

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

CIVIL APPEAL NO. 184 OF 1980

(On Appeal from High Court Action No. 2401 of 1976)

BETWEEN

EDWARD WONG FINANCE CO. LIMITED

**Appellants
(Plaintiffs)**

and

JOHNSON STOKES & MASTER (a firm)

**Respondents
(5th Defendants and Third Party)**

RECORD OF PROCEEDINGS

VOLUME 2

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VOLUME 2

PART I

13th June, 1980.

10.35 a.m. Court resumes

All parties present. Appearances as before.

D.W. 2 – MA Pok-sum O.F.A.

XXN. BY MR. PRICE CONTINUES

Q. Mr. Ma, you told his Lordship yesterday how at the meeting on 27th January a guarantee document was signed by all three of you. Do you remember telling him that?

A. Yes.

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Q. You also told his Lordship that apart from the guarantee document no reference was made to instalment payments at that meeting in the presence of Miss Leung.

A. That's right.

Q. Now, I would like you to think carefully about this. In connection with the guarantee document, is it possible that there was no reference at all to instalment payments?

A. I do not know because I don't know English.

Q. Ah! You see, did Miss Leung give you some explanations about the guarantee document?

A. No.

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Q. Oh! Did you tell his Lordship that she explained to you that in default of the – if there was any default in respect of the instalment payments you would be liable? Is that something you say that she told you?

A. Yes, it was just as simple as that, but the contents of the document were not explained to us.

Q. Could you open volume 3 at page 60? Now, this is a copy of course – Mr. Interpreter, explain that. If you turn to page 63, that is your signature in the – you will see your signature, page 63 of volume 3.

A. Yes.

Q. That is your signature?

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A. That's right.

Q. Now, this is a document which does not refer to instalment payments at all?

A. I do not know . . .

Q. It is not a question yet. It refers to a total liability of 1.355 million, and the guarantee is of liability – of Bovill's liability to Edward Wong Finance Company up to that limit 1.355 million with interest, and there is no reference at all to any arrangement for payment of instalments. Now, in the explanation of this document that Miss Leung gave to you she will say that she did not refer to instalment payments. She will also tell his Lordship that as she understood from 21st January onwards the formal documents were not to refer to instalment payments. Now, do you think that you can be remembering not what Miss Leung told you but what Mr. Shum told you about the arrangement?

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A. Not true. It was Miss Leung who told me that.

Q. Now, you told his Lordship that other documents were signed – I am sorry, do you

remember that other documents were signed on that occasion?

A. Not clearly. I do not remember clearly.

Q. Yes. Let's look again at one of them. Would you turn to volume 4, page 76? Now, do you see your signature on that document?

A. Yes.

Q. And do you remember the explanation which I think the interpreter gave to you yesterday of this document?

A. Yes.

Q. Now, you told his Lordship this – you first of all told him that you didn't remember whether any explanation of this document was given to other people but none was given to you, and then when the Court resumed at a little after 12 o'clock mid-day you said that you remembered seeing the document on 27th January and you said this "It was not explained to me by Miss Leung". So you were repeating what you said before and according to your recollection it was not explained to anyone else? 10

A. No, that was the case. It was not explained to me.

Q. This is what I wanted to clarify. Are you saying that you remember the occasion so clearly that you are able to tell his Lordship that it was not explained to anyone else, or are you saying that you don't remember whether any explanation was given to anyone else? 20

A. No, I do not recollect whether or not at that time the document had been explained to all of us.

Q. You don't recollect whether it had been explained to all of us. Yes, it is important to have that: "I don't recollect whether it had been explained". Mr. Ma, part of this document – part of the typing on this document was struck out at that meeting?

A. I do not recollect.

Q. I was going to say and it was struck out by Miss Leung. Do you remember Mr. Shum objecting to a floating charge being referred to in the document at this meeting? 30

A. Absolutely no recollection. I did not hear of any floating charge at the meeting.

Q. Again, am I right in interpreting that as "I have no recollection of mention of floating charge"?

A. What I mean is I never heard of this term 'floating charge'. I do not understand this term 'floating charge'.

Q. Is it your practice, Mr. Ma, to sign documents that have not been – of which explanation has not been given to you?

A. No, but it was the case for me to my solicitor. She was my solicitor. She told me everything had been fixed up. 40

Q. You appreciate, Mr. Ma, that this document is quite a short document. Look at it.

A. Yes.

Q. And a short document is easily explained?

A. That's right.

Q. In this document there is reference to Bovill – that is the new company – asking Edward Wong Finance Company to make available to Bovill credit facilities to the extent of 1.355 million dollars. Now, that is not a question yet. Do you remember that when you signed this document the figure of 1.355 million dollars as the amount of loan from Edward Wong was mentioned?

- A. I do not remember.
- Q. Is this correct – according to your recollection that at the time when you signed this document no reference had been made in the presence of Miss Leung to the provision by Edward Wong Finance Company of any larger sum than 1.355 million?
- A. There was no mention.
- Q. Of any larger sum. Now, you did not put your signature on the debenture at this meeting. Do you remember Mr. Shum putting his signature to a document that you did not sign?
- A. I do not remember . . . 10
- Q. I see.
- A. . . . whether or not he signed other documents. He might have; he might not have.
- Q. I see. There was one very short document to which we referred extensively yesterday – the one in volume 2 at page 38, and I asked you about that.
- A. I remember that he signed this document. But as to other documents – whether he signed other documents or not – other than this – I do not remember.
- Q. So, it is no good asking you, Mr. Ma, about the debenture or its signature by Mr. Shum because you just don't remember, is that right?
- A. What I thought what I had been asked yesterday would not be asked to-day. Yesterday I said that that document was signed. 20
- Q. You have a look at 38 now. I am not quarrelling with you. So far as the debenture – the other – another document is concerned, you were not – it is no use my asking you about Mr. Shum putting his signature to the debenture, which is not that document but a much longer document.
- A. I don't know. You are entitled to your own opinion.
- COURT: Counsel is simply saying to you – does he understand the position to be that you cannot remember Mr. Shum signing any other document and in particular a very long document – a debenture. Is that the position?
- A. I remember that Mr. Shum signed two documents. One a short one and the other a longer one, and all the three of us subscribed our signatures to that document. But as for other things I do not remember clearly. 30
- Q. Yes. “Other things I don't remember clearly”. Can I take it – so, the longer one that you are referring to is the guarantee?
- A. Yes, the three of us signed.
- Q. I was only asking you – I don't want to waste time by asking you questions in relation to something that you say you don't remember. You told his Lordship on this day at this meeting you saw Edward Wong coming in?
- A. Yes.
- Q. And you told his Lordship that he stayed for a short time?
- A. Yes. 40
- Q. Did you know at the time why he had come?
- A. I did not know.
- Q. Did you know that in the course of that day a letter had been sent round to Edward Wong Finance Company?
- A. Who by?
- Q. You've got open in front of you a letter signed by Mr. Shum addressed to Edward Wong Company and directing them to provide 1.355 million dollars. Did you appreciate that that letter was sent round by hand that day to Edward Wong

- Finance Company?
- A. All I knew was that that letter was signed on that day, but as to when it was sent out I do not know.
- Q. Did you think that Mr. Wong's arrival had anything to do with the 1.355 million loan?
- A. I did not know why he came.
- Q. After his arrival was it apparent to you that Miss Leung was very surprised?
- A. I could not tell. I do not remember whether or not she was surprised.
- Q. Miss Leung was very surprised because, although the letter sent round to Edward Wong Finance Company referred to 1.355 million, Mr. Wong had in fact arrived with cashier orders payable to Danny Yiu for 1.665 million dollars. Now, were you aware that shortly after Mr. Edward Wong arrived Miss Leung spoke by telephone to Danny Yiu? 10
- A. I do not remember whether the telephone call was made either before or after Mr. Wong's arrival.
- Q. Yes. Now you told his Lordship that after that meeting you went to a Solicitor Yiu?
- A. That is true, but it was Miss Leung who told us to go there.
- Q. It is all right. You told his Lordship that in that meeting there was an occasion when Miss Leung picked up the telephone and spoke, as you understood it, to Solicitor Yiu. Do you remember telling him that? 20
- A. Yes.
- Q. And you said that she spoke to Solicitor Yiu in English?
- A. Right.
- Q. And accordingly you did not understand what was said?
- A. That's right.
- Q. Now, Miss Leung will tell his Lordship that her conversations with Solicitor Yiu were always in Cantonese.
- A. But on that occasion I heard her talking in English. 30
- Q. To somebody?
- A. To Solicitor Yiu.
- Q. And you told his Lordship that the occasion for that conversation was that Mr. Shum said that there were other charges including stamp duty that ought to be paid, is that right?
- A. Yes.
- Q. Can you cast your mind back to the beginning of the meeting on the 27th January. Did you hear Miss Leung ask Mr. Shum whether you had paid Danny Yiu and signed documents?
- A. No, I did not. 40
- Q. Did it appear to you at any time in that meeting that Miss Leung had thought that you had already been to Danny Yiu's office to pay him and sign documents?
- A. She did not say that she thought we had already paid.
- Q. You told his Lordship that before you left that meeting Mr. Shum said that "We ought to have paid you"; that is, you ought to have paid Miss Leung.

