimulate more competition and more bidders"?
- A. Well, it would depend on the market conditions at the time.
- Q. Of course, of course. I'm asking you a general question.
- 30 A. Generally I would say, generalizing, you would probably get a larger sum total selling individually, but it might take a long time.
- Q. It may take a long time. On the other hand, those unsold might be ...
- A. Might go up in the market.
- Q. Yes, might go up in value.
- A. Right.
- 40 Q. Or that the mortgagee might purchase it, it depends on the time, you say. I'm asking you "If" - if in the case of a market which is depressed, the only - if, I'm not saying it is - it would be much easier to sell flat by flat than to ask for a portion of the premises to be sold altogether. I mean it's almost unsellable in that case, if it is a depressed market. Wouldn't you agree?
- A. Possibly, but it may take time.
- Q. Oh yes, take time, yes, but it will

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Cross-
examination
(Continued)

- stimulate more bidders, for instance, or more ...
- A. Probably, yes.
- Q. Competition ...
- A. Probably.
- Q. If one were to sell shop by shop, a person might like one shop, another might like another shop.
- A. Yes.
- 10 Q. Now if it is sold as a whole, I mean as a portion, odd lots, the only possible person would be interested, would you not say, either investors ...
- A. Yes.
- Q. Or those who want a quick re-sale.
- A. I would say that would be the more likely people, yes.
- Q. And that may not be easy to find, would you not agree?
- 20 A. Possibly not.
- Q. It is not so available.
- A. If the market is depressed, probably not.
- Q. Or the market is stagnant, for instance.
- A. Yes.
- Q. So you would advise, would you not, as a reasonable...
- A. Well, if I was acting for a client I would say, "Well, do you want them a quick sale and the money now and possibly less, or can you wait and possibly you may get more, I can't guarantee it, by selling individually."
- 30 Q. You would give them that?
- A. That's what I would say, yes.
- Q. Now I want to ask you a final question. You have been extremely fair yesterday in giving your evidence, your comments, but as your instruction goes as to comment on the evidence alone, and nothing more, you cannot - am I right to say - that the valuation was not reasonable and proper and correct?
- 40 A. I can't comment on the figures.
- Q. You can't comment on the figures. So the final question I would like to ask you is that if you look at page 127, if you look at the transcript, letters M and O, you can't dispute that, can you, that the valuation is reasonable and right and 1.2

- million is not a fair market price.
- A. I don't think I can comment on either.
- Q. Yes, you can't. A final question is that the difference between 2.2 and 1.2 would you not say as a comment in a gross undervalue, the difference?
- A. Sorry ...
- Q. Would the difference of 1.2 and 2.2 million be described as a gross undervalue?
10. A. I would say a large difference.

REXN BY MR. WONG:

- Q. Mr. Raymond, you told the court that you had a slight disagreement with Mr. HSU's technique.
- A. Yes.
- Q. But that you would have asked more questions had you been instructed to do that particular valuation. What additional question would you have asked were you instructed to do that valuation?
20. A. As I say, I would have asked more questions, whether I would have got the answers, but I would have endeavoured to, but I would have been interested to know what had happened to the other 36 flats and also the 18 commercial units. Whether one would have found out that shops has been vacant at the time, I don't know, but also I think I would have been interested in, you know, this actual auction, whether it went for the right price or not, but the fact that it did sell for 1.2 I would have taken that into account in arriving at a unit rate for the property.
30. Q. In other words, apart from the disagreement with the technique, you also disagree vis-a-vis the surrounding circumstances?
40. A. Yes.
- Q. Now in 1966, bearing in mind the charts that you produced and the political position in Hong Kong then, would you advise a mortgagee to sell 54 units flat by flat or to sell 54 units at one go at an auction?
- A. Well, I would have said that I said just a

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Re-
examination

*In the Supreme
Court of
Hong Kong
High
Court*

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Re-
examination
(Continued)

minute or two ago. I would have said that, "I believe that if you want the money now, your repayment now, then let's go to auction." However, I would point out, assuming market conditions were depressed, that it's possible if you sold them individually you might get more and you might not, but you might get more, but it might take some time."

- 10 COURT: Why do you say you might not get more?
A. Well, if the market went down, it is possible you might ...
COURT: But I'm talking about at that time. When you sell a lot like this it's really odd-job wholesale, but if you are selling flat by flat you are selling retail where you have another type of customer - the public.
- 20 A. Certainly I would say the odds are you would get more selling individually. It's just the time element.
COURT: Can't you be - put it higher than that?
A. I should say it's twice as likely that you can get a higher price.
- Q. And that is bearing in mind the chart that you have shown to this honourable court, Exhibit P, indicating the pressure of demand for domestic units?
- 30 A. Yes.
Q. Now you have been asked about the possibility of being shown a valuation report which bears simply the figures. Assuming that you were shown a valuation report indicating that domestic units are valued \$20,000, offices valued at \$15,000 and shops valued at \$50,000 and the explanation given in that report is (a) by virtue of the market conditions, by virtue of the depressed political condition at that juncture, (b) by virtue of the opinion of the valuer that the units so valued are worse than the units already disposed of - all right?
- 40 A. Yes.
Q. What then would be your comment on such a valuation?
A. What, the actual valuation - are we

10 talking about the actual one done by Mr.
HSU or a hypothetical one?
Q. The method of valuation.
A. Hypothetical?
Q. Yes.
A. As I say, what came out in cross-
examination is the approach - it may be an
approach. If this valuation just came out
with some figures with no background, I
would say it left something to be desired.
However, it's possible the figures could
be correct.

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Re-
examination
(Continued)

COURT: We just don't know because it's just
nothing.
A. That's right.
COURT: It might be right, it might be wrong.
A. Yes, right.

20 Q. And such a hypothetical report, is it a
reasonable attitude for a non-professional
to take, non-professional valuer, to take?
A. I wouldn't say hypothetically it was the
usual attitude. I suppose, you know, if
you ask someone in the street to value
something, and a lot of people in Hong
Kong think they know values, they might
write out a list like that, but I don't
think anyone professional would do that.
Q. Would you describe such a valuation as
grossly negligent?
30 A. It could be.

MR. WONG: Yes, that's all I have.

COURT: Thank you, Mr. Raymond.

10.39 a.m. evidence ends

30th March, 1979

*In the Supreme
Court of
Hong Kong
High
Court*

We certify that to the best of our skill
and ability the foregoing is a true transcript
of the shorthand notes taken of the evidence
in the above proceedings.

Defendants'
Evidence

No.6
D.W.7.
Nigel Claud
RAYMOND
Re-
examination
(Continued)

(sd.) illegible
.....
Susan Kwong

(sd.) illegible
.....
Dannie Ko

(sd.) illegible
.....
Norah Withey

(sd.) illegible
.....
Adrienne Ozorio

1966, No.2102

*In the Supreme
Court of
Hong Kong
High
Court*

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79

BETWEEN

WONG CHIT SEN Plaintiff

and

TSE KWONG LAM Defendant

(By original Action)

10

and

BETWEEN

TSE KWONG LAM Plaintiff

and

WONG CHIT SEN 1st Defendant

CHING WAI SHORK (or SHOOK) 2nd Defendant

CHIT SEN COMPANY LIMITED 3rd Defendant

(By Counterclaim)

Coram : Zimmern, J.

Date : 15th May, 1979.

20

J U D G M E N T

This is a contest between a Mortgagor and a Mortgagee.

In June 1966 the Mortgagee exercising his power of sale under a Building Mortgage and three further charges sold by public auction the

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

10

20

30

40

security of divers shops, offices and flats being part of a newly completed building for the sum of \$1,200,000.00. By a writ dated 31st October, 1966 the Mortgagee sued the Mortgagor on the covenant for the balance of the debt due. The Mortgagor served a defence and counterclaim inter alia to have the sale set aside. In 1967 upon the application of the Mortgagee, the Court ordered the appointment of Mr. Ronald F. S. Li, Certified Accountant as arbitrator to consider what amount if any was still due and owing by the Mortgagor and to report to the Court. In February 1968 Mr. Li reported to the Court that the principal due was \$316,383.39 with interests set out therein. On 16th November 1968 the Court adjudged that the Mortgagee recover against the Mortgagor the principal and interests found due by Mr. Li with a stay of execution until further order pending the Mortgagor's prosecution of his counterclaim. In February 1969 the Mortgagor with leave amended his counterclaim by replacing it with a new one. The Mortgagee with leave amended his defence to the counterclaim in July 1970.

On the date fixed for hearing the Mortgagee applied to strike out the counterclaim on the ground of Res Judicata and the Mortgagor applied for leave to amend the counterclaim. Both applications were dismissed with costs. Should this case go elsewhere I must add that it was expressly understood between bench and bar that the Mortgagor on the pleadings would not be allowed to allege actual fraud as distinct from equitable fraud against the Mortgagee but if in the course of the trial should there emerge evidence which could support such an allegation then the dismissal of the Mortgagor's application would not prejudice his right to apply for leave to amend to allege actual fraud. Such an application was in fact made and refused.

I shall now refer to the Mortgagor as Claimant and the Mortgagee as Respondent as shown on the record. I sat through, I am told, 23 days of hearing during which time quite a few so called issues were vented and contested. They were quite unnecessary for the real contest between the parties - namely whether the sale of

the property by the Respondent was bona fide and without negligence on the part of the Respondent.

*In the Supreme
Court of
Hong Kong
High
Court*

In the course of the Claimant's evidence I was handed a document called "Agreed Issues" setting five questions which leading counsel for the parties asked me to answer. This document alone shows some of the unnecessary skirmishing but I shall nevertheless answer them. The
10 questions are :

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

1. 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.
2. Whether, in equity, the 1st Respondent as mortgagee should have taken the money paid to him from the pre-sale of units to satisfy interest so that interest
20 would not have been owing.
- 3.(a) Did the Mortgage Deed oblige the 1st Respondent as Mortgagee to release part of his security so as to permit the pre-sale of units.
 - (b)(i) Whether in fact the Mortgage Deed in law or in equity obliged the claimant to pay over the purchase money of the pre-sale of units to
30 the 1st Respondent.
 - (ii) Was the claimant so obliged.
4. Whether other like transactions between the 1st, 2nd and 3rd Respondents and other land owners are relevant and material to the above issues.
5. Was the 1st Respondent negligent in the keeping and rendering of the accounts of the mortgage so as to entitle the claimant to damages.

I start off with a description of the parties and the history of the mortgage and further charges.

10 The Claimant calls himself a property developer perhaps a bit euphemistically for he did not at material time appear to have had either the experience or the wherewithal to enter into such speculative adventures. Anyway he purchased in 1962 52 and 54 Cheung Sha Wan Road (which I shall call the property) by way of mortgage. His object was to rid the sitting tenants, demolish the existing buildings and erect a 15 storey building with the usual shops on the ground floor a commercial area on the 1st and 2nd floors and 72 domestic flats on the upper floors. He estimated that the total costs including redemption of the existing mortgages and compensation for the sitting tenants at just under \$2,000,000.00 and conceived the notion
20 that if he could raise a mortgage for \$1.5 million the rest could come from pre sale of flats prior to completion. He was introduced to the 1st Respondent. There is much conflict of evidence as to when and where they first met and by whom they were introduced. Nothing turns on this. They executed a mortgage dated 13th November 1963 at the offices of Johnson Stokes and Master (J.S.M.). The 1st Respondent was then and no doubt still is an important client
30 of one of the managing clerks of that firm named Liu King Wah. Before I deal with the terms of the mortgage let me say a few words about the 1st Respondent. He has been in the property business since the thirties. He appears to me to be a top professional in his line of country, well versed in the rights and liabilities of mortgagors and mortgagees. To him rights are rights in which sentiment plays no part. His wife the 2nd Respondent is a kindred soul.