INTERPRETER: I beg your pardon.

- Q. Before leaving Miss Leung's office after the conversation – that is it has been related

about stamp duty and solicitor's fees – Mr. Ma told his Lordship yesterday that Mr. Shum said to Miss Leung “We ought to have paid you” – meaning Miss Leung – and he was referring to the stamp duty and solicitor's fees that had still to be paid to Danny Yiu, and you continued by saying that Miss Leung said that this payment should be made to Danny Yiu.

Mr. Ma, in respect of some aspects of this meeting it seems that your memory has faded.

- A. What respect?
- Q. Miss Leung will say that there was no such observation by Mr. Shum, that the money to be paid to Danny Yiu ought to have been paid to her. Will you think about that again. Is that something . . . 10
- A. But to my recollection there was such an incident.
- Q. Very well. Let's see what happened. You left that meeting and got to Mr. Yiu's office?
- A. Yes.
- Q. You told his Lordship that some documents were signed there?
- A. Yes.
- Q. And that they were signed without any explanation being given?
- A. That's right. 20
- Q. Did you or Mr. Shum or Mr. Tsiang ask Solicitor Yiu for an explanation? The answer is yes or no?
- A. No such request had been made.
- Q. Are you in the habit of signing documents which had not been explained to you?
- A. No.
- Q. And you told his Lordship that Solicitor Yiu simply presented papers for your signature, is that right?
- A. That's right, but he said something.
- Q. Who was present at Mr. Yiu's office?
- A. Apart from the three of us – Shum, Tsiang, myself – there was also present at Mr. Yiu's office Mr. CHAN Sun-ming. 30
- Q. What did Mr. Chan Sun-ming do at this meeting?
- A. He did nothing, but I don't know, I am not sure whether or not he was there waiting for us to sign the document or documents.
- Q. Was he asked, while you were there, to sign a document or documents?

INTERPRETER: I am sorry, sir?

- Q. Did he sign any document while you were there?
- A. No.
- Q. Was any document that you signed already signed by him?
- A. I don't know. 40
- Q. I see. Did you have any conversation with him at Danny Yiu's office?
- A. Yes.
- Q. What conversation did you have with him?
- A. Nothing much apart from the usual greetings.
- Q. I see. Did you know that the purchase was now being arranged – I haven't finished that – on the formal basis of a new agreement between Lucky Time Finance

Company and Bovill Investment?

A. At that time I really knew that we were purchasing the property from CHAN Sun-ming.

Q. Did you know that Mr. Chan Sun-ming had agreed to purchase the property with Kai Ming – the Kai Ming Company – from Lucky Time?

A. Yes, I knew.

Q. You knew that. And as between Kai Ming and Chan they had arranged between them for Kai Ming to take the upper floors and Chan the ground floor?

A. Right, I knew.

Q. But you did not know, you told his Lordship, that the arrangement was now being put on the formal basis that Lucky Time was selling the ground floor direct to your company Boville?

A. I was not aware of the direct sale. All I knew was that we were buying the property from Chan Sun-ming.

Q. Is it possible that one of the documents you signed was a new formal agreement for sale from Lucky Time to Boville.

A. I did not know because at that time no one told me anything about that. Therefore it was not possible.

Q. I am not sure that I follow. Mr. Ma, your answer must be that if – since you signed the document without explanation, as you told his Lordship, it is possible that you signed such a document.

A. It is possible that I might have signed that document without my knowing it.

Q. And you might have signed a formal document of assignment completing such sale from Lucky Time to Boville direct, is that right?

A. If no one had explained to me about that document then it was possible that I might have signed such a document. However, if someone had explained to me the nature of that document then it would not have been possible.

Q. Yes, and let me ask you this. You referred to a plan. Was there a plan attached to one document or more than one of the documents you signed?

A. To my recollection it seemed to me there was only one plan.

Q. Do you remember signing the document or do you remember signing the plan?

A. Both.

Q. I see. Is this the case that without explanation you were prepared at that meeting to sign whatever document Danny Yiu placed in front of you?

A. Yes. Because before I went to see Danny Yiu whilst we were inside in Miss Leung's office Miss Leung said that everything had been fixed up and that we were just to go there to sign.

Q. So it follows, doesn't it, that you were signing trusting Danny Yiu?

A. No, because upon my arrival there Solicitor Yiu also spoke something.

Q. You remember, Mr. Ma that – or do you remember that Mr. Chan had issued two receipts – one for \$100,000 and one for \$85,000 in respect of the money paid by Po Fung.

A. Yes, I do remember.

Q. Do you know whether those receipts were handed back to Mr. Chan?

A. You mean to Mr. Shum? Because we paid them; therefore receipt ought to have been given to us.

Q. Do you know whether those receipts were at any time handed back to Mr. Chan?

A. No, the receipts should have been with us.

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MR. PRICE: I don't know whether your Lordship regard that as the time to have the short break?

11.36 a.m. Court adjourns

11.55 a.m. Court resumes

All parties present. Appearances as before.

D.W. 2 – MA Pok-sum O.F.A.

XXN. BY MR. PRICE

- Q. Mr. Ma, so as to be quite clear what you are talking about that these receipts – what I am talking about as the original of the receipts in bundle 3 at pages 21 and 27, you say you told his Lordship you didn't understand my question because those receipts should have been retained by Po Fung. 10
- A. That's right.
- Q. Have you got them?
- A. Can't be traced.
- Q. Do you know where they are?
- A. Don't know.
- Q. When you say they can't be traced, what do you mean by that?
- A. Because the original was in Mr. Shum's possession.
- Q. The original was in Mr. Shum's possession? 20
- A. Therefore I don't know whether or not there are still in existence.
- Q. But do you know what happened to the originals?
- A. No, I don't know.
- Q. I see. In respect of this matter after it was known that Danny Yiu had run away, a firm of solicitors Philip K. H. Wong & Co. were instructed on your behalf?
- A. Yes.
- Q. Did you know that at the time?
- A. What do you mean by that?
- Q. Did you know at the time that Philip K. H. Wong & Co. were instructed that they were being instructed? 30
- A. After Danny Yiu had run away the three of us had a discussion concerning instructing Philip Wong.
- Q. So the answer is "Yes, I did know at the time"?
- A. That's right.
- Q. On 7th May, 1976 Philip Wong wrote in a letter that the originals of those two receipts had been returned to Mr. Chan and that that was done in January 1976? Is that in accordance with your understanding of what happened?
- A. I did not know whether or not the letter had been returned.
- Q. Whether or not the receipts?

INTERPRETER: Sorry, the receipts had been returned. 40

A. And I do not know that there was a letter from Philip K. H. Wong.

- Q. I see. On the footing that the receipts were returned to Mr. Chan, what reason was there for returning the receipts to Mr. Chan?
- A. I don't know.
- Q. Are you able to say that whether they had been returned to Mr. Chan before you went to Danny Yiu's office?

COURT: In view of his answers to your previous questions, is that . . .

MR. PRICE: I think it is clear that I can make sufficient comments upon it. Thank you, my Lord.

- Q. In Danny Yiu's office you told his Lordship you and Shum signed a cheque? 10
- A. Yes.
- Q. And you also told his Lordship that you knew that the amount included what was due in respect of stamp duty on the purchase, is that right?
- A. Right.
- Q. And when you were referring to this you said "I knew nothing about the rest of the money paid to Danny Yiu".
- A. That's right.
- Q. But you did know, didn't you, that the payment of \$45,820 to Danny Yiu was in respect of the stamp duty and Solicitor Yiu's charges in respect of the purchase of the property, didn't you? 20
- A. I knew the money included the stamp duty but I did not know at that time that that amount also included solicitor's fee to Solicitor Danny Yiu.
- Q. In your evidence yesterday about what happened before you left Miss Leung's office you told his Lordship that Mr. Shum had referred to paying stamp duty and solicitor's fees. I don't know whether your Lordship – whether anyone else has a note. In reply – Mr. Tang then asked you when Mr. Shum said stamp duty and solicitor's fees what solicitor's fees were referred to and you said "Our fees to Solicitor Yiu". My note reads "Re: In respect of the purchase of the property". Do you remember saying that?
- A. No. After we had made the payment of \$12,000 to Miss Leung Shum Ka-ching 30 asked Miss Leung something. Shum asked as to how much we were to pay as solicitor's fee to Miss Leung.
- Q. Who told you the amount of the cheque that was to be signed – that was signed in Danny Yiu's office?
- A. It was Danny Yiu.
- Q. Did you not ask for explanation of the amount?
- A. No.
- Q. So Danny Yiu could have said 55,000, could he, and he was paid?
- A. That's right, because before that Miss Leung already had a conversation with Danny Yiu. 40
- Q. When you went to Danny Yiu's office you were aware that documents had been signed in Miss Leung's office referring to 1.355 million, weren't you?
- A. Yes.
- Q. You knew that wasn't enough to complete the purchase?
- A. In my opinion that amount was sufficient because we had already made out cheques in the amount of \$370,000 in favour of the Edward Wong Finance Company.

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Ma Pok-
sum cross-
examination

Q. And how was that money going to get to Danny Yiu?
A. The amount of 1.355 or the . . .

- Q. No, the extra.
- A. I don't know. I don't know because we had already paid Edward Wong Finance Company.
- Q. At any rate, what you were paying by this cheque did not include any purchase money as you understood, did it? What you are paying to Danny YIU – the 45,000.
- A. This amount had nothing to do with the purchase money. It was for stamp duty.
- Q. Stamp duty and solicitor's charge.
- A. But there was no mention of solicitor's charges at that time.
- Q. Then you were asked by Mr. TANG whether an account was presented to you by Solicitor YIU in respect of the \$45,820 and you told his Lordship that if there was that you did not remember and that if there was an account your company's employed accountant would have kept it. 10
- A. That's true.
- Q. Have you or Mr. SHUM or Mr. TSIANG caused any search to be made or inquiries to be made for that account?
- A. I myself did not.
- Q. You told his Lordship that Solicitor YIU told you on this occasion that after he had completed everything for you he would send the documents to Miss LEUNG.
- A. Yes, that's why I signed the documents. 20
- Q. I see. He did say that to you before you signed the documents.
- A. That's true.
- Q. I see. Before, not after. Would this be within your knowledge, Mr. MA, that if somebody lends money on the security of property, the title deeds of the property are normally given to that person or that lender or his solicitors?
- A. Yes, I know.
- Q. So a man who lends money on the security of property keeps the title deeds until he has been paid off.
- A. That's right. That's right – by instalments.
- Q. And is that something which you understood before you saw Solicitor YIU? 30
- A. Right.
- Q. Is that something of which you had previous experience?
- A. No, because I never had any purchase of property.
- Q. It was part of your general knowledge, was it?
- A. I heard people say.
- Q. So that you appreciate that when Danny YIU had done his work, the documents would have to go to Edward Wong or their solicitors.
- A. But Miss LEUNG said that those documents would be sent to her.
- Q. In February, 1976 you heard that Danny YIU had or might have run away. 40
- A. Right.
- Q. From whom did you first hear that?
- A. Mr. SHUM told me about that.
- Q. And did Mr. SHUM tell you that – you may not be able to answer this question. When Mr. SHUM told you that, did you understand that he had already told the same thing to Miss LEUNG?
- A. It was possible, but he did not use the word "running away" or "run away". He said that Mr. Yiu could not be found; his whereabouts were not known.
- Q. I see. But now when he told you that, was he already worried about – was he already worried about it?

- A. Yes.
- Q. When he told you that, were you worried about it?
- A. I was all the more worried. I was more worried than Mr. SHUM was.
- Q. Can you explain why you were worried?
- A. As I understood it, Danny YIU was to complete the title deed procedure for us and after completion those title deeds were to be sent to Miss LEUNG. If Danny YIU had absconded, if we could not get the title deed, it would mean the end of our factory or factories.
- Q. Can we examine that a little? You told his Lordship – I can't now remember whether it was you or Mr. SHUM who told his Lordship, but in December – in about December, 1975 Mr. CHAN had come along without previous arrangement and had offered you the opportunity of buying the ground floor. 10
- A. Mr. SHUM might have mentioned it, but that was something within my knowledge.
- Q. It was within your knowledge, yes. So that if Mr. CHAN had not come along in December with the opportunity, you would have still been tenants of the ground floor, wouldn't you?
- A. That's right.
- Q. Yes. If you had still been tenants, would your factory be in peril?
- MR. INTERPRETER: Be in? 20
- Q. Would your factory be at risk? If you had still been tenants, why would your factory be at risk?
- A. It's a well-known fact in Hong Kong that factory owner – if a factory owner does not have his own factory premises he can hardly exist at all.
- Q. He can hardly exist at all, but you have existed for ten years or more on these premises.
- A. But if there was a rent increase, then the factory would close down at any moment.
- Q. Now, in February you knew that money had been received by Danny YIU for the purchase of the property, didn't you? 30
- A. Yes.
- Q. And Danny YIU had told you that he would complete the title deeds procedure.
- A. Yes.
- Q. And when you heard that Danny YIU's whereabouts were unknown, did you fear that Danny YIU had dishonestly gone off?
- A. Yes, I had such a fear.
- Q. Did you fear that he had taken the money with him?
- A. No.
- Q. You did not fear that?
- A. What I was in fear of was that the title deed procedures – formalities had not yet 40
been completed.
- Q. And you were, therefore, afraid that instead of being the owners of the property subject to a mortgage you were still only tenants, is that what you are telling his Lordship?
- A. That's right. If I were the tenant, that means I could not carry on with the factory – the operation of the factory.
- Q. So this is right, Mr. MA, isn't it, that you had that fear without any lawyer

- explaining to you whether you had cause to fear or not?
- A. The most important thing to me was the property. Without the property I could have done nothing.
- Q. And the cause of your fear was simply that you heard that Danny YIU could not be traced.
- A. Right.
- Q. Now, is this right then, Mr. MA, that you were aware – that you were dependent on Danny YIU properly performing what he had to do after the 27th of January? 10
- A. That's right.
- Q. Yes. Were you shocked at the possibility of Danny YIU being dishonest?
- A. I was shocked because I have never heard of solicitors being so dishonest. I never heard of that.
- Q. But the shock was accompanied by the realisation that you might be damaged by his dishonesty.
- A. That's right.
- Q. Well, now, let's then go back to the 27th of January and ask in respect of that a hypothetical question. Before I ask that hypothetical question, I must ask you one further question. Was your shock shared by Mr. SHUM? 20
- A. Yes.
- Q. And so far as you could judge, is this right? He too realised that you might be damaged by Danny YIU's dishonesty?
- A. Right.
- Q. Now, we'll go back to ask you a hypothetical question as of the 27th of January. Suppose that in Danny YIU's office Danny YIU had said to you, not simply that "When I have completed everything for you I will send the documents to Miss LEUNG," but he had also gone on to say this, "You realise, of course, that you are trusting me to complete this title deeds procedure," you would have said, wouldn't you, "But that's obvious, Solicitor YIU." 30
- A. That's a supposition.
- Q. It's a supposition, but a reasonable supposition.
- A. I would have said that verbally.

MR. PRICE: My Lord, I have no further questions for Mr. MA.

MR. FUNG: May it please you, my Lord. May I seek your Lordship's leave to ask a few questions of this witness?

XXN BY MR. FUNG

- Q. Mr. MA, on the 27th of January, 1976 you realised that Edward Wong Finance Company was lending to Bovill a sum of \$1,355,000.
- A. Yes.
- Q. And you realised that you, Mr. SHUM and Mr. TSIANG were providing a personal 40
guarantee in respect of that loan.
- A. I did not realise that at that time.
- Q. When did you first realise?
- A. It was after the matter had gone sour, after I had been sued that I came to know that the three of us were standing guarantee for the loan of 1.355 million dollars.

- Q. Do you know what interest Bovill had to pay Edward Wong Finance Company?
A. 1 per cent per month.
Q. Did you know that in January, 1976?
A. Yes.
Q. When you learned about the guarantee which you had provided personally in respect of this loan, did you know that you also had to pay interest?
A. I understood that we signed the guarantee that the property mortgaged a security and that we had to pay interest at the rate of 1 per cent per month.
Q. So your understanding is that the rate of interest applicable to the mortgage is the same as that applicable to your personal guarantee. 10
A. That's right.
Q. Would you please have a look at Volume 3, page 60? You remember that you were referred to this document by Mr. Price this morning.
A. That's right.
Q. And you have told us that your signature appears on page 63 of that document.
A. Right.
Q. Now, going back to page 60, the third paragraph from the top – you see this provision: "Our liability under this guarantee shall not exceed in the aggregate 1.355 million dollars with interest thereon at 2.1 per cent from the date of demand by you for payment." 20
A. I never knew that. All I knew was that the rate was 1 per cent.
Q. That's your understanding.
A. Had I been told that the interest rate was 2.1 per cent, then I would not have agreed that the loan be made from Edward Wong Finance Company, because Edward WONG himself had said that the terms would be similar to those in the banks.
Q. 1 per cent per month.
A. That's right.