40 Under the Mortgage the 1st Respondent agreed to lend the Claimant sums not exceeding \$1.5 million on the security of the property in the following manner :-

(1) \$730.00.00 on 30/11/63 @ 1.2 per cent per month interest payable monthly,

(2) \$770,000.00 for the building by ten instalments commencing 30/3/64 ending 28/5/65.

All the loans were repayable on 29th May 1965. There were the usual clauses covering default by the Mortgagor and the Mortgagee's power of sale.

*In the Supreme
Court of
Hong Kong
High
Court*

J.S.M. opened ledger accounts in the names of the Claimant and the 1st Respondent with them. The latter about mid December paid into his account sums totalling \$730,000.00 which J.S.M. partly used for clearing the existing
10 mortgages, costs for obtaining vacant possession and partly paid to the Claimant.

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

The Claimant paid interests for the first four months and then defaulted. It was agreed between him and the 2nd Respondent on behalf of the 1st that interests due and owing should be capitalised and treated as advances under the \$770,000.00 building loan. They exchanged receipts to this effect on 3rd December 1964 in
20 the sum of \$57,962.00 and thereafter approximately monthly up to August 1965 for sums totalling \$84,689.30 making \$142,651.30 all told. These were of course acts of grace shown by the 1st Respondent but well might a bystander ask where will the replacement money for building costs come from? In fact the parties had executed a further charge for \$300,000.00 on
30 17th July 1964 at 1.4 per cent per month, repayable 29th May 1965 and on 23rd July 1965 they executed another for \$200,000.00 at 1.4 per cent per month and 23rd May 1965 a third further charge for \$250,000.00 at the same interest rate both repayable on 29th May 1966. These were all acts of grace by the 1st Respondent and it must have been obvious to the Claimant that his budget of the cash flow at inception was just wishful thinking.

I now inspect the pre-sale of flats. The Claimant had printed the usual catalogue and price lists. The Claimant said he agreed to
40 sell a shop space on the ground floor to a buyer for \$100,000.00 in April 1964 and both had instructed Woo & Woo Solicitors to prepare the formal sale and purchase agreement. He had told both Liu and the 1st Respondent of this agreement and the latter insisted that such agreements must be handled by Liu at the offices of J.S.M. Both Liu and the 1st Respondent

*In the Supreme
Court of
Hong Kong
High
Court*

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

denied any knowledge of this. The sale fell through but all the other sales totalling 36 domestic flats were put through Liu at J.S.M. which leads me to Agreed Issue 3. What this issue has to do with the issues pleaded in the counterclaim I fail to see. The Claimant is apparently suffering from a sense of grievance over it. Where there is a conflict of evidence it often happens that the truth is somewhere in between. It is because of that sense of grievance that I answer the three questions raised in the Agreed Issue 3 and the answer is no to all three of them. As to Agreed Issue 3(a) the 1st Respondent as Mortgagee was not concerned with the pre-sale of units by the Claimant who was free to sell to whom, when and at any price he liked without any interference by the 1st Respondent. The 1st Respondent qua Mortgagee need not release any part of his security until the last cent due on principal and interests had been repaid unless there was a collateral agreement express or implied to the contrary. If there was it would no doubt be upon terms as to the Claimant's conduct of such sales. The parties are agreed that there was such a collateral agreement between them but there was much conflict of evidence as to time place and the terms thereof. Nothing turns on this for the 1st Respondent did re-assign the units sold by the Claimant for assignment free from incumbrance to the buyers. As to Agreed Issue 3(b)(i) & (ii) nothing in the mortgage deed in law or in equity obliged the Claimant to pay over any purchase price to the 1st Respondent. The disposal of the purchase price which term no doubt includes deposits, instalment payments was a matter for agreement between seller and buyer. This would be convenient now to dispose of Agreed Issue 2 also. There is no question of any equity in this matter. The various sums paid by J.S.M. into the account of the 1st Respondent from the proceeds of sale were pursuant to express powers given them as stakeholders under the sale and purchase agreements. J.S.M. as stakeholders only had powers to retain the money or apply them for construction costs or reduction of the mortgage principal. They chose the last mentioned and the 1st Respondent agreed to accept those sums in reduction of principal.

Up to the date of the sale by the 1st Respondent J.S.M. as stakeholders had paid into the account of the 1st Respondent with them in reduction of mortgage principal sums totalling \$838,860.00.

*In the Supreme
Court of
Hong Kong
High
Court*

10 The building was completed on 30th December 1965 and the Building Authority issued his occupation permit on 12th January 1966. Unfortunately two contractors' bills remained
20 unpaid and they effectively stopped any occupation between them by disconnecting the lifts and removing locks of doors. The lines of loans from the 1st Respondent were exhausted and the Claimant cap in hand had to ask him for more and it was not till sometime in April 1966 when the 1st Respondent agreed to pay these sums totalling \$87,450.00 before re-connection were made by the contractors. The Claimant
30 complained that his lines of loans totalling \$2,250,000.00 had not been exhausted in as much as the 1st Respondent had not paid out of his own pocket anything like \$2,250,000.00. That was perfectly true but no one has apparently explained to him that the mortgage and the further charges were not taken to secure a floating balance up to a limit of \$2,250,000.00 but were for definite amounts which when once drawn on went towards the exhaustion of those amounts irrespective of the Mortgagee's receipts
40 from pre-sales. For example the capitalisation of interests were drawn on those amounts. The Claimant had no cause for complaint.

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

By a letter dated 28th February 1966 J.S.M. on the instruction of the 1st Respondent served notice on the Claimant to pay interests outstanding on or before 29th March 1966 failing which the 1st Respondent would exercise his power of sale. On the 28th April J.S.M. similarly served two notices on the Claimant
40 calling in the Mortgagee and further charges demanding repayment of principal in the sum of \$1,512,137.95 and interests due in the sum of \$136,803.35 on or before 29th May 1966 failing which the 1st Respondent would sell. The Claimant was frantic. He had not been able to sell further units firstly because 1965 1966 were bad years for the property market and secondly because of the contractors' "lock out"

*In the Supreme
Court of
Hong Kong
High
Court*

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

of the building already referred to which matter was not completely resolved till April 1966. He did not have the money to redeem. He wrote to the Governor. He tried to get another mortgage with C. C. Lee & Co. which fell through. He said he approached the Wing On Life Assurance Co. Ltd. on 26th April 1966 and that Company agreed in principle to take on the mortgage for a loan of \$1,500,000.00 at 1.2 per cent per month. He produced a letter to this effect signed by the Manager. This letter was proved by the Asst. Manager of the Company who had actually written the letter (in the Chinese language) on the instructions of the then Manager. He further told the Court that the Company generally disregards an applicant's list prices and makes its own evaluation of the security and advances 70% on it. I accept his evidence and find that the letter to be authentic and that such an offer was made to the Claimant on the 26th April 1966. The Claimant said he showed the letter to Liu, the 1st Respondent and his wife, and demanded a transfer of the mortgage as the 1st Respondent had demanded a sum in excess of his debts which was no more than slightly over \$1.4 million and that \$1.5 million obtainable from the Company was ample to cover the transfer. There is no doubt that the sums demanded were in excess of the debt then due and this was found by Mr. Li the Court appointed Arbitrator. The sums demanded were given to J.S.M. by the 1st Respondent and made up by his wife. Having seen the so called account book kept by her I would have been surprised if she had got any figure right. Liu, the 1st and 2nd Respondents all denied ever having seen the letter before trial. Each was confronted with it and each denied it in a convincing manner and I believe them in this matter. It is not up to me to speculate why he did not show them the letter. He was by then without a solicitor. In view of my finding there is no evidence that the Claimant had in any way which could remotely suggest a tender of the mortgage debt which leads me to Agreed Issue 5. The answer is the 1st Respondent was negligent in the keeping and rendering of the accounts but there was no duty on the 1st Respondent to keep accounts. The 1st Respondent

was not a mortgagee in possession. It was the duty of the Claimant qua Mortgagor to tender repayment on due date. He failed to tender any sum and no dispute arose at that stage as to the accounts. The Claimant is not entitled to damages in this issue.

*In the Supreme
Court of
Hong Kong
High
Court*

10 The 1st Respondent as I said was highly professional and he timed the moment to exercise his power of sale to perfection - after the entire building had been completed occupation permit issued and the last debt to contractors arranged. That was his right and privilege which cannot be queried. A mortgagor has no power to postpone sale.

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

20 The 1st Respondent told the Court that the Claimant went to see him and asked him not to put up the property for auction but to sell flat by flat. He refused because (1) the Claimant had failed to pay interests for six months (2) the mortgage was up (3) Hong Kong was then unsafe because of disturbances. There is in evidence a pathetic letter written by the Claimant to the 1st Respondent dated 17th June 1966 in which he begged the 1st Respondent to sell flat by flat.

30 The 1st Respondent said he gave instructions to Liu to sell and was advised that he could sell by private treaty or public auction but that the latter with a reserved price was fairer.

J.S.M. then caused to be printed and made available for circulation the particulars and conditions of sale dated 9th June 1966 by Lammert Brothers on Friday 24th June 1966 at 3 p.m. The sale was subject to a reserved price. The auction was prominently advertised in both the Chinese and English press. All this was quite unimpeachable.

40 The 1st Respondent said he made certain calculations and estimated the value of the 36 remaining domestic units at \$20,000.00 each the 12 units on the 1st and 2nd floors at \$15,000.00 each and the six shops on the ground floor at \$50,000.00 each making a total of \$1.2 million in all.

He had taken into consideration the unsteady political situation, the falling property market and the locality being north of Boundary Street therefore the lease (presumably the lease with China) had only a short term to run. He then said he had no interest in the property himself but his company the 3rd Respondent decided that if nobody would take the property at the reserved price of \$1.2 million then it would.

10 I now set out the contentious minutes of a meeting of directors of the 3rd Respondent dated 20th June 1966. It was reported to have been attended by the 1st and 2nd Respondent and the last mentioned took the chair.

"7. Matters for Discussion :

(1) Whether or not to take part in the auction of six shops on the ground floor and all offices on the 1st and 2nd floor and 36 residential flats on the upper floors of Kwong Hing Building at Nos.52 - 54 Cheung Sha Wan Road.

Resolutions

(a) Wong Chin Wai Shork (2nd Respondent) be appointed to attend at the office of the Lammert Brothers before 3 p.m. on the 26th June of this year to take part in the auction of Kwong Hing Building but in principle the bidding price shall not exceed \$1,200,000.00.

30 (b) The amount of short fall shall be provided by the Company."

The 3rd Respondent was incorporated on 29th December 1964 and at the date of the meeting the issued capital was 190 shares of \$1,000 each i.e. \$190,000.00 all paid up by the 1st Respondent. The shareholders were the 1st and 2nd Respondents and their eldest son who was then away. The balance sheet of the Company as at 31st March 1966 shows fixed assets of Land & Building at cost of about \$1.3 million. Advances of nearly \$900,000.00 no doubt a mortgage, and a non interest bearing loan of

over \$2.5 million from a director (1st Respondent). Shareholders funds stood at \$263,000.00. This is a typical picture of a family company completely under the control of a rich father.