REXN BY MR. TANG

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- Q. Mr. MA, I have to direct your attention now to the hypothetical question which my learned friend put to you which was the last question which my learned friend, Mr. Price, put. You said, on his supposition, you would have said that verbally. You see, on the supposition that YIU should have said to you, "You realise, of course, that you are trusting me to complete this title deed procedure," your answer to Mr. Price was, "On that supposition I would have said that verbally." What do you mean by you would have said that verbally?
A. What I meant to say was that as a matter of courtesy – etiquette I would have agreed.

MR. TANG: As a matter of good manners or politeness.

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MR. INTERPRETER: Politeness.

- Q. Out of politeness you would have said that. Now, I would put to you another hypothetical question. If Mr. YIU had said to you on that occasion, "You realise, of course, that you are trusting me to complete this title deed procedure, but if

I were dishonest and if I should run off with the money, you would have no title to the property. It's also possible that the money that you borrowed together with the money that you paid would have been lost, but as an alternative procedure to the one that I was going to adopt you could insist on not paying – that no money should be paid over until the complete title deeds are ready,” now would you have said that in answer? And if he were to further say to you, “As a solicitor it would be wrong for me not to agree to adopt the procedure of money against documents – payment against documents. . .”

MR. INTERPRETER: It would be wrong for me. . .

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Q. “It would be wrong for me not to agree to adopt the procedure of payment against document,” what procedure would you have adopted?

A. I would have adopted the document against payment procedure.

Q. At the time when you – at any time up to and including the 27th of January, did anyone say to you that signing documents at Miss LEUNG's office and then going to Danny YIU's office to sign further documents might have led to a loss of the money borrowed by you and the loss of money which you had to pay in order to make up the deficiency in the loan?

A. No.

Q. Now, my learned friend asked you when you were worried in February, 1976 had you already obtained any legal advice. I don't think you had given an answer to that question.

20

A. No.

Q. You were asked whether it was your habit to sign documents without having those documents explained to you.

A. I said it was not.

Q. But you signed documents in Danny YIU's office without explanation to you.

A. That is true, because beforehand Solicitor LEUNG said that everything had been fixed up before she told us to go over.

Q. You were also asked whether or not when you were signing documents you were trusting YIU. Your answer was, “No, because upon my arrival YIU also spoke something.”

30

A. Right.

Q. What was it that Mr. YIU asked you about?

A. He said that he had already had a telephone conversation with Solicitor LEUNG; “therefore, regarding these documents you please just sign them.”

Q. Now, when you were asked why you were worried in February, 1976 and you said as you understood it Danny YIU was to complete the title deed procedure for us – now, what did you mean by completing the title deed procedure for you?

A. What I meant was that when I arrived at Danny YIU's office Danny YIU said that he would send the documents to Solicitor LEUNG after they had been completed by him.

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

COURT: Yes, thank you, Mr. MA.

1.00 p.m. Court adjourns

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28th July, 1980.

11:20 a.m. Court resumes.

Appearances as before.

MR. PRICE: May it please you, my Lord. I was going to save myself a little effort, as I arrived at my hotel at 9:15 this morning, by asking Mr. Richard Mills-Owens to examine two subsidiary witnesses first but we have waited long enough, that's obviously a traffic jam, and so I am not going to address your Lordship by way of opening my case. I am simply going to call my witnesses and I call my first witness, Miss LEUNG Wai-ling.

10

COURT: Yes.

D.W. 3 – LEUNG Wai-ling Sworn in English

XN BY MR. PRICE:

Q. Miss Leung, your full name?

A. LEUNG Wai-ling.

Q. And your address?

A. Flat 10B, Chi Fu Fa Yuen, Pokfulam.

Q. I think you must speak up. The judge wants to hear you, all Counsel will want to hear you so you must do your best to throw your voice about the court, so shall we have your address again?

20

A. Flat 10B, No. 8, Chi Fu Fa Yuen, Pokfulam, Hong Kong.

Q. And are you a solicitor?

A. Yes.

Q. When and where did you qualify as a solicitor?

A. In June 1970 in London.

Q. In June 1970 in London, yes, and in London did you have after qualifying practising experience?

A. Yes.

Q. With what firms?

A. With Howard & Co. and then eventually Sacker & Partners.

30

Q. And you were with Mr. Syson of Kennedys as well?

A. That was where I was articled.

Q. You were articled with Kennedys?

A. Yes.

Q. And how long did you spend in England in articles and then in practice?

A. Two years in articles and three years in private practice.

Q. Yes, and did you achieve any particular merit awards in your solicitor's examinations in England?

A. I had distinction in conveyancing.

Q. You had a distinction in conveyancing. When did you return to Hong Kong?

40

A. In March 1973.

Q. And what firm did you join in Hong Kong?

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- A. Johnson, Stokes & Master.
- Q. And have you been with Johnson, Stokes & Master ever since?
- A. Yes.
- Q. When you first joined Johnson, Stokes & Master, in which office did you work?
- A. I worked in the Hong Kong office of the firm for a few months.
- Q. Yes, and after that?
- A. I went to the Kowloon side of the – the Kowloon office of the firm.
- Q. Yes and what was the responsibility you undertook then in the Kowloon office?
- A. It was not specifically spelt out but I was in charge of the conveyancing department 10
of the . . .
- Q. You were in charge of the conveyancing department.
- A. But the partner who's ultimately responsible for my work is Mr. Mike Thornhill –
M.J.E. Thornhill.
- Q. Yes, Mr. Michael Thornhill is the partner ultimately responsible but you have charge.
- A. Yes.
- Q. Is that the position today?
- A. Yes but the partner who is ultimately responsible now is Mr. John Mutimer.
- Q. How many conveyancing transactions does your office deal with in a year? Are you
able to give any figure – in round figure, Miss Leung? 20
- A. I am afraid I can't give . . .
- Q. Miss Leung, in the course of any average week how many conveyancing transactions
are completed on average. I mean is it ten, is it five or is it some greater number?
- A. In a week it would be more than ten.
- Q. It would be more than ten in a week?
- A. But it would be less than ten per day, say, 6 or 7 per day.
- Q. 6 or 7 a day?
- A. Yes.
- Q. 6 or 7 a day so that over a whole year there would be something like what –
fourteen/fifteen hundred or more? 30
- A. Yes.
- Q. When you came to Hong Kong from England, did you find that there was a
difference between the English manner of completing conveyances and
conveyancing transactions and the practice in Hong Kong?
- A. Yes.
- Q. You have been in court when we have talked about English style completions,
have you not?
- A. Yes.
- Q. In your experience, have English style completions taken place in Hong Kong?
- A. Yes. 40
- Q. How often?
- A. Very rarely.
- Q. One of the – I think the expert witness called by the other side agreed that it might
be one in a thousand. He thought the Hong Kong style completion would be in nine
hundred and ninety-nine cases out of a thousand. What sort of proportion would
you say were Hong Kong style completions to English style completions?
- A. There would be just one or two in a year.
- Q. One or two in a year, yes. Is Mr. Edward Wong a customer – a client of Johnson,
Stokes & Master?

- A. He was.
- Q. He was. Yes, and the companies that he's concerned with have been clients too of Johnson, Stokes & Master.
- A. Yes.
- Q. And if you cast your mind to the beginning of the year 1976, was Mr. Edward Wong someone known to you?
- A. Yes.

MR. PRICE: Can Miss Leung have in the first place Bundle 2, Volume 2?

(Witness handed the exhibit.)

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Q. Would you turn to page 23? That's a copy of a letter sent from Johnson, Stokes & Master on the 21st of January 1976 to Mr. Danny Yiu. Is the reference at the top left-hand corner WLL/78204 – is that your reference?

A. Yes.

Q. Is that a letter for which you were responsible.

A. Yes.

Q. It refers to 76, Hung To Road, the whole of the ground floor and you write to Mr. Danny Yiu: "We understand that you are acting for the Vendor of the above property. We have received instructions to prepare a Mortgage over the same in time for completion which we believe is proposed for the 26th of January 1976. "Please let us have the title deeds subject to the usual undertaking and a note of the amount required for completion together with a note of your charges." Now, that's a letter written on the 21st of January. Was that written after meeting Mr. Wong?