*In the Supreme
Court of
Hong Kong
High
Court*

10 On the day appointed the 1st and 2nd Respondents with a solicitor from J.S.M. and Liu attended at Lammert Brothers and saw Mr. Watson the auctioneer who was told the reserved price. On the advertised hour Mr. Watson mounted the rostrum read the particulars and conditions of sale which were then read in Chinese by his assistant. He then announced the reserved price of \$1,200,000.00. The 2nd Respondent made the bid and there being no other bid the property was knocked down to her. That was the sale which the Claimant seeks to impeach. He was present at the auction. He told the Court the first he heard of the reserved price was when it was announced by Mr. Watson and he protested that it was too low. There was much conflict of evidence as to how many people attended the auction. This is not important but the conflict of evidence as to whether the Claimant was told of the reserved price, beforehand is. The 1st Respondent did not say he had told the Claimant the reserved price. He said Tse (the Claimant) ought to have known of it before (the auction) because his wife and Liu had told him. Liu said 20 he did not know if it had been communicated to Tse before the auction. He himself had been told a few days before. The 2nd Respondent first said that she could not remember whether the reserved price was mentioned to Tse went on to say Tse went to see her to withhold the auction as he had written to the Governor. He mentioned that the reserved price was on the low side. She said she told Tse to find friends to bid higher. I totally disbelieve her in this 30 aspect of the case and find as a fact that the Claimant was never told before-hand the reserved price and that he first heard of it from the mouth of Mr. Watson at the auction. 40

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

It is now clearly established that a mortgagee when exercising his power of sale must act in good faith and owes a duty to take reasonable care to obtain a proper price. In

Cuckmere Brick Co. v. Mutual Finance Ltd. (1)
Salmon L. J. said :

10 " It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it : compare, for example, Kennedy v. de Trafford [1896] 1 Ch. 762; [1897] A.C. 180 with Tomlin v. Luce (1889) 43 Ch.D. 191, 194.

20 The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours.' Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the 'proper price', others to the 'best price' Vaisey J. in Reliance Permanent Building Society v. Harwood-Stamper [1944] Ch. 362, 364, 365,

30

40

(1) [1971] 1 Ch. at 966

seems to have attached great importance to the difference between these two descriptions of 'price'. My difficulty is that I cannot see any real difference between them. 'Proper price' is perhaps a little nebulous, and 'the best price' may suggest an exceptionally high price. That is why I prefer to call it 'the true market value.'"

*In the Supreme
Court of
Hong Kong
High
Court*

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

10 and at p.968

"I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line."

20

The burden of proof is on the mortgagor to prove the breach of duty by the mortgagee but this may shift. In Farrar v. Farrars Ltd. (2) Lindley L.J. said :

30

" A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by an ordinary power of sale, and in our opinion, such a sale is warranted by such a power, and does not fall within the rule to which we have at present referred. But although this is

40

(2) [1889] 40 Ch.D. at 409

*In the Supreme
Court of
Hong Kong
High
Court*

No. 7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

10 true, it is obvious that a sale by a person
to an incorporated company of which he is a
member may be invalid upon various grounds,
although it may not be reached by the rule
which prevents a man from selling to
himself or to a trustee for himself. Such
a sale may, for example, be fraudulent and
at an undervalue or it may be made under
circumstances which throw upon the
purchasing company the burden of proving
the validity of the transaction, and the
company may be unable to prove it. Fraud
in the present case is not now alleged; it
was alleged in the Court below, and was
then clearly disproved. But, for reasons
which will appear presently, the
circumstances attending the sale were such
as, in our opinion, throw upon the company
the burden of sustaining the transactions."

20 Let me now examine the facts as I have
found them. First the reserved price. 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. In
either case the reserved price ought not be made
30 known beforehand to any intending purchaser at
the auction otherwise how can there be fair and
equal competition. In the commercial world
advance knowledge is knowledge indeed. The 1st
Respondent divulged the reserved price to the
3rd Respondent well before the auction which
then decided to buy and did buy with the 1st
Respondent's backing at that price. Yet it was
not divulged to the Claimant the one vitally
40 affected by the result of the sale, the one who
ought to have been informed if anyone were to be
informed at all. In Barns v. Queensland
National Bank Ltd. (3) the High Court of
Australia reversing the Supreme Court of
Queensland reviewing the duties of a mortgagee
in exercising his power of sale decided the
disclosure of a reserved price to an intending
purchaser may be a breach of the mortgagee's

(3) [1906] 3 C.L.R. 925

duty. The hearing at first instance was before a jury.

*In the Supreme
Court of
Hong Kong
High
Court*

10 I now turn to the valuation of the reserved price. The 1st Respondent made the valuation himself without calling in aid a professional valuer. He fixed a price and he admitted under cross-examination he wanted the property at that price for his company. A reserved price must bear some relationship with the property's true value and not capriciously fixed otherwise it serves no purpose. Where it is fixed at below the mortgage debt the more care ought to be taken over it as the mortgagor has no say in the fixing but might be called upon to pay the difference. On the facts of this case the price of \$1.2 million was fixed by the 1st Respondent quite capriciously. All the domestic flats were fixed at one price without regard for size and location as were the ground floor shops. I am
20 unable to accept on the evidence that the price of \$1.2 million bore any relationship with the property's then true value even after taking into consideration that 1966 was a bad year for property. Further it was the intention of the Claimant to develop the building and sell until by unit. The 1st Respondent knew of this and there was a collateral agreement to the effect that the 1st Respondent as Mortgagee would re-assign piecemeal. It was the duty of the 1st
30 Respondent to obtain the true market value of the mortgaged property. The Claimant 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 lot of a building wholesale. There was here a conflict of interest between
40 the Mortgagor and Mortgagee and in my view he intentionally sacrificed the interests of the Claimant for his own gain. He is not entitled to do that. (see Forsyth v. Blundell (1973) 129 C.L.R. 477 at p.494). He was minded to acquire the property for his company for the purpose of retail i.e. selling unit by unit. This is implicit in his statement that after the auction the company tried to sell the units but could

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

sell only two or three in three years. Further the 3rd Respondent did not have the money to hold on to the property. The reason why the company was not more successful is obvious, for the Claimant had registered a *lis pendens* against the property at the Land Registry.

10 I now come to the company the 3rd Respondent. Applying Farrar v. Farrars Ltd. (2) the circumstances of this case certainly throw upon it the burden of proving the validity of the sale. What can it say? It went to the auction in a privileged position. It knew the reserved price. It did not have the money but knew the vendor will not ask. Its whole case depends upon the conduct of the 1st and 2nd Respondents. It was argued in its favour that the company did acquire the property at a properly advertised public auction. That is not evidence of the true market price of the
20 property. (see Hodson v. Deans [1903] 2 Ch. at 653). 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.

30 Viewing all the circumstances of this case I find the conduct of the 1st Respondent in regard to the sale was grossly unfair to the Claimant and he had acted in bad faith. What then is to be done. It will be quite wrong to set aside the sale after a lapse of 13 years. The Claimant was at fault in delaying so long. However, the 1st Respondent is accountable to the Claimant for the difference between the true market price and \$1.2 million being the loss sustained by him.

40 Mr. William Hsu, Manager of Harriman Realty Co. Ltd. was called by the Claimant. He produced his report. It is dated 1st June 1970 and he on behalf of Harriman Realty estimated the value of the property as at 24th June 1966 to be \$2,206,300.00. It was done by way of comparable values, a system which leaves much room for doubt unless corroboration is forthcoming. It is however a well known and accepted method of valuation. There is

(2)[1889] 40 Ch.D. at 409

corroboration in this case. I refer to Wing On Life Assurance's offer in April 1966. It is sufficiently proximate to June 1966. The offer was \$1.5 million being 70% of its valuation of the property which comes to just under \$2.15 million. This is institutional money and an offer of this nature is not made lightly. The two estimates are very close and I find the true value of the property to have been \$2.15 million from which I have to deduct the \$1.2 million accounted for. There will be judgment for the Claimant on his counterclaim in the sum of \$950,000.00 against the 1st Respondent. There is still the outstanding judgment against the Claimant in the sum of \$316,383.39 with interest at 1.4 per cent per month. I cannot offset one against the other but I do not see any reason why the Claimant should not enjoy the rate of interest first charged by the 1st Respondent i.e. 1.2 per cent per month on his the Claimant's \$950,000.00 and I award that to commence from 1st July 1966. The Counterclaim against the 2nd and 3rd Respondents are dismissed.

This leaves the last two questions raised in the Agreed Issues. As to (1) the answer is that it was not a proper sale. As to (4) the answer is no as there is no evidence of a common design. The findings in this case were made entirely on the suit mortgage and no other.

B. Bernacchi, QC & Patrick Woo (H.H. Lau & Co.)
for Plaintiff in Counterclaim.

Jackson-Lipkin, QC & R. Wong (Johnson, Stokes & Master)
for Defendants in Counterclaim.

*In the Supreme
Court of
Hong Kong
High
Court*

No.7
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

No.8
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

BETWEEN :

WONG CHIT SEN Plaintiff

and

TSE KWONG LAM Defendant

(By Original Action)

10

and

BETWEEN :

TSE KWONG LAM Plaintiff

and

WONG CHIT SEN 1st Defendant
CHING WAI SHOK (or SHOOK) 2nd Defendant
CHIT SEN COMPANY LIMITED 3rd Defendant

(By Counterclaim)

BEFORE THE HONOURABLE MR. JUSTICE
ZIMMERN IN COURT

20

J U D G M E N T

THIS 15TH DAY OF MAY, 1979

This action having on the 15th day of May, 1979 been tried before the Honourable Mr. Justice Zimmern without a jury and the said Mr. Justice Zimmern having on 15th day of May, 1979 entered judgment for the Plaintiff (by counterclaim) on his counterclaim in the sum of \$950,000.00 against the 1st Defendant by counterclaim together with interest at the rate

of 1.2 per cent per month on the said \$950,000.00 commencing from the 1st day of July, 1966 the Counterclaim against the 2nd and 3rd Defendants are dismissed and the Plaintiff by Counterclaim do have 50% costs of his action against the 1st Defendant by Counterclaim.

IT IS THIS DAY ADJUDGED that the Plaintiff to the Counterclaim recovers against the 1st Defendant by counterclaim \$950,000.00 together with interest at the rate of 1.2 per cent per month on the said \$950,000.00 commencing from the 1st day of July, 1966 and the Plaintiff by Counterclaim do have 50% costs of his action against the 1st Defendant by Counterclaim.

P.G. O'DEA
ACTING REGISTRAR.