20

A. Yes.

Q. With anybody else?

A. With Mr. Shum.

Q. Did they come to your office or did you go to them?

A. They came to my office together.

Q. How long before that letter was written did they come?

A. On the same day I would say.

30

Q. On the same day. Turn back a page now would you in that bundle? What's that page are you able to say? Page 22.

A. That's a piece of paper on which I have written.

Q. That's a piece of paper on which you wrote at the time?

A. Yes.

Q. Yes?

A. At the meeting.

Q. At the meeting, I see.

A. But then the lower bit about the address of Mr. Ma might have been given to me later on.

40

Q. I see. Before I ask you in detail about this meeting, would you tell his Lordship what you remember of the meeting? Let me ask you to pick up another bundle and it's volume 3 and would you turn to page 21 and an English translation of that is at page 22? When did you first see that document or a copy of that document?

A. When Mr. Shum first came to my office.

Q. When he first came with Mr. Wong?

- A. Then I saw this, yes.
- Q. Did you then see a copy or the original of that document?
- A. I think it was a copy.
- Q. "I think it was a copy." Please speak up because everyone is trying to hear. I know it's difficult with a light voice. Then would you now turn – Now, that's a document which indicates that one CHAN Sun-ming had received from Po Fung Co., Ltd. a deposit of \$100,000.00 for the purchase of property under CHAN Sun-ming's name, that is to say, the ground floor of the Industrial Building situate at 76, Hung To Road, Kwan Tong. "It has been clearly stated that the total purchase price is Hong Kong Dollars One Million Eight Hundred and Fifty Thousand only. Apart from the one hundred thousand dollars paid today, it is also arranged that a further eighty five thousand dollars to be paid to me on the 15th January 1976. The formal Sale and Purchase Agreement shall be signed at a solicitor's office before the end of January. Sd. CHAN Sun Ming." and dated the 30th of December. Turn to page 25 – turn onto page 26 – so sorry page 27. Now, that dated the 15th of January is Mr. CHAN Sun-ming's acknowledgment that he had received the further sum of \$85,000. When did you first see the document at page 27? 10
- A. At the first meeting.
- Q. And at that first meeting was the document that you saw the original or a copy? 20
- A. I think it was a copy.
- Q. Yes. So that those two documents were brought by Mr. Shum to your first meeting with him and Mr. Wong about this matter, is that right?
- A. Yes.
- Q. Were any of the other documents brought to you for this first meeting?
- A. No, it could have been that – with these two Chinese agreements it could have been that the original was produced to me and then I made photostat copies of it and then returned the original to Mr. Shum – it could. . .
- Q. When you say it could have been . . .
- A. I couldn't remember. 30
- Q. Your first recollection – your first statement to his Lordship is: "I think copies were produced."?
- A. Yes.
- Q. Look, will you, at page 23? Now, there's another Chinese agreement. This time, an agreement between Mr. Chan Sun-ming and Kai Ming Investment Co. Ltd. The translation is at pages 25 and 26. Was that agreement produced to you on this occasion or any copy of it, that is to say, this first meeting that you had?
- A. I don't think it was produced at the first meeting.
- Q. "I don't think it was produced at the first meeting."
- MR. CHEUNG: I really can't hear at all. 40
- A. Sorry, I'll try to be louder.
- Q. I think you must be louder however disagreeable that may be.
- A. Yes.
- Q. Now, at this first meeting are you able to tell his Lordship what was the cause of the conversation when Mr. Wong and Mr. Shum came, what was said, what were you to do?

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- A. I was told by Mr. Wong, Edward Wong, to prepare a mortgage over the property which Mr. Shum was buying.
- Q. Yes, I see. Were you told how much money was to be lent by Mr. Wong or his company?
- A. Mr. Wong said most probably it was going to be \$1,300,000.00 but he hasn't made up his mind and he was to confirm later by telephone the exact figure.
- Q. If we look at your note at page 22 in Volume 2, we see the figure \$1,300,000 in the top left hand corner, is that right?
- A. Yes. 10
- Q. And under it a reference to Debenture.
- A. Yes.
- Q. And GBF.
- A. Yes.
- Q. What is GBF?
- A. General banking facilities.
- Q. I see. Then look at the top right hand corner of your manuscript note. You have written in a box 7 years and you then put "principal" and then you said something on reducing balance, is that right?
- A. Yes. 20
- Q. That's all crossed out?
- A. Yes.
- Q. Now, what was said about that?
- A. I think Mr. Wong said something about – that the proposal was that the loan would be repayable over 7 years and the interest is payable on the reducing balance at the rate of 1% per month subject to fluctuation.
- Q. But then that was crossed out. Why was it crossed out?
- A. Because in the course of the conversation with the two of them it transpired that they had a continuing business relationship and it was anticipated that Edward Wong might be lending some more money to Mr. Shum or his company in the next few years. 30
- Q. Yes.
- A. So that if the mortgage was just expressed to secure the present principal, then these future loans would not be secured so I said, "Why not have this mortgage as a continuing security to secure future loans as the principal of this loan was reduced."
- Q. Yes.
- A. And Mr. Wong agreed so I crossed it out.
- Q. Turn in Volume 3 to page 60. Is that the form of Debenture eventually prepared for this transaction? 40
- A. I think the Debenture is on page 66 – sorry . . .
- Q. 60 is the Guarantee. 39. I'm so sorry.
- A. Yes.
- Q. 39. I'm so sorry, and so that refers, dealing with the amount of the loan, to credit facilities to the extent of \$1,355,000.00 at any one time and interest and the company covenants with the mortgagees and they will on demand in writing of the mortgagees made to the company, pay to the mortgagees all sums of money due on the date of demand.
- A. Yes.

COURT: That's page?

MR. PRICE: Page 39, that is, my Lord. I gave your Lordship the wrong page at the start.

COURT: Yes.

Q. And so is that form of mortgage debenture – Is that form in accordance with what was arranged as noted by you when you crossed out the reference to principal 7 years on reducing balance?

A. Yes, except that it was not general banking facilities but general credit facilities because Edward Wong is not a bank. . .

COURT REPORTER: "Because Edward Wong is not a –?" 10

A. Edward Wong's company is not a bank.

Q. I don't think what was just said would have been noted by anybody, Miss Leung. What you just said to the shorthand writer, I'm afraid, it has been noted by nobody.

COURT: General credit facilities not banking facilities.

MR. PRICE: My Lord, that's right, but then she went on to make some expressive gesture that's spoken in a low voice.

A. Because Edward Wong's company is not a bank.

Q. I see. "Because Edward Wong's company is not a bank."

A. Yes.

Q. Now, who was to be the borrower in this transaction? 20

A. A company which Mr. Shum has purchased from Johnson, Stokes & Master called Bovill Investments Limited.

Q. Could you open Volume 4 and turn to page 18? This is a photostat copy. An original was in fact produced in court last time. I don't know where it is. We'll try to do without it. Look at page 18 in bundle 4. It's a document which is a photocopy of the Memorandum and Articles of Association of North American Meat Packing Company Limited. Is that a document that you recognise?

A. Yes.

Q. When did you first see it?

A. Mr. Shum produced the original of this to me, a booklet. 30

Q. Yes. When did he produce that?

A. At the first meeting when he came with Mr. Wong.

Q. And this was the company you said he had purchased for the – you said Mr. Shum had purchased the company.

A. This was the company he purchased from his accountants.

Q. I see and this was to be the company that took conveyance of the property, was it?

A. No.

Q. Or wasn't it?

A. North American Meat, no.

Q. What was the North American Meat Company to do then as Mr. Shum told you? 40

- A. It was the intention of Mr. Shum to purchase the property with this company – in the name of this company and thereafter to mortgage the property to Edward Wong Finance Company Limited.
- Q. Yes and this was explained to you at the meeting. . .
- A. Yes.
- Q. . . by Mr. Shum or by Mr. Wong?
- A. I could not remember.
- Q. And did you look at this document?
- A. Yes.
- Q. And having looked at it, what did you say about the plan to have the purchase in the name of North American Meat Packing Company Limited? 10
- A. I asked Mr. Shum as I was reading the Memorandum and Articles of this company what he intended to do with this company. Then Mr. Shum informed me that he would like this company to be a property holding company of his group of companies and then I commented that the first object of this company is to deal with meat and pigs and sheep and it would be rather inappropriate to have a property holding company having its main object as dealing in meat and cattle.
- Q. And when you said that, what did Mr. Shum say?
- A. Then Mr. Shum and Mr. Wong conversed together in Shanghainese for a little while and eventually Mr. Wong said to me that Mr. Shum would purchase a shelf company from Johnson, Stokes & Master. 20
- Q. What was your reaction to that?
- A. Although I was already very busy and I wasn't really keen to have more work coming in, I agreed to provide Mr. Shum with a shelf company because I saw that as the quickest way of getting around it because if I told him to go back to his accountants to get another shelf company, it may take a little longer than if I were to take over the matter.
- Q. I see. When this matter arose was there some question of dealing with the matter very quickly then? 30
- A. Yes, I was told that they were expecting this matter to be finalised by the 26th of January.
- Q. I see. Did you make a note of that on your memorandum?
- A. Yes.
- Q. That's the date on the left "26th of January, balance of pp." and then you've got "\$1,850,000.00".
- A. Yes.
- Q. In Volume 2, page 22.
- A. I think I meant by that – by those scribbles that on the 26th of January 1976 the balance of the purchase price was to be payable but the full purchase price was 1.85 million dollars not the balance was 1.85 million. 40
- Q. I see and so on the 26th of January you told his Lordship that you thought it would be quicker for you to provide the shelf company than for Mr. Shum to go back to his accountants to get one.
- A. Yes.
- Q. I see. Did you know that your firm had a shelf company available?
- A. I think I telephoned my Hong Kong office companies department to find out that a shelf company was available for use.
- Q. And did any question arise about the name of the company?