*In the Supreme
Court of
Hong Kong
High
Court*

No.8
Judgment of
Mr. Justice
Zimmern
15/5/79
(Continued)

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

TSE KWONG LAM *Appellant*

AND

WONG CHIT SEN *1st Respondent*

CHING WAI SHORK (or SHOOK) *2nd Respondent*

CHIT SEN COMPANY LIMITED *3rd Respondent*

RECORD OF PROCEEDINGS

In the Court of Appeal

Civil Appeal No. 34 of 1979

Amended pursuant to
R.S.C. Order 59
Rule 7(1)(b)

Civil Appeal No.34 of 1979

*In the Court of
Appeal
Hong Kong*

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

ACTION NO.2102 OF 1966

No.9
Supplementary
Notice of
Appeal
26/1/80

BETWEEN

WONG CHIT SEN

Appellant
(1st Defendant
to Counterclaim)

10

and

TSE KWONG LAM

Respondent
(Plaintiff by
Counterclaim)

SUPPLEMENTARY NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Appellant (1st Defendant to Counterclaim) on Appeal from a Judgment of the Honourable Mr. Justice Zimmern given on the 15th day of May 1979 whereby it was ordered that there be judgment for the Respondent (Plaintiff in the Counterclaim) against the Appellant (1st Defendant to the Counterclaim) for the sum of \$950,000 with interest at the rate of 1.2% per month from the 1st day of July 1966 and that the Respondent (Plaintiff in the Counterclaim) should have 50% of the costs of his action against the Appellant (1st Defendant to Counterclaim)

FOR ORDERS that :-

1. The said Judgment be

- (a) (i) set aside
(ii) and judgment may be entered in the above-mentioned Counterclaim for

the Appellant (1st Defendant to
the Counterclaim) and costs of the
said action to be taxed

No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

or alternatively

10

(b) varied by substitution (in place of the
said sum of \$950,000) of such lower sum
by way of damages as to the Court of
Appeal shall seem just and of a rate of
interest which the Court of Appeal
thinks just and proper

AND

2. The Respondent (Plaintiff in the Counter-
claim) be ordered to pay to the Appellant
(1st Defendant to Counterclaim) his costs
of this Appeal to be taxed.

AND FURTHER TAKE NOTICE that the grounds of
this Appeal are that :-

20

~~1. There was no or no sufficient evidence to
support the finding of the learned Judge
that the Appellant timed the moment to
exercise his power of sale under the
mortgage and the further charges.~~

~~2. The finding of the learned Judge that the
Respondent was never told the reserved
price before the 24th day of June 1966 was
against the weight of the evidence.~~

30

~~3. There was no evidence to support the
finding of the learned Judge that the 1st
Respondent divulged the reserved price to
the 3rd Defendant well before the auction.~~

1. In finding that the sale of 24th June 1966
was not a proper sale, the learned Judge
misdirected himself on the facts and erred
in law. (Particulars appear from Grounds 2
to 31 hereunder).

2. The learned Judge erred in law in directing
himself that it was the duty of the
Appellant (1st Defendant to Counterclaim
hereinafter called "the Appellant") to

- obtain the true market value of the property (Judgment, p.13). Upon a true direction, the learned Judge ought to have directed himself that the duty of the Appellant was to take responsible care to obtain a proper price for, alternatively the true market value of, the property.
- 10 3. The learned Judge erred in law and misapplied the facts in findings that, at an auction at which the reserved price is publicly announced prior to the bidding, there cannot be fair and equal competition if one of the intending purchasers has been informed of such reserved price prior to the time of the auction. (Judgment, p.12)
- 20 4. In finding as set out in Ground 3 above, the learned Judge misdirected himself as to the true construction and effect of Barns v. Queensland National Bank Ltd. (1906) 3 C.L.R. 925.
- 30 5. Upon a true construction of the judgment of Griffith C.J. in Barns it emerges that the High Court of Australia was criticising the public announcement of the reserved price at the auction at least as much as it was criticising the price publication of that price by circulars. At p.944 Griffith C. J. expressly prayed in aid Delves v. Delves (1875) 20 Eq. 77, in which Malins V. C.'s mind was clearly directed to the private divulging of the reserved price in the context of an auction at which such price was not publicly announced.
- 40 6. At p.12 of the Judgment the learned Judge said: "In the commercial world advance knowledge is knowledge indeed." There was no evidence to support the inference that the 3rd Defendant to Counterclaim (referred to in the Judgment as "the 3rd Respondent" and hereinafter - except in quotations from the Judgment - called "the Company") gained any advantage, whether fair or unfair, from its prior knowledge of the reserved price, nor any evidence to suggest that the Respondent (Plaintiff in the Counter-claim

*In the Court of
Appeal
Hong Kong*

No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

- and hereinafter - except in quotations from the Judgment - called "the Respondent") suffered any prejudice, loss or damage thereby.
7. At p.12 of the Judgment the learned Judge said of the reserved price: "Yet it was not divulged to the Claimant the only vitally affected by the result of the sale, the one who ought to have been informed if anyone were to be informed at all." If and in so far as the learned Judge intended by that passage to infer that the Respondent had thereby suffered any prejudice, loss or damage, such inference was unreasonable and/or there was no evidence to support the same.
8. In Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. (1971) 1 Ch. 949, at p.965, Salmon L. J. said : "Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes." The learned Judge ought to have directed himself that this passage correctly states the law, not only of England but also of Hong Kong, and ought to have applied it to the facts of this case. (At p.8 of the Judgment the learned Judge described as "quite unimpeachable" the manner in which the auction was advertised.)
9. At p.12 of the Judgment the learned Judge said : "The 1st Respondent made the valuation himself without calling in aid a professional valuer." If and in so far as this was intended as a criticism of the Appellant, it was unjustified in view of the learned Judge's findings in respect of the Appellant at pp. 3 to 4 of the Judgment, namely: "He has been in the property business since the thirties. He appears to me to be a top professional in his line of property, well versed in the

rights and liabilities of mortgagors and mortgagees."

*In the Court of
Appeal
Hong Kong*

10. At p.12 of the Judgment the learned Judge said : "He (the Appellant) fixed a price and he admitted under cross-examination he wanted the property at that price for his company." If and in so far as this influenced the finding referred to in Ground 1 above, the learned Judge erred in law in that he ought to have directed himself that he was not entitled to have regard to the motives behind the Appellant's exercise of his power of sale (vide Belton v. Bass, Ratcliffe and Gretton Ltd. (1922) 2 Ch. 449, which correctly states the law, not only of England but also of Hong Kong).
11. The finding of the learned Judge that the reserved price of \$1,200,000 was fixed by the Appellant "quite capriciously" was against the weight of the evidence and wrong. (Judgment, p.13)
12. In directing himself that the reserved price must bear some relationship with the property's true value (Judgment, p.12) the learned Judge erred in law in that he was -
- (a) propounding a standard which is appropriate to a sale by a trustee but does not apply to a sale by a mortgagee; and
- (b) failing to direct himself that there is no duty upon a mortgagee, when selling by public auction, to fix any reserve at all.
13. If and in so far as the learned Judge's finding that the reserved price was fixed at too low a figure influenced the finding referred to in Ground 1 above, the learned Judge erred in law and misapplied the facts in that -
- (a) he failed to direct himself as set out in (b) of Ground 12 above;

No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

*In the Court of
Appeal
Hong Kong*

No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

- 10 (b) since, at the auction, nobody other than the 2nd Defendant to Counterclaim made any bid at all, there are no grounds for reasonably believing that, had the reserved price been fixed at a higher figure, a better price would have been realised;
- (c) accordingly, the Respondent suffered no prejudice, loss or damage by reason of the figure at which the Appellant fixed the reserved price; and
- (d) by reason of the foregoing, such fixing of the reserved price in no way rendered the sale improper.
- 20 14. The learned Judge's finding that the sum of \$1,200,000 did not bear any relationship with the property's then true value (Judgment, p.13) was against the weight of the evidence and wrong. In particular, the learned Judge paid no, or no sufficient, heed to the fact that, at a well publicised auction, nobody bid more than the said sum.
- 30 15. If and in so far as the learned Judge's finding as set out in Ground 1 above was influenced by the fact that the property was bought by the Company, the learned Judge misapplied the facts in that -
- (a) he paid no, or no sufficient, heed to what would have happened had the Company not bought the property, namely that the property would have had to be put up again at a lower reserved price and would, as a matter of reasonable probability, have been ultimately sold at a price below \$1,200,000; and
- 40 (b) accordingly, had the Company not bought the property at the auction on 24th June 1966, the Respondent would have been indebted to the Appellant in a sum higher than the sum which was found due by the Arbitrator, Mr. Ronald Li.
16. The learned Judge paid no, or no

10 sufficient, heed to the fact that the Appellant had no motive for fixing a reserved price which was unreasonably low. The unchallenged evidence was that the Company would not have bid more than \$1,200,000, a sum which fell substantially below the Respondent's then indebtedness to the Appellant who knew that the Respondent was then impecunious. The learned Judge ought to have directed himself that, as a matter of reasonable probability, the Appellant, had he believed the property to have been worth substantially more than \$1,200,000, would have fixed a higher reserve.

17. Further or alternatively to Ground 16 above, the learned Judge's findings that -

(a) the Appellant wanted the property at \$1,200,000 for his company; and

20 (b) the Appellant quite capriciously fixed a reserved price which was substantially below the true value of the property,

are inconsistent in that, if both these findings were correct and true, the Appellant would have reasonably anticipated that someone at the auction would bid more than the sum of \$1,200,000.

30 18. In directing himself that the sight of a wife bidding at an auction sale ordered by her husband mortgagee might well deter others from entering (Judgment, p.14), the learned Judge erred in that he paid no, or no sufficient, heed to -

40 (a) the fact that there was no evidence that any of the potential bidders at the said auction recognised the 2nd Defendant to Counterclaim as being the wife of the vendor/mortgagee; and

(b) that it was highly improbable that any such bidder would know that the property was being sold on the order of

the Appellant (vide the Transcript of
Evidence at p.202J-0).

—————
No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

19. If and in so far as the finding set out in Ground 1 above was influenced by the learned Judge's finding that "It (the Company) did not have the money but knew the vendor will not ask" (Judgment, p.13), the learned Judge erred in law in that such finding is irrelevant to the issue of whether or not the sale was a proper one.
10
20. In directing himself that the price realised by a property at a properly advertised public auction is not evidence of the true market price of the property (Judgment, p.14), the learned Judge erred in law and misconstrued the true effect of the judgment in Hodson v. Deans (1903) 2 Ch. 647.
21. The Appellant repeats the substance of Ground 9 above in respect of the learned Judge's rhetorical question : "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 lot of a building wholesale?" (Judgment, p.13)
20
22. Further, the Appellant did not at the hearing have any opportunity to answer the question set out in Ground 21 above. The possibility of a unit by unit auction was first canvassed, by the learned Judge himself, at an advanced stage in the hearing and after the Appellant had given his evidence (vide the Transcript of Evidence, p.368S).
30
23. By reason of the matters set out in Ground 22 above, there was a breach of the rule of natural justice audi alteram partem and the learned Judge erred in law in taking into account, in his Judgment, the possibility of a unit by unit auction.
40

24. The finding of the learned Judge that the Appellant intentionally sacrificed the interests of the Respondent for his, the Appellant's own gain (Judgment, p.13) was against the weight of the evidence and was wrong.
- 10 25. There was no, or no sufficient, evidence to support the learned Judge's finding that the Appellant "was minded to acquire the property for his company for the purpose of retail i.e. selling unit by unit" (Judgment, p.13). Further, the said finding was contrary to the unchallenged evidence of the Applicant and of the 2nd Defendant to Counterclaim (vide the Transcript of Evidence, p.177S and p.273F-G).
- 20 26. If and in so far as the learned Judge relied, in finding as set out in Ground 1 above, upon the implication that a unit by unit auction would have realised a price higher than that actually realised, such implication was unreasonable and against the weight of the evidence; in particular the evidence given by Mr. Watson at p.385K-N of the Transcript of Evidence - evidence which, in view of Mr. Watson's long experience of conducting auctions in Hong Kong, ought to have been accepted.
- 30 Further, the learned Judge ought to have have regard to the fact that, if the property was indeed worth substantially more than \$1,200,000 if auctioned unit by unit, it could reasonably have been expected to have been sold at the said auction, for more than \$1,200,000, to a dealer who intended to make a profit by thereafter auctioning it unit by unit.
- 40 27. Without prejudice to the generality of Ground 23 above, the learned Judge misdirected himself as to the facts and the law in taking into account, in his Judgment, the possibility of a unit by unit auction, in that-
- (a) the uncontradicted and unchallenged

- evidence of Mr. Watson and Mr. Raymond was to the effect that it was improbable that all of the property would have been sold at a single unit by unit auction (vide the Transcript of Evidence at p.384Q-R and p.406F-U); and
- (b) as a matter of clearly established law, a mortgagee is entirely free to choose the moment for realising his security by turning it into money.
- 10
28. The finding of the learned Judge that the Company did not have the money to hold on to the property (Judgment, p.13), was against the weight of the evidence and was wrong. At the date of the hearing of the Company still owned the property and was not insolvent.
- 20
29. In the premises, the learned Judge's finding that the conduct of the Appellant in regard to the sale was grossly unfair to the Respondent and that the Appellant had acted in bad faith (Judgment, p.14) was against the weight of the evidence and was grounded in errors of law and is wrong.
- 4→30 There was insufficient evidence to support the finding of the learned Judge that the true value of the property was \$2,150,000. In finding as aforesaid, the learned Judge -
- 30
- (a) paid no, or no sufficient, heed to the fact that the property had been sold for \$1,200,000 at a well publicated auction;
- (b) gave too much weight to the theoretical calculations made by Mr. Hsu in June 1970; and
- 40
- (c) in view of the fact that no witness was called by the Respondent who could give direct evidence as to the valuation upon which was based the offer set out in the letter of Wing On Life Assurance Co. Ltd., dated 26th April 1966,

(Exhibit "E1"), gave too much weight to that letter and to the inferences which he drew therefrom.