- A. I think Mr. Shum had some preference about names, and I told him that the name could be subsequently changed to any name that he likes.
- Q. Yes and so what did you agree or arrange to do in respect of the company, the shelf company, then?
- A. I think I wrote a memorandum to the companies department in Hong Kong office to confirm the telephone conversation and to ask for the file to be transferred across to Kowloon side.
- Q. Yes. Look at page 24 in Bundle 2. Is that the memorandum or note you were referring to? 10
- A. Yes.
- Q. This is dated the 21st of January, Volume 2, page 24, saying that "Further to our telephone conversation this afternoon, I list out below the two persons involved in the acquisition of the investment company who will themselves be appointed directors:—
1. MA Pok Sum, David (his address is given), and 2. SHUM Ka Ching (and his address is given). Please note that the company is required for the acquisition of a property to be completed on the 26th of January, 1976." And so that was the company arrangement as it was made — you were to procure the shelf company and its new directors of it were to be appointed, is that right? 20
- A. Yes.
- Q. And it would then be the completing purchaser?
- A. Yes.
- Q. Yes and was that company in fact Bovill Investments Limited?
- A. Yes.
- Q. And look, if you will, at Volume 4, page 1? Is that a copy of the Memorandum and Articles of Bovill Investments Limited?
- A. Yes.
- Q. Turn to page 17, will you, I see that the witness to the signatures of the subscribers is M. Poon. Is that the same person as you addressed the memorandum of the 21st of January to? 30
- A. Yes.
- Q. Mildred Poon.
- A. Yes.
- Q. In your Hong Kong office?
- A. Yes.
- Q. And Gregson Limited and Dredson Limited. What companies were they?
- A. They are nominee companies of Johnson, Stokes & Master.
- Q. I see. So this was a shelf company that Johnson, Stokes & Master had ready for such an occasion, is that right? 40
- A. Yes.
- Q. And looking at the objects clause did you think that the objects clause — this is at page 4 — was more appropriate for a company to hold investments or other property?
- A. Yes.
- Q. Look, will you, at page 27 at Volume 2? This is a letter dated the 22nd of January to Edward Wong Finance Company for the attention of Mr. Edward Wong and this has the same reference in the top left hand corner as your letter of the previous date to Mr. Danny Yiu.

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- A. Yes.
- Q. That's your reference?
- A. Yes.
- Q. Is this a letter written by you?
- A. Yes.
- Q. And you sent copies to Shum Ka Ching and David Ma Pok-sum.
- A. Yes.
- Q. Let's look at this letter. You say to Mr. Edward Wong Finance Company Limited: "We thank you for your instructions yesterday to prepare a Debenture to secure credit facilities to the extent of \$1,355,000.00 at an interest rate of 1% per month subject to fluctuation according to current bank rate. The said credit facilities are to be secured by a Mortgage over the property and a floating charge over the assets of the Company giving such Debenture. The completion of the purchase of the above property and the Debenture is to take place on the 26th of January 1976. We will use our best endeavours to complete on time although it depends on factors beyond our control." 10
- We also confirm having received instructions from Messrs. Shum Ka Ching and Ma Pok Sum, David to acquire a shelf company whose main object is for investment and this company will acquire the property and give the Debenture in your favour. This matter has also been put in hand to synchronise with the completion of the purchase and Debenture." 20
- Miss Leung, looking at the first paragraph of that letter you were there telling or acknowledging instructions received from Edward Wong Finance Company.
- A. Yes.
- Q. Did you ever write at this time a letter to Mr. Shum or to any company on his behalf thanking him or the company for instructions to act on the purchase of the property?
- A. No.
- Q. Why not? 30
- A. Because I was not acting on the purchase.
- Q. What were the instructions that you had received, as you understood it, from Mr. Shum?
- A. To set up the company to purchase and to give mortgage.
- Q. Had to set up the company?
- A. Yes.
- Q. I see in this letter of the 22nd of January that the figure that you give as the amount to be secured is not \$1,300,000 as in your note – as in your manuscript note but \$1,355,000. Where did that figure come from are you able to tell his Lordship? 40
- A. I telephoned Edward Wong subsequent to the first meeting to obtain from him that figure in order that I could write that letter because I was aware that from previous transactions with him that if he came down to see me, then he wouldn't write a letter giving me instructions in writing. That's why I had to confirm the instructions as early as possible.
- Q. Now, you had written immediately to Danny Yiu. Was Danny Yiu a solicitor with whom you had previously had dealings? You had written at page 23 on the 21st of January, the very day of the meeting, to Mr. Danny Yiu. Was he a solicitor with whom you had previously had dealings?

- A. Yes. Perhaps not Danny Yiu himself but Danny Yiu and Company.
Q. You had dealings of a conveyancing kind or some other kind?
A. I don't think – It must be conveyancing because I was not doing any other work.
Q. And the reply to that letter of the 21st of January is a letter dated 23rd of January which appears at page 28 in the same bundle, and in that letter Messrs. Danny Yiu sent you a number of documents. Let me pick up Volume 3. We can see what these documents were. The first document is said to be a photocopy of a Lease dated the 14th of August 1971 of Kwun Tong Inland Lot No. 158, that is, 76 Hung To Road and that appears at pages 1 to 10.

10

MR. PRICE: Does your Lordship have it?

COURT: No.

MR. PRICE: That's the Crown Lease.

COURT: This is set out in Danny Yiu's letter?

MR. PRICE: That's right. It was intended that pages 1 to 10 of Volume 3 is the Crown Lease. I don't think anything turns on the precise terms of it.

Q. Now, then, item 2 is a copy Assignment and I think that's an Assignment by which – and then item 3 is an attested copy Certificate of Incorporation on Exchange of Names of Perfect Industrial Company Limited to Southern Properties Limited. Then we come to an attested copy Agreement for Sale and Purchase dated 17th of December 1975 which appears at page 11 in Bundle 3. So that document came to you now on the 23rd of January from Danny Yiu and then also item 5 is the Agreement for a copy Agreement for Sub-Sale and Purchase also on the 17th of December and that's between Lucky Time and Kai Ming and CHAN Sun Ming, that's at page 17. Do you see that?

20

A. Yes.

Q. Then there's an attested copy Agreement in Chinese writing dated the 5th of January and that's in Volume 3 at page 23 which we looked at a little earlier this morning.

30

A. Yes.

Q. Now, and that has at page 24 attached to it an acknowledgment – a certificate saying: "We, the undersigned, hereby certify and attest that we have examined the foregoing copy. . . with its original and that the same is a true and correct copy. . ." and then the signature of two persons as clerks to Messrs. Danny Yiu and Company, solicitors, Hong Kong, and is that the copy as you received it with this letter?

A. Yes.

Q. And then there is a copy Deed of Mutual Covenant and a copy Assignment from Mr. HO Sau-ki. Look, will you, at Volume 3, at page 72? Is that a Deed of Mutual Covenant?

40

A. Yes.

Q. As provided by Mr. Danny Yiu with this – Messrs. Danny Yiu & Co. with this letter?

A. Yes.

- Q. And the copy Assignment from Mr. HO Sau-ki is – Look at page 66, will you? I think it may include 65, the plan. Page 66 is a copy Assignment, Ho Sau-ki, Lucky Time Finance Company Limited, the confirmor, and then there is room for a company purchase. You see that? . . .
- A. Yes.
- Q. Is that a draft document as received by you with this letter of the 23rd of January 1976 from Danny Yiu?
- A. Yes.
- Q. Let me ask you a question. In your letter of the 21st of January to Mr. Danny Yiu at page 23 you hadn't told him that the purchaser was to be a company or who the purchaser was. 10
- A. No.
- Q. In the draft Assignment at page 66, the document is prepared on the assumption that the purchaser will be a company. Is that something that you had caused or brought about or just a matter for Mr. Danny Yiu?
- A. Yes.

COURT: You don't know why. . . (To Counsel) Is that it?

MR. PRICE: That's what I am seeking to. . .

- A. I don't think I spoke to him before the 23rd. 20
- Q. You don't think you did.
- A. No, but subsequently I did many times.
- Q. Subsequently, yes. I see.
- A. Yes.
- Q. Now, looking at the list of documents that came with the letter of the 23rd of January 1976 from Danny Yiu, those documents don't include the two Chinese receipts, do they, the receipt for \$100,000 and the receipt for \$85,000 respectively.
- A. Can I go back on this purchaser?
- Q. Can you go back –?
- A. To the name of the purchaser being anticipated as a company. 30
- Q. This is at page 66.
- A. Yes, I don't remember when the telephone conversation took place but there was a telephone conversation between Danny Yiu and me discussing the name of the purchaser and I was trying to spell the name of the purchaser to Danny Yiu but his English did not seem to be very good so he didn't get it so I said, "Why don't you leave it blank and leave it for me to fill it in and return it to you later on." but I could not remember whether it was before or after he sent the document to me.
- Q. You don't remember whether it was before or after.
- A. No.
- Q. Let's take the other matter that I have gone into. The letter of the 23rd of January 1976 did not include any copies of the two Chinese receipts which Mr. Shum produced – of which he produced copies at your meeting on the 21st. 40
- A. No.
- Q. Before you had received the letter of the 23rd, had you told Danny Yiu that you had copies of those Chinese receipts?
- A. No.

- Q. You had not?
- A. I could not remember any contact with Danny Yiu at all until after the letter.
- Q. Yes. If Mr. Danny Yiu knew that you had copies of the Chinese receipts already and therefore did not include them in his letter of the 23rd of January, that was information he got from someone other than you, is it?
- A. Yes.
- Q. The answer is yes. After the letter of the 23rd of January did you have any conversation with Danny Yiu?
- A. Yes. 10
- Q. And did you find – Were you telling his Lordship that you found his English rather defective?
- A. Yes, well . . .
- Q. I am putting it in my words not yours. He had difficulty over the spelling of “Bovill”, is that right?
- A. Right.
- Q. Now, Danny Yiu had sent to you with the letter of the 23rd of January the draft assignment for completion of the purchase of the land, hadn't he?
- A. Yes.
- Q. Which party in Hong Kong practice normally undertakes the preparation of the assignment to the purchaser? 20
- A. It is normally the purchaser's solicitor who would draft the assignment but there are three possibilities, either the purchaser's solicitor or the solicitor who is acting for both parties, the purchaser and the vendor, or if the purchaser is not represented, then the vendor's solicitor.
- Q. Yes, in some cases where you have a multi-storeyed development, you might have a standard form for assignment provided by the vendor.
- A. Yes.
- Q. Yes, was this that sort of case?
- A. It is possible, yes. 30
- Q. When you received the draft Assignment with the letter of the 23rd January from Danny Yiu, did you draw any inference as to who Danny Yiu was acting for in the matter?
- A. I don't remember if I drew any inference at the time.
- Q. Yes.
- A. From looking at . . .
- Q. Were you telling his Lordship that you were not acting for the purchaser in the transaction?
- A. Yes.
- Q. During this period after you had received the documents from Danny Yiu, did you have any idea as to which solicitor, if any, was acting for Mr. Shum as purchaser? 40
- A. It is definitely not Johnson, Stokes & Master but I can't remember whether I drew any inference on receipt of that letter as to whether or not Danny Yiu was acting for the purchaser on the receipt of the letter.
- Q. Are you emphasizing on the receipt of the letter – Was there a time when your understanding was clarified?
- A. On subsequently telephone conversations with Danny Yiu.
- Q. How was it clarified?

- A. He gave me the impression that he was either acting or was keen to be acting – he was acting for the purchaser, Mr. Shum, because as soon as, if I were acting, then I would be entitled to charge the full scale costs on the purchase and then Danny Yiu would be only entitled to charge, on behalf of the vendor, only one half of the scale costs.
- Q. Let's go back to their letter of the 23rd of January because I don't think I read the second page of that letter – 23rd of January, Volume 2, page 28, and if you turn over the page after the list of documents he says this: "The original of the above title deeds and documents are now used for another transaction." Was it a little unusual, pausing there, to have attested copy agreements rather than original agreements, attested copy documents, photocopy of the title deeds? 10
- A. If there are simultaneous transactions affecting the same title, then it is normal for the solicitor to send copies to one solicitor and then the originals to another solicitor or even keep the originals themselves and send copies to everybody else.
- Q. And the agreement of division between CHAN Sun Ming and Kai Ming Investment Company indicated that there were two transactions being organized, is that right?
- A. Yes.
- Q. Let's continue with the letter: "For your information, the balance of purchase price payable on completion is \$1,640,000.00." Was that a figure which caused you any surprise? 20
- A. No.
- Q. "For your kind attention," the letter continues, "our costs and disbursements in this matter is \$45,820.00." You see that?
- A. Yes, that would be the full costs, full scale costs.
- Q. Is that figure one from which you are able to draw any inference as to whether it included – as to what Danny Yiu was charging for?
- A. It definitely included the stamp duty.
- Q. Yes, it must have included the stamp duty on the purchase. 30
- A. Yes.
- Q. And is that something which the purchaser's solicitor would normally be responsible for?
- A. Yes.
- Q. If you turn ahead in this bundle for the moment to page 45, you will there see a receipt from Danny Yiu and Company. You see that?
- A. Yes.
- Q. "Re No. 76, Hung To Road, Kwun Tong, received from Bovill Investments Limited the sum of \$45,820.00 only being payment of our costs and disbursements herein." and signed Danny Yiu & Co., so there is the \$45,820.00 featuring in the receipt which Danny Yiu provided later on the 27th of January and that's the figure mentioned in the letter of the 23rd of January. 40
- A. Yes.
- Q. What would be the rate of stamp duty that the purchaser would have to pay on this transaction?
- A. 2% on the purchase price – 2% on the current market value.
- Q. Has it been 2% or 2.25% – has it been 2.25% at any time?
- A. It's 2.25 now.
- Q. It's 2.25 now. In 1976 it was 2%, is that right?
- A. Yes. 50

- Q. I see. Looking at the figure which Mr. Danny Yiu quoted and for which he gave a receipt, is it because the amount of the figure is so large that it must include stamp duty that you draw the inference that Danny Yiu was quoting costs and disbursements as including costs and disbursements on behalf of the purchaser?
- A. But that would be – yes – but I think I have also to say that if the purchaser is not represented then the vendor solicitor would also be entitled to charge the full scale.
- Q. Would this figure include full scale or would it include full scale plus something?
- A. Full scale plus stamp duty, yes, but the vendor and the purchaser are equally liable for stamp duty so that even if the purchaser is not represented, if the vendor – if Danny Yiu only represented the vendor, he could charge that as well, provided the purchaser is unrepresented. 10
- Q. Yes, well, I am not now clear – Do you draw the inference from the amount of the costs and disbursements which Mr. Danny Yiu was charging as purchase solicitor or as vendor solicitor or as both?
- A. It could be any of those cases, but then I think my initial reaction would be that, thinking back, my initial reaction would be that because the sum was so large it must include stamp duty and it is more normal for a purchaser solicitor to charge stamp duty than the vendor solicitor, it is more normal but there are exceptions. 20
- MR. CHEUNG: I wonder if that could be repeated. The witness was speaking both quickly and softly that I really could not hear it.
(Court Reporter reads back last answer)
- Q. About the payment of stamp duty, that is necessary, isn't it, in order to complete the arrangements for registering the purchaser?
- A. Yes.
- Q. Why is that the responsibility ever of the vendor solicitor how did it ever . . .
- A. . . . Under the Stamp Ordinance both parties to the assignment would be liable for stamp duty.
- Q. Well, then, in preparation for completion of the purchase, arrangements had to be made to deal with the company, Bovill Investments, and its directors, didn't it, didn't they? 30
- A. Yes.
- Q. Did you deal with that or did you deal with any part of that?
- A. I think when Mildred Poon's. When the file came from Hong Kong side Mrs. Mildred Poon to me – when the file came from the Hong Kong side from Mrs. Mildred Poon, the particulars of directors which I gave in the memo was already filled in the form.
- Q. Yes.
- A. And I think my secretary – I can't remember – but it could be my secretary who arranged for the signing of that form prior to completion on the 27th, but apart from that neither I nor my secretary had anything to do with the company, it was another member of the staff who took instructions and – detailed instructions – and set up the company for Mr. Shum. 40
- Q. Let's just open, shall we, Bundle 4 and look at the company documents and see what, if any, you were concerned with. We start at page 58, Volume 4, where Mr. Shum Ka Ching – Mr. Shum says he is willing. Is that something you were concerned with or is that – ?