*In the Court of
Appeal
Hong Kong*

- 5.31 The learned Judge was wrong in law and in fact in failing to hold that the price of \$1,200,000 obtained at the auction ~~constituted~~ represented the true market value of the ~~premises in the suit~~ property.
- 10 6. ~~The learned Judge was wrong in law in holding that the burden of proof in relation to breach of duty to take reasonable precautions shifted to the Appellants.~~
- 20 7. ~~The learned Judge was wrong in law in fact in holding that the Respondent sacrificed the interest of the Appellant by virtue of a failure to seek professional advice as to whether a better price could be obtained by auctioning off the suit premises unit by unit.~~
- 8.32 ~~That~~ The learned Judge was wrong in law ~~and in fact~~ and erred in principal in awarding interest on the Judgment sum of \$950,000 at the rate of 1.2% ~~1.4%~~ per month, to run from 1st July 1966, in that he applied to this long period a rate of interest taken from the rate in a comparatively short term mortgage.
- 30 9.33 Such further or other grounds as may appear from such further Supplementary Notice of Appeal as may hereafter be lodged pursuant to the provisions of Order 59 Rule 7(1)(b) of the Rules of the Supreme Court.

No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

AND FURTHER TAKE NOTICE that the Appellant intends to set this Appeal down in the Final Appeals list.

~~Dated the 21st day of May 1979.~~

*In the Court of
Appeal
Hong Kong*

Dated the 26th day of January 1980.

No.9
Supplementary
Notice of
Appeal
26/1/80
(Continued)

~~JOHNSON, STOKES & MASTER
Solicitors for the Appellant.~~

(sd. JOHNSON, STOKES & MASTER)
Solicitors for the Appellant.

To : The abovenamed Respondent

AND TO: Messrs. H. H. Lau & Co.,
2202 Realty Building,
71 Des Voeux Road C.,
in the Colony of Hong Kong,
his Solicitors.

Amendment pursuant to
R.S.C. Order 59
Rule 7(1)(a)

Civil Appeal No.34 of 1979

*In the Court of
Appeal
Hong Kong*

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

ACTION NO.2102 OF 1966

No.10
Amended
Notice of
Appeal
8/10/80

BETWEEN

TSE KWONG LAM Appellant
(Plaintiff to Counterclaim)

and

10 WONG CHIT SEN 1st Respondent
(1st Defendant to Counterclaim)

CHING WAI SHORK (SHOOK) 2nd Respondent
(2nd Defendant to Counterclaim)

CHIT SEN COMPANY LIMITED 3rd Respondent
(3rd Defendant to Counterclaim)

A M E N D E D NOTICE OF APPEAL

20 TAKE NOTICE that the Court of Appeal will
be moved so soon as Counsel can be heard on
behalf of the abovenamed Appellant (Plaintiff to
Counterclaim) on Appeal from part of the
Judgment of the Honourable Mr. Justice Zimmern
given on the 15th day of May 1979 and that the
judgment should be varied by setting aside the
award to the Appellant of the sum of \$950,000.00
and interest at the rate of 1.2 per cent per
month and substituting therefor an order that
the purported sale of the property under the
mortgage and the further charges by the 1st
30 Defendant to the 3rd Defendant be set aside on
such terms as to this Honourable Court shall
seem just and including rendering of accounts of
all rents and profits derived from the said
property from the time of the said purported
sale todate by the 1st and 3rd Respondents or
such further or other orders as the Court of

Appeal may deem just.

AND FURTHER TAKE NOTICE that Counsel on behalf of the Appellant will apply to the Court of Appeal for an order that the Defendants pay to the aforesaid Appellant the costs occasioned by this Notice and the costs of the action to be taxed.

AND FURTHER TAKE NOTICE that the grounds of the Appellant's appeal are :-

- 10 1. (a) On the evidence the sale was in effect a sale by the 1st Respondent to himself under the guise of a limited family company, bidding through his wife the 2nd Respondent and consequently void or otherwise voidable unless and until the 3rd Respondent can prove the bona fides and the validity of the same (pages 13 and 14 of the judgment).
- 20 (b) The learned judge, having found on facts that the sale of the property by the 1st Defendant was "not a proper sale" (page 15 of the judgment) and that "he had acted in bad faith" (page 14 of the judgment) erred in law in not holding that the sale was void and of an effect, alternatively was voidable and should be set aside.
- 30 2. The learned judge erred in law and on fact and misdirected himself in finding "that the claimant (Appellant) was at fault in delaying so long" and therefore "it will be quite wrong to set aside the sale after a lapse of 13 years" (page 14 of the Judgment) especially as the Counterclaim was originally filed in December 1966.
- 40 3. Alternatively, the learned judge having found the sale was not a proper sale, erred in law and on principle in failing to exercise his discretion to set aside the sale by the 1st Defendant to the 3rd Defendant under the mortgage and further charges.
4. ~~The learned judge misdirected himself in~~

~~that when he hold that "there is no evidence of a common design" and thereby erred in law, fact and discretion in refusing to give leave to the Appellant to amend his Counterclaim to include the allegation of fraud, inter alia, on the part of the 1st, 2nd and 3rd Defendants to the Counterclaim.~~

*In the Court of
Appeal
Hong Kong*

No.10
Amended
Notice of
Appeal
8/10/80
(Continued)

10 (a) The learned judge misdirected himself in finding that the other like transactions between the 1st, 2nd and 3rd Defendants and other land owners were not relevant and material and "there was no evidence of a common design" (page 15 of the Judgment).

20 (b) The Agreed Facts (Exhibit "M") and Minutes of the 3rd Respondent (Exhibit "C") when taken into conjunction with the circumstances of this case proved a system of fraud and the learned trial judge erred in law, fact and discretion in refusing to give leave to the Appellant to amend his Counterclaim to include an allegation of fraud on the part of the 1st, 2nd and 3rd Defendants (Respondents) to the Counterclaim, in the terms of the proposed amendment being paragraph 7(A) to the Amended Counterclaim as formulated and handed up to the Court, with suggested appropriate amendments to the Agreed Facts (page 2 of the Judgment).

30

(c) Further the learned trial judge should have set aside the sale for actual fraud referred to in paragraphs 4(a) and (b) above.

40 (d) Further or in the alternative the learned judge should have taken into consideration the said Agreed Facts and all the said Minutes in considering the issue of bad faith against the 1st, 2nd and 3rd Respondents, and in particular when considering whether to set aside the sale rather than to award damages.

5. The learned trial judge misdirected himself

In the Court of
Appeal
Hong Kong

No.10
Amended
Notice of
Appeal
8/10/80
(Continued)

in holding that the manner in which the auction was advertised was "quite unimpeachable" (page 8 of the Judgment) in that the particulars of the property for auction whilst disclosing it was a sale of some portions of certain lot numbers together with buildings thereon known as Nos.52 and 54 Cheung Sha Wan Road did not disclose:-

- 10 (a) That it was premises in a brand new 15 storey building;
- (b) That the said premises which were to be sold had never been occupied;
- (c) That 12 units on the 1st and 2nd floors were specifically designed for a restaurant and that approval by the appropriate authority for such use had been obtained; and
- (d) The floor areas of the individual shops, offices, restaurant and flats or even the area of the individual units.
- 20 ~~5.6.~~ The learned judge in all the circumstances wrongly exercised his discretion :-
- (a) In not setting aside the said sale; and
- (b) In giving the Appellant only ~~80%~~ 50% of the costs of the action, and only as against the 1st Defendant.

30 ~~6.7.~~ Such further or other grounds may appear from such further ~~supplementary~~ amended Notice of Appeal as may hereafter be lodged pursuant to the provision of Order 59 Rule 7(1)(~~b~~)(a) of the Rules of Supreme Court.

AND FURTHER TAKE NOTICE that the Appellant intends to set this Appeal down on the Final Appeals List to be heard together with Civil Appeal No.34 of 1979.

~~Dated this 25th day of May, 1979.~~

Dated the day of September, 1980.

*In the Court of
Appeal
Hong Kong*

~~Signed Patrick L. W. Woo Esq.
Counsel for the Appellant~~

No.10
Amended
Notice of
Appeal
8/10/80
(Continued)

~~Signed Brook Bernacchi, Q.C.
Counsel for the Appellant.~~

~~Signed H. H. Lau & Co.,
Solicitors for the Appellant.~~

Signed Patrick L.W. Esq.
Counsel for the Appellant.

Signed Brook Bernacchi Q.C.
Counsel for the Appellant.

H. H. LAU & CO.,
Solicitors for the Appellant.

*In the Court of
Appeal
Hong Kong*

IN THE COURT OF APPEAL

1979, No.34
(Civil)

No.11
Judgment
the Court of
Appeal
8/10/80

BETWEEN

TSE Kwong-lam

Appellant
(Plaintiff by
Counterclaim)

and

WONG Chit-sen

1st Respondent

10

CHING Wai-shork

2nd Respondent

Chit Sen Co. Ltd.

3rd Respondent

Coram: Huggins and McMullin, JJ.A. and Garcia, J.

J U D G M E N T

Huggins, J.A:

20 This is an application to amend a notice of
appeal. In respect of some of the grounds it is
desired to amend, the amendments are not
opposed, but as to two of them (Grounds 4 and 5)
they are opposed. The original Ground 4
attacked the refusal of leave to amend the
Counterclaim. It was not very happily worded,
but in effect it complained that the judge had
refused leave to amend the Counterclaim on the
ground that the Claimant had no evidence by
which he could possibly prove the fraud which he
sought to allege by the amendment. Leave to
make the amendment had previously been refused,
but the judge had then indicated that, if the
evidence adduced at the trial could arguably
30 establish fraud, application for leave to amend
might be renewed. Mr. Bernacchi appears to say
that by the proposed paragraphs (a), (b) and (c)
he is not seeking to introduce any new matter
but merely to give particulars of what is

10 already pleaded. The new ground, as I understand it, suggests that the judge held that the agreed facts were not material to a consideration of whether there was evidence of fraud. In my judgment that is a wrong premises: the learned judge never so held. The rest of paragraph (a) of the suggested amended ground, in my view, does not add anything to the existing ground. Paragraph (b) is an
10 elaboration of the original Ground 4 and it seeks to introduce by reference the amendment which was refused. In my view, apart from the wrong premises in paragraph (a), paragraphs (a), (b) and (c) really add nothing to the original ground and they should not be allowed.

20 Paragraph (d) raises an entirely different point. Mr. Bernacchi says that the judge found equitable fraud but that in so finding he held to be immaterial the similar transactions of which evidence was given in the Agreed Facts. It is now sought to uphold the finding of equitable fraud on this further ground, that those transactions themselves disclosed fraud. In my view it is not fairly arguable that the Agreed Facts are in any way indicative of fraud. Therefore, I would refuse leave to amend paragraph 4.

30 The new paragraph 5 raises a point not pleaded, not opened and not investigated. I think it is too late to raise this issue and I would refuse leave to amend paragraph 5.

McMullin, J.A.:

I agree and I do not wish to add anything further..

Garcia, J.

I also agree.

8th October 1980

*In the Court of
Appeal
Hong Kong*

IN THE COURT OF APPEAL

1979 No.34
(Civil)

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980

BETWEEN

TSE KWONG LAM

Appellant

and

WONG CHIT-SEN

1st Respondent

CHING WAI-SHORK (SHOOK)

2nd Respondent

CHIT SEN COMPANY LIMITED

3rd Respondent

10 Coram : Huggins & McMullin, JJ.A. and Garcia, J.

J U D G M E N T

Huggins, J.A.:

McMullin, J.A. is unable to be present today but he has authorised me to say that he agrees with the judgment which I am about to deliver.

20 The 1st Respondent was a mortgagee with a right of sale. He chose to exercise that right on 24th June 1966. There was an auction and the 1st Respondent set a reserve price of \$1,200,000.00. There was only one bid and the property was knocked down at the reserve price. The purchaser was a company (the 3rd Respondent) in which the mortgagee, his wife (the 2nd Respondent) and one of their sons were directors and the principal shareholders. Three other sons had a shareholding. The mortgagor sought to set aside the sale or alternatively to obtain damages for a wrongful sale. The trial judge
30 found that the sale was not made bona fide and awarded damages, he refusing to order rescission on the ground that there had been unreasonable delay in the proceedings to set

aside the sale. He assessed the damages by deducting the price obtained from what he found to be the true market value of the property.

*In the Court of
Appeal
Hong Kong*

Relationship between the mortgagee and the purchaser.

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10 Initially the attack upon the sale was founded upon the relationship between the mortgagee and the purchaser. It is not in dispute that the relationship was such as to put a burden on the purchaser to show that the sale was bona fide. The judge having held that it was not bona fide, the mortgagee seeks to persuade us that the judge's reasons for so finding are insupportable. However, it had been pleaded by the mortgagor that the sale to the company was void on the ground that the 3rd Respondent purchased as his agent, so that the purported sale was a sale by the 1st Respondent to himself. At the trial agreed issues were put before the judge and that allegation finds no place therein : the only issue raised was whether the sale was voidable on the ground of bad faith. The judge dealt with the matter wholly on the basis of a claim in equity for rescission. Before us the mortgagor has sought to revive the original allegation and has argued that upon the evidence the judge ought to have held that the sale was not merely voidable but void. That, of course, is a matter different from the allegation of fraud which the mortgagor sought unsuccessfully to raise by applying to amend his notice of appeal. The point has been argued and I will deal with it.

40 Put shortly it is this : Mr. Bernacchi contends that the 3rd Respondent was the alter ego of the 1st Respondent. He submits that the 1st Respondent had complete control of the company - although he was a minority shareholder and one of three directors - by reason of the facts that he was Chinese and the other shareholders and directors were his wife and children and that the company was substantially financed by the 1st Respondent. In effect Mr. Bernacchi invites us to take judicial notice of the alleged fact that a Chinese paterfamilias is a despot whose word is law to his immediate family, for there is no evidence whatever that

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10

20

30

40

this particular family was subservient to the will of the 1st Respondent. Reliance was placed upon Gilford Motor Co. Ltd. v. Horne 1933 Ch. 935, Jones v. Lipman 1962 1 W.L.R. 832 and Rex v. Grubb 1915 2 K.B. 683, but I think they are clearly distinguishable : they concerned fraudulent attempts by the defendants to escape a personal liability by the legal device of interposing a company over which they had absolute control and which they acquired or created specifically for the purpose of the frauds. The present case is very different. The 3rd Respondent was created some time before the sale and its accounts show that it carried on the business for which it was created. In the end one has to look at the practicalities of the matter, while recognising that a person may have control of a company although he is only a nominal shareholder and that the legal insignia may be consistent with his having no control. At the same time one must remember that what has to be shown is not merely control but such control and other factors as demonstrate that the company is a sham - a mere mask to cover acts which, if done by the person himself, would have been improper. I do not accept that the company here was a mere sham and that, whatever the apparent legal position, the 1st Respondent was using it to mask a purchase by himself. Indeed, the judge does not appear to have been so satisfied. In the light of the agreed issues he may well have thought that it was not necessary for him to decide the point. The nearest he came to it was to say "this is a typical picture of a family company completely under the control of a rich father", but his decision was not that the sale was void, only that it was voidable and should be avoided on the ground that good faith had not been established.

Much play has been made upon the description of the company by the 2nd Respondent as her husband's company. I attach no weight at all to the use of a figure of speech no doubt commonly used to describe a company with which a person is associated - possibly as a humble employee - and which may not be used to indicate a proprietary or controlling interest.

The allegations of bad faith.

The evidence that the 1st Respondent wanted the property at \$1.2 million for his company in no way indicates that the 1st Respondent was acting otherwise than bona fide in the exercise of his power of sale : provided that his actions were proper his motives were immaterial : Belton v. Bass, Ratcliffe & Gretton Ltd. 1922 2 Ch. 499.

*In the Court of
Appeal
Hong Kong*

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10 The matters relied upon by the judge as establishing bad faith were :

1. that the reserve price was fixed too low:
2. that the reserve price was disclosed to the company before it was disclosed publicly :
3. that the price obtained was allegedly not a proper price and that, in particular, more could have been obtained by a sale flat by flat :
- 20 4. that the 1st Respondent had alleged more to be outstanding on the mortgage than was in fact outstanding.

The fixing of the reserve price.

30 For the purpose of this part of the argument I will initially assume that the reserve price was greatly below the price which ought to have been obtained, which I will call the day's market price. It was contended that by fixing the reserve price at such a low figure the mortgagee prevented the bids from reaching the level which they would have reached had the reserve price been fixed nearer to the day's market price. I confess that I have not been able to see how such a result would have been brought about. It is conceded that, although a reserve price is commonly fixed, there is no obligation upon the mortgagee to fix a reserve price at all. As I understand it, the sole object of fixing a reserve price at an auction
40 is to protect the vendor against the possibility that the property may be sold at a price lower than he, in his own interests, is prepared to accept. When he is selling his own property he

*In the Court of
Appeal
Hong Kong*

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10

20

30

40

may, for example, prefer to keep it, or to give it away to a relative, rather than to sell it to a stranger at a very low price. When he is selling under a power of sale in a mortgage he may prefer to retain his security rather than to let it go at a low price and risk not being able to recover the balance of the mortgage debt from the mortgagor. The fallacy in the judge's assertion that, where the reserve price is fixed below the mortgage debt, more care ought to be taken over it, as the mortgagor has no say in the fixing, is that the reserve price has nothing whatever to do with the mortgagor, who is concerned only with the price received. The mere fact that a low reserve price is fixed cannot inhibit a would-be purchaser from bidding such higher price as he may think reasonable and be prepared to pay. Indeed, the only effect upon the auction of fixing an unduly low reserve price may be to prolong the sale by inducing the first bidder to start lower than he might otherwise have done, and that, of course, will only be in a case where the reserve price is disclosed. There is no reason to expect that the final bid will be any different from that which it would otherwise have been, save in the unlikely event that no one else will take the property at a price which is above the reserve price but which, *ex hypothesi*, is still well below the true value. Accordingly I cannot accept the judge's view that the reserve price must "bear some relationship with" (by which I understand him to mean "to approximate to") "the property's true value": what is material is that the successful bid must approximate to the day's market price. Mr. Bernacchi submits that the judge's view is supported by Barns v. Queensland National Bank Ltd. (1906) 3 C.L.R. 925, but it is not. The sale there took place at a time when "the divulging of the reserve price was an unusual circumstance" which was not explained by the evidence, and the court was impressed by what Malins, V.C. indicated in Delves v. Delves (1875) 20 Eq. 82 to be very plainly an impropriety. No criticism was made in Barns's Case of the figure at which the reserve price was fixed. In our case it has never been suggested that the mere divulging of the reserve price was improper or even unusual. Here we are

10. assuming that the price obtained was not a proper price and I shall have to consider later whether that assumption is justified. If no reserve price had been fixed here, even a lower bid than \$1.2 million might have been the top bid. If there were a duty to fix a reserve price in the interests of the mortgagor it might be said that the fixing of an absurdly low price was some indication that the mortgagee was not seriously endeavouring to obtain a proper price (and, in turn, the court might the more readily find that the price in fact obtained was not a proper one), but there is no such duty. Where the sale is by auction the only duty is to take reasonable steps to advertise the sale in a manner likely to attract prospective purchasers and to do nothing to damp the bidding.

The disclosure of the reserve price.

20 Under the old practice of the Court of Chancery, upon a sale by the court the court fixed a reserve price and this was not disclosed until after the hammer had fallen. Premature disclosure was a ground for avoiding a sale, because such disclosure might have the effect of damping the bidding. It is notorious that in our day a reserve price is commonly disclosed in the form of an "upset price". Here the existence of a reserve price was advertised in the printed Conditions of Sale and the auctioneer
30 announced at the beginning of the auction that the reserve price was \$1.2 million. The fact that an announcement was made is not the basis of any complaint. What is complained of is that the company had knowledge of the amount of the reserve price four days before any other prospective bidder. The judge regarded this as unfair and declared that "in the commercial world advance knowledge indeed". While it is true that advance knowledge may be extremely
40 valuable, Mr. Bernacchi has been unable to explain to us what advantage of substance the company could have gained from advance knowledge of the reserve price. He suggested that if the mortgagor had had similar advance knowledge he might have arranged finance to enable him to bid more than \$1.2 million. He could have done that

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

without advance knowledge. Indeed, there is evidence that at one stage he had previously arranged finance to the extent of \$1.5 million. If he were able to obtain backing to that amount he could have bid more than \$1.2 million and, as we now know, if he had done so he would have been the purchaser, for the 2nd Respondent was not authorised to go beyond that figure on behalf of the company.

10 This whole argument seems to me to be an extension of the argument that the mortgagee was selling to himself. No one could fix the reserve price except the 1st Respondent and, as soon as the 1st Respondent decided what it was to be, the company ipso facto had knowledge, because the 1st Respondent was a director of the company. In truth there was no "disclosure" at all to the company. It is possible that
20 different considerations might have applied if the reserve price had not been disclosed by the auctioneer to the others present, but we need not spend time on a case which does not arise here.

The proper price

Some of the dicta in the decided cases can be misleading as to the duty of a mortgagee in exercising his power of sale. References to his having to obtain the "best" price or the
30 "proper" price must be read in their context and I respectfully adopt what was said by Tysoe, J.A. in J. & W. Investments Ltd. v. Black (1963) 41 W.W.R. 577 at p.602 :

40 "As to 'proper price' - a sale by a mortgagee under his power of sale is generally, as the sale here was, in the nature of a forced sale. In such a case, 'proper price' must be measured by what can be obtained at such a sale. It is hardly necessary to say that this measure is by no means the same as that prevailing in the case of such a sale as a merchant might be expected to make in the ordinary course of his business or a sale by an owner of property who does not have to sell but can afford to await better prices. Where

property has to be sold and quickly (as where there is a forced sale) value, and so price, is fixed by demand.

*In the Court of
Appeal
Hong Kong*

Whether 'reasonable steps and precautions' have been taken will depend upon all the circumstances of the particular case. The conduct of the mortgagee must be looked at bearing in mind that he has his own interests to consider as well as those of the mortgagor and that, as Duff, J. intimated in B.C. Land & Inv't. Agency v. Ishitaka, supra, he is not under a duty to the mortgagor to take (regardless of his own interests as mortgagee) all the measures a prudent man might be expected to take in selling his own property. I should perhaps add that the nature of the steps and precautions may be quite different where the realization is by means of a public auction sale and where it is by means of a private sale."

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

On the other hand I cannot accept the suggestion of Griffith, C.J. in Pendlebury v. Colonial Mutual Life Assurance Society, Ltd. (1912) 13 C.L.R. 676 at p.683 that "if a mortgagee sells by private contract he is bound to take reasonable means to ascertain the value before selling, and the same rule applies ... to a sale by auction". We have been shown no other authority for its proposition and I believe the only duty is to take the "reasonable steps and precautions" mentioned by Tysoe, J.A. That can be done without quantifying the value.

It is contended on behalf of the mortgagor that the true market price of the property on the day in question was \$2,150,000.00, in spite of the fact that no one bid more than \$1,200,000.00 at the auction. There is a danger here of a circular argument, for in the first place it is said that what is alleged to be a very low price is evidence of bad faith (and, indeed, of fraud) and then it is said that because there was bad faith that very low price cannot be evidence of what was the true market price. A mortgagee is not obliged to sell by auction, but he is often well advised to do so

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10

20

30

40

for the very reason that, if the sale is properly conducted, it is difficult for the sale to be impugned on the ground that a better price could, and should, have been obtained. In the present case the judge found that the decision to sell by auction with a reserve price and the subsequent advertisement of the sale were unimpeachable. Unless, therefore, the claimant can support one of his complaints that the price was artificially depressed, it seems to me that the mortgagee has taken all reasonable precautions to obtain a proper price and that the price obtained at the auction is prima facie a proper price. The judge relied upon Hodson v. Deans 1903 2 Ch. 647 as authority to the contrary, but, with respect, I do not think it does support the contrary view. There, although he did say that the property was sold at a slight value, Joyce, J. found that the sale was not bona fide. It was a case where an ample security was sold by a friendly society to one of the members of the society's committee, a member who was obviously known to be such by those present at the auction and who had prior knowledge of the reserve price fixed by the society. The only other bidder was the mortgagor's agent, who did not know the reserve price. It is therefore not surprising that the judge was led to think that the mortgagor had not been fairly and honestly dealt with. For reasons which I shall give I am satisfied that the judge's findings of bad faith in our case cannot be supported.

The inevitable result of a conclusion that the price obtained at the auction was prima facie a proper price is that any opinion evidence which suggests an appreciably higher value for the property must be viewed with considerable circumspection, even if based on apparently sound principles. Before looking at the opinion evidence in the present case I must deal with some other complaints about the auction.

Sale flat by flat.

The subject matter of the mortgage was originally an entire building. The mortgagor

was permitted to sell off a number of the flats and at the time of the sale the security consisted of thirty-six residential flats and two floors of shops and offices. These were all offered as one lot. The mortgagor contends that, if each unit had been offered separately, a higher price could have been obtained.

*In the Court of
Appeal
Hong Kong*

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10 . As it seems to me a mortgagee exercising his power of sale is prima facie entitled to sell his security in the form in which it is given to him. Only if it is manifest that a better price could be obtained by selling it piecemeal is he obliged to depart from this normal procedure. In particular, where there is a risk that upon a sale piecemeal part of the security may not be sold at all, this is an important factor to be taken into account.

20 The judge appears to have been of opinion that a sale flat by flat would have produced a higher price and that the 1st Respondent should "at least have taken professional advice to see in the circumstances then prevailing whether a better price was obtainable by auctioning of unit by unit as against what was in fact the sale of an odd lot of a building wholesale". Rather was it for the mortgagor to show that a better price would have been so obtained and that it would manifestly have been so obtained.

30 As it was, the matter was first raised by the judge. What was the evidence? Mr. Raymond said that in general a sale flat by flat "would probably get a larger sum total ..., but it might take a long time". Mr. Bernacchi seemed to take that to mean that the auction would take longer, but that is not my reading. In the first instance I think the witness was saying that if one were prepared to sell by private

40 treaty and to delay sales until beneficial offers were received, a larger sum total would probably be obtained. In that connection it must be remembered that a mortgagee is entitled to choose a date for the sale which serves his own interests and is not obliged to postpone sale where that would be in the interests of the mortgagor : Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. 1971 Ch.949. It was then suggested to Mr. Raymond that to put up the flats one by one would "stimulate more bidders", and it is

10 by no means clear that he was directing his mind to a sale by auction when he replied "Probably, yes". Mr. Liu said that in general "A sale of shop by shop, storey by storey, unit by unit (would), at the end of the day, fetch a better price than an odd lot wholesale job". Mr. Watson, on the other hand, was not prepared to agree with that and thought there was a risk that some of the units would not be sold at all, with the result that the total sum actually received might not have reached \$1.2 million, and that the mortgagee would have been left with a part of his security. In view of the difficulty that the mortgagor had had previously in selling individual units, it is impossible to say that such a risk did not exist, nor do I think it was manifest that a better price would have been obtained by a sale flat by flat.

Bidding by the 2nd Respondent

20 It is contended that the fact that the 2nd Respondent made a bid at the auction on behalf of the 3rd Respondent damped the sale, so that the price obtained was lower than might otherwise have been obtained. There was certainly no evidence that her part in the auction did have a damping effect and clearly it could not have done so unless those present knew (1) that she was the wife of the 1st Respondent, (2) that the 1st Respondent was the mortgagee, 30 and (3) that the 2nd Respondent was connected with the purchaser. On behalf of the mortgagee it is submitted that there was no evidence from which it could be inferred that those present at the auction knew the 2nd Respondent was his wife or that he was the mortgagee who was advertised as authorising the sale of the property. Mr. Bernacchi contends that they must have known, because the 1st Respondent had been in the property business since the 1930s and because 40 the 1st and 2nd Respondents had gone into the auctioneer's room with a solicitor shortly before the auction began. The name of the mortgagee was not advertised and there was no evidence that any of those present at the auction saw, or could have seen, the 1st and 2nd Respondents go into the auctioneer's room; nor does it necessarily follow that anyone who did

see this would have deduced that the 2nd Respondent was related to the 1st Respondent or that the 1st Respondent was the mortgagee. The learned judge appears to have thought otherwise, for he said "the sight of a wife bidding at an auction sale ordered by the husband mortgagee might well deter others from entering". As a statement of fact that is unexceptionable, but in context it suggests a state of facts which was not shown to have been apparent in this case. Mr. Bernacchi contends that it was not for him to show knowledge but for the mortgagee to negative knowledge, since, by reason of the 1st Respondent's connection with the company, it was for the mortgagee to establish good faith: Farrar v. Farrars Ltd. (1889) 40 Ch. D. 395. I agree that it was for the mortgagee to establish good faith, but that does not mean that he had to negative possible additional suspicious circumstances which had not been pleaded. It was not pleaded that the knowledge of those present at the auction concerning the relationship between the 2nd Respondent and the other Respondents was indicative of bad faith.

Opinion evidence as to value.

The judge based his conclusion of a sale at a gross undervalue upon the evidence of Mr. Hsu and upon a letter sent to the mortgagor by the Wing On Life Assurance Co. Ltd. Being of opinion that the sale was not bona fide, he attached no weight to the price obtained at the auction.

Mr. Hsu was not a professionally qualified valuer but had considerable experience in this field. He made his valuation four years after the sale and admitted that there were very few records of sales in 1966. He based himself on such incomplete information as he had about sales of individual flats and upon the list of prices at which the mortgagor was originally offering units before the 1st Respondent exercised his power of sale. He was not told that some of the list prices had been considerably reduced nor was he aware of some of the sales which had in fact been made or of the difficulty which the mortgagor had experienced

*In the Court of
Appeal
Hong Kong*

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10.

in finding purchasers for the remaining units. He was not asked to advise what price the security should have fetched, but was specifically asked to value individual flats. In particular he was not told to have regard to the fact that his valuation was intended to indicate what price might have been recovered upon a forced sale. As a theoretical valuation his resulting figure of \$2.2 million was accepted as basically fair for what it was by Mr. Raymond, a professionally qualified valuer, but it was not sufficient to sustain an allegation of a sale at a gross undervalue.

20

30

The letter from Wing On Life Assurance Co. Ltd. was sent on 26th April 1966, just two months before the sale, and agreed in principle that Wing On would take a mortgage of the property for a sum of \$1.5 million. Mr. Bernacchi argues that, because there was evidence that Wing On would normally not advance more than 70 per cent of the value of a security, this was evidence that the property was worth over \$2 million. The witness who spoke to this letter wrote it on the directions of someone else and we do not know what basis any valuation was made. Moreover, the two months which passed after the letter was written were critical, because during that period that the real property market continued to fall. Again, I do not think this evidence was sufficient to sustain an allegation of a sale at a gross undervalue.

40

On the other side it is fairly stressed that the mortgagor himself at the time clearly thought the value of the property was substantially less than \$2 million. He admitted telling Mr. Liu "that if the property was to be auctioned (he) would be suffering a lot and there would be nothing for (him)". He wrote a letter to His Excellency the Governor in which he said that he had had difficulty in finding buyers for the flats and another letter to the 1st and 2nd Respondents, dated before the sale, in which he said "the flats are not saleable". In an affidavit he asserted that five months before the sale he had accepted an offer by the mortgagee "to pay \$150,000 ... to pay off all

debts incurred in construction of the building and other expenses thereof in consideration of extinguishing (the) right of redemption", but that the mortgagee had repudiated the agreement. We have not been shown how much was owed at that date for principal and interest on the mortgage nor how much the mortgagee would have to pay to other creditors, but Mr. Bernacchi suggested that, with the \$150,000.00 to be paid in cash for the equity of redemption, the mortgagor would be valuing the property at around \$1.8 million. Accepting that figure for the purpose of the argument and making allowance for the further drop in values during the ensuing five months, it does not appear to me that the mortgagor has made good his assertion that the price obtained at the end of June was at a gross undervalue. In so saying I appreciate that the opinion of the mortgagor as to the value may not carry any great weight in itself, but it is at least some indication that the price in fact obtained was not so low as to be indicative of bad faith on the part of the mortgagee vendor.

The excessive demand.

The strongest criticism that can fairly be brought against the 1st Respondent is that he demanded from the mortgagor a total sum larger than that which was outstanding under the mortgage. Had the correct sum been demanded the mortgagor would have been able to pay off the mortgage, because he had the offer of finance from the Wing On Life Insurance Co. Ltd., and no sale would have been necessary. However much the 1st Respondent may have been at fault the fact remains that the mortgagor never tendered the amount which was in truth due. Nothing short of such tender could deprive the 1st Respondent of his right to sell his security, and, if he sold, the excessive demand could not turn what was otherwise a valid sale into a sale voidable on the ground of bad faith. The mortgagor has only himself to blame if he failed to keep proper accounts in order that he might know how much was outstanding, and he can hardly impugn the sale on the ground that the 1st Respondent had not kept proper accounts. As the judge said, the 1st Respondent was under no duty

to the mortgagor to keep proper accounts.

Conclusion as to good faith.

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10 The judge having negatived good faith, this court will naturally be slow to come to a different conclusion, but the fact remains that each of the grounds upon which bad faith was alleged is seen, on analysis, to have no substance. It is to be noted that some of the particulars relied upon as indicating bad faith were never pleaded, a fact which cannot be altogether overlooked when one considers the significance of the evidence adduced. The mortgagee has not only refuted all the allegations of bad faith but has shown that the sale was properly advertised and properly conducted. It is not disputed that he was lawfully entitled to exercise the power of sale. In my view nothing more can reasonably be required of him. To say, as the judge did, that

20 "he intentionally sacrificed the interests of the claimant for his own gain" is certainly not a justifiable inference from the primary facts found. This was a very different case from Forsyth v. Blundell (1973) 129 C.L.R. 477, where the security was sold by private treaty at a price lower than that which a company had previously indicated that it was willing to pay at an auction. In our case it was the purchaser whose conduct was possibly open to question, but

30 I think that on a fair view of the evidence it has been shown that the company did not gain any unfair advantage. What more could it do to establish good faith? The answer must be "Nothing". It has been suggested that the company should have called witnesses to prove affirmatively that those present at the auction did not know the relationship between the 2nd Respondent and the 1st Respondent or know that the 2nd Respondent was bidding on behalf of a company in which the 1st Respondent had an

40 interest. There was evidence that one broker present did not know who the 2nd Respondent was and at the trial it was conceded by counsel for the mortgagor that no one would know the identity of the vendor.

Rescission or damages ?

Lest the matter should go further I will deal with the other matters raised on the mortgagor's appeal, and the first of these relates to the relief granted.

*In the Court of
Appeal
Hong Kong*

10 The judge refused rescission solely on the ground of the mortgagor's delay and the question which arises is whether delay after action brought is material. The prayer for rescission was contained in the counterclaim filed on 16th
20 December 1966, so that there could be no suggestion that the mortgagor waited an unconscionable time before making his claim. The delay occurred thereafter and as a result of it the mortgagee applied on 30th November 1978 to strike out the counterclaim, judgment on the claim having been given in November 1968. Cons, J. dismissed the application to strike out and the counterclaim came on for trial on 21st
November 1978, it having then been amended three times and the mortgagor having changed his solicitors no less than ten times.

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

30 Laches were not pleaded as an equitable defence to the claim for rescission, but the judge clearly thought that, as the mortgagor was himself seeking an equitable remedy, there was nevertheless power in the court to refuse that remedy if the conduct of the mortgagor had been such as to make it unjust that he should have it. He thought it would be unjust. Mr. Bernacchi submits that delay is immaterial unless it has the effect of lulling the opposite party into a false sense of security and that, once action has been brought, the opposite party cannot be lulled into a false sense of security so long as the proceedings subsist. From the fact that he was unable to find any case where an equitable remedy had been refused on the ground of delay after action brought he argued
40 that such delay must be irrelevant and he pointed out that the refusal of Cons, J. to strike out the counterclaim proves that the mortgagee had suffered no prejudice from the delay in prosecuting the action. The argument based on the absence of any case where delay in prosecuting a claim after it had been brought had been relied upon would not have been a strong one in any event, but Mr. Wilmers has

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

10

drawn our attention to In re Sharpe 1892 1 Ch. 154, where the judge clearly took such delay into consideration but, on the facts, considered that it was not so long as to bar the plaintiff from his remedy. For my part I do not see why delay after action brought should not be considered, although it may not be so weighty a factor as delay before any claim is made. Mr. Bernacchi submits that Du Sautoy v. Symes 1967 Ch. 1146, which had also been cited by Mr. Wilmers, was in his favour. I agree that it does not support the opposite argument. Cross, J. said at p.1168 :

20

It is said, however, that there was great delay in bringing the action to trial. Assuming that to be so, however, I do not think it is sufficient to justify me in refusing to grant (the Plaintiff) specific performance and to grant damages under Lord Cairns' Act. I can conceive of a case where, though an action is started promptly, nevertheless, by his conduct the plaintiff has lulled the defendant into a sense of false security that he is going to ask for damages only and not specific performance."

30

Mr. Bernacchi submits that, because in the present case the claim for damages was not lodged until "very late", the Respondents had no reason to think that the mortgagor was going to ask for damages only and not specific performance. In fact the claim to damages was lodged at the beginning of April 1970. I think the judge had a discretion to refuse specific performance and that there was ample ground upon which he could exercise it as he did.

Interest

40

The conclusion that the price obtained was a proper price necessarily destroys the basis for an award of damages and, consequently, of the order for payment of interest. The judge fixed the interest at 1.2 per cent a month from 1st July 1966 until judgment. That rate was the lower of the two rates of interest which the mortgagor had been required to pay on the sums

advanced under the mortgage.

*In the Court of
Appeal
Hong Kong*

10 There are two elements in an order for
interest, the period over which the interest is
to be paid and the rate. Mr. Wilmers submits
that, assuming a sum on which interest should be
paid, the judge was wrong both as to the period
and the rate. He does not attack the
commencement date, but says that where the
judgment creditor has been guilty of
unreasonable delay he should not receive
interest for the whole of the period during
which he has been kept out of his money, since
he has brought his loss of the use of the money
upon his own head. Mr. Bernacchi replies,
first, that interest is at the discretion of the
judge, and so it is, but it must be awarded in
accordance with the principle that it is
compensation for loss caused by the wrongful
deprivation of his money: interest based upon
20 any other principle is punitive and should not
be allowed to stand. In favour of the judge's
order it is said, secondly, that the mortgagee,
on his side, was awarded the other contractual
rate of interest of 1.4 per cent a month upon
his judgment in respect of the mortgage debt and
that, if the mortgagor were entitled to damages
exceeding the amount of the mortgage debt for
selling at an undervalue, then, although the
mortgage debt could not be set off against the
30 damages, it was fair that the mortgagee should
have to pay an equally high rate of interest.
Mr. Bernacchi points out that this view is
supported by the fact that a stay of execution
was placed upon the mortgagee's judgment. There
is a measure of rough justice in this
submission, but the delay, for which the
mortgagor alone is responsible, would bear
heavily upon the larger sum payable by the
mortgagee. I think the fairest course would
40 have been to order the payment of interest at
the rate of 1.2 per cent a month up to the date
at which the mortgagor would have obtained
judgment had he prosecuted his claim with
reasonable diligence - and 24th December 1970
would probably be fair, that being the last day
of the Michaelmas term four years after the
action commenced, in spite of the fact that the
claim to damages was not added until April 1970
- and thereafter at the average of the Hong Kong

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

*In the Court of
Appeal
Hong Kong*

No.12
Judgment of the
Court of Appeal
dated the 26th
November 1980
(continued)

prime lending rate plus 1 per cent over the whole period. If I had come to a different conclusion upon the rest of the appeal I would have allowed the mortgagee's appeal to the extent of altering the order for interest accordingly.

Costs.

10 The last matter argued related to the order for costs made in favour of the mortgagor. The learned judge took the view that many irrelevant issues had been raised and awarded only 50 per cent of the costs of the trial. Mr. Bernacchi submits that such an order was totally unjustified. It is not disputed that costs were in the discretion of the judge. He considered nothing which was not relevant and no one was better placed to decide to what extent, if any, the trial had been unnecessarily prolonged. I would not have been prepared to interfere with the order he made. Perhaps it is right that I should add that, if the mortgagor had succeeded in this court, I think we would have had to consider very seriously whether he should be given all the costs of the appeals.

20 As it is, I would allow the mortgagee's appeal and set aside the judgment against him with costs here and below. I would dismiss the mortgagor's cross-appeal with costs.

30 Garcia, J.:

I have had the advantage of reading in draft the judgment delivered by the learned President and I fully agree with what has been said.

I have nothing to add and would also allow the mortgagee's appeal and dismiss the cross-appeal of the mortgagor.

26th November 1980.

Civil Appeal No.34 of 1979
IN THE COURT OF APPEAL
(ON APPEAL FROM THE HIGH COURT OF JUSTICE
ACTION NO.2102 OF 1966)

*In the Court of
Appeal
Hong Kong*

No.13
Order of the
Court of
Appeal
15/1/81

BETWEEN

TSE KWONG LAM Appellant
(Plaintiff to Counterclaim)

and

10 WONG CHIT SEN 1st Respondent
(1st Defendant to Counterclaim)

and

CHING WAI SHORK (SHOOK) 2nd Respondent
(2nd Defendant to Counterclaim)

and

CHIT SEN CO., LTD. 3rd Respondent
(3rd Defendant to Counterclaim)

BEFORE THE HONOURABLE SIR ALAN HUGGINS,
VICE-PRESIDENT, THE HONOURABLE MR. JUSTICE
LEONARD AND THE HONOURABLE MR. JUSTICE CONS

20

O R D E R

UPON READING the notice of motion dated the 8th day of December 1980 on behalf of the Appellant that he may be granted leave to appeal herein from the judgment of the Court of Appeal given on the 26th day of November 1980.

AND UPON HEARING Counsel for the Appellant and Counsel for the 1st, 2nd and 3rd Respondents.

30 IT IS ORDERED that the Appellant do have leave to appeal to Her Majesty in Council

*In the Court of
Appeal
Hong Kong*

No.13
Order of the
Court of
Appeal
15/1/81

against the judgment of the Court of Appeal dated the 26th day of November 1980 both in so far as the Court of Appeal allowed the appeal of the 1st Respondent from the Original Judgment in High Court Action No.2102 of 1966 and dismissed the cross-appeal of the Appellant against all three Respondents on condition that:-

10 (i) the appellant do within 14 days from the date hereof provide a security in the sum of \$100,000.00 as security for the due prosecution of the appeal and the payment of all such costs as may become payable to the Respondents in the Appeal; and

(ii) the Record be prepared and dispatched to England within six (6) months from the date hereof.

AND IT IS ORDERED that the costs of and incidental to this application be costs in the Appeal to Her Majesty in Council.

20 AND IT IS ORDERED that the judgment of the Court of Appeal dated the 26th day of November 1980 as to costs be carried into effect, but that the payment of the costs be made to the Respondents' solicitors and that the costs paid be held by the Respondents' solicitors pending the determination of the Appeal to Her Majesty in Council.

Dated the 15th day of January 1981.

Acting Registrar.

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

TSE KWONG LAM *Appellant*

AND

WONG CHIT SEN *1st Respondent*

CHING WAI SHORK (or SHOOK) *2nd Respondent*

CHIT SEN COMPANY LIMITED *3rd Respondent*

RECORD OF PROCEEDINGS

VOLUME III

HASTINGS & CO.,
Solicitors for the Appellant
JOHNSON, STOKES & MASTER
Solicitors for the Respondents