- Pg. 59,60. A. No, I didn't.
 Q. And similarly at page 59 and at 60 where Gregson and Dredson appoint David Ma and Shum as directors, is that – was it Miss Chor, is it, who . . .
- Pg. 60 A. . . . Yes.
 Q. . . . Was it Miss Chor or Mildred Poon who would have done this?
 A. Page 60?
 Q. Yes.
- In the Supreme Court of Hong Kong High Court Defendant's evidence No. 12 Leung Wai-ling examination A. Since it is signed by Mr. Gregory, this is Mr. Gregory's signature, it would be dealt with on the Hong Kong side, this one, this particular page. 10
 Q. Yes, well, now, you must explain that: by "Hong Kong side" you mean in Mildred Poon's office?
 A. Yes.
 Q. I see, so page 60 ought really sensibly to come after page 61, ought it?
 A. Yes.
 Q. Yes. You had on the 21st you had told Mildred Poon that David Ma and Mr. Shum were to be appointed directors and at page 60 it is dated the 20th of January Gregson and Dredson appoint David Ma and Mr. Shum as directors, is that right?
 A. Yes.
- Pg. 74 Q. Well, then, turn, will you, to page 74; is that a document which you were concerned with? 20
 A. Yes.
 Q. Now . . .
- MR. CHEUNG: "Yes" or what?
- MR. PRICE: The answer is "yes".
- Pg. 76 Q. (Cont.) And that is a document in draft and we see that at page 76 that document has amendments and signatures on it, yes; who prepared that document there – who prepared that document?
 A. I think I did, this one.
 Q. You did? 30
 A. Yes.
 Q. And was that prepared in – Was that prepared as part of preparations for completion of the purchase?
 A. That is part of the completion of the debenture.
 Q. Yes.
- COURT: Volume what?
- Vol. 4 Pg. 76 MR. PRICE: Volume 4, page 76, my Lord.
- Vol. 3. Pg. 39 Q. (Cont.) Now, part of – you say that was prepared as part of arrangements for completion of the debenture. We have already looked once at the debenture itself as arranged by you, that is in Volume 3 at page 39; who prepared that document; you did, is that right? 40
 A. I can't remember whether I personally prepared it or whether I asked the clerk. . .
 Q. . . . Yes. . .

A. . . . in the conveyancing department to prepare it but it would be in the standard form.

Q. The standard form, but the details relate – the relationship to this transaction would be under your direction, is that right?

A. Yes.

Q. Now, that was one document that had to be got ready. What about the document page 60 which I referred you to a little earlier, now, that is a document of guarantee, page 60, who prepared that?

A. Either me personally or the clerk -- a clerk in the conveyancing department -- 10
David Leung -- under my direction with information from me.

Q. Yes. Well, now, that indicates that the directors, is that right, of Bovill, the people who became interested as directors of Bovill Investments, were guaranteeing the 1,355,000 pounds (dollars?) facility that Edward Wong was providing for Bovill?

A. Yes.

Q. Now, let's then retrace our steps, if we may, was anything said about a guarantee at the meeting on the 21st of January?

A. No.

Q. And when did you receive -- when and from whom did you receive instructions that there was to be a guarantee? 20

A. It was usual when we acted for Edward Wong Finance Ltd and when the borrower was a limited company for the directors to personally guarantee the facility but nothing was mentioned at the meeting. So subsequently Edward Wong was telephoned to check whether or not personal guarantees by the directors were required and Edward Wong said, "Yes, I would require personal guarantees."

Q. Yes, so that document was prepared on Edward Wong's instructions, is that right?

A. Yes.

Q. Did you, before preparing the document, refer to Mr. Shum or his associate Directors?

A. No, not until they came and signed the guarantee. 30

Q. Yes, I see. In the form of assignment which Mr. Danny Yiu had prepared -- this is page 66 of Volume 3 -- there is included in the parties Lucky Time Finance Company as confirmor; do you see that?

A. Yes.

Q. Now, there is no reference in that document to Chan Sun Ming, is there?

A. No.

Q. And no reference to Kai Ming, the Kai Ming Company?

A. No.

Q. Were you concerned when you received and looked at that document that it only joined in Lucky Time as confirmor? 40

A. Yes.

Q. What did you -- let me ask you first: why were you concerned?

A. Because . . .

Q. Let me ask you first: why were you concerned?

MR. CHEUNG: She hasn't --

A. I said "because".

MR. PRICE: I think she said "because".

- A. Chan Sun Ming ought to be a second confirmor here to acknowledge the profits that he is making in the transaction – the profit that he is making from the transaction.
- Q. So what did you do about that?
- A. I telephoned Danny Yiu and asked him why the assignment was drafted in such a way and whether or not Chan Sun Ming could be inserted as a second confirmor.
- Q. Yes.
- A. Then he appeared – Danny Yiu appeared to be very reluctant to amend his form of assignment. 10
- Q. Now, this would have been – Can you give a date for this conversation?
- A. It was . . .
- Q. . . . After you received the letter of the 23rd?
- A. Yes.
- Q. And with a time for completion approaching that, is that right?
- A. Yes.
- Q. What did you arrange. . .

MR. CHEUNG: . . . Did she answer the question "What was the date of the conversation?"?

- A. I don't remember. 20
- Q. In what language did you speak to Danny Yiu?
- A. Cantonese.
- Q. I see, yes. So having explained the point to him, what did you arrange or agree about this matter?
- A. Well, somehow Chan Sun Ming's profit had to be accounted for and Danny Yiu and I agreed that perhaps we can treat Chan Sun Ming as a broker so that his profit could be treated as a commission and he would not then be required to join in the assignment but then that would mean cancelling the agreement between Chan Sun Ming and Po Fung and – and Po Fung.
- Q. Yes, those were the two Chinese receipts? 30
- A. Yes.
- Q. Yes, the two Chinese receipts, they were to be cancelled?
- A. Yes.

COURT: Cancel the agreement between – ?

- A. Chan Sun Ming and Po Fung as evidenced by the two Chinese receipts.
- Q. Who was going to arrange for that cancellation?
- A. Danny Yiu.
- Q. Was it a matter of further concern for you if Danny Yiu arranged to cancel it?
- A. Yes, because if Chan Sun Ming is to come out at all completely as a purchaser, it would mean just not cancelling the subsequent Chinese receipts, it would also mean cancelling his own sale and purchase agreement together with Kai Ming from Lucky Time and I was concerned whether or not he – Danny Yiu would be able to arrange all that and Danny Yiu assured me that he would be able to make arrangement for that – for the two cancellations. 40

- Q. If the cancellation was arranged by Danny Yiu, as he agreed, was that then a matter of any further concern to you?
- A. The cancellation would have to be made simultaneously with a new agreement between Lucky Time and Bovill to give Bovill a contractual status over the premises.
- Q. Well, now, you – was it your understanding that you were concerned on behalf of Edward Wong?
- A. Yes, yes.
- Q. As long as the cancellation was arranged – was in fact arranged by Danny Yiu, did it concern Edward Wong at all further?
- A. Well, provided he gets all the title deeds properly executed and the right stamp duty and so on, I don't think I was particularly concerned over the arrangement when it was going to be done or how it was going to be done.

10

COURT: Right, would it be a convenient moment?

MR. PRICE: Is it – ?

COURT: 2.30.

12.57 p.m. Court adjourns

2.30 p.m. Court resumes

Appearances as before.

D.W. 3 LEUNG Wai-ling OFO

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XN. BY MR. PRICE: (Cont.)

- Q. Miss Leung, between the 21st and the 27th of January was the date for completion arranged?
- A. Yes.
- Q. Between whom?
- A. Between Danny Yiu and me.
- Q. Yes; and was that date the 27th of January?
- A. Yes.
- Q. Yes. Now, in one of the – yes, in the agreement between Lucky Time and Kai Ming and Chan Sun Ming the date for completion had been specified as the 29th January; that appears from Volume 3, page 18; was there any special reason for choosing an earlier date?
- A. Because the 29th of January was too close to the Chinese New Year.
- Q. I see.
- A. And it is reasonable to expect the subsequent agreement to be completed . . .
- Q. . . . Yes . . .
- A. . . . Prior to the superior agreement.
- Q. So did this happen – Danny Yiu indicated that he could be ready on the 27th of January, is that right, did you check with Edward Wong if . . .
- A. . . . Yes, I did check with Edward Wong that the 27th of January was all right

30

40

- for him.
- Q. Did you before the 27th have any communication with Mr. Shum – any further communication with Mr. Shum?
- A. Yes, yes.
- Q. Was that by telephone?
- A. Yes.
- Q. And what was said in that telephone conversation?
- A. That he would like the matter to be completed as quickly as possible.
- Q. Yes. When you had this telephone conversation with him, was the day the 27th of January already organised with Danny Yiu? 10
- A. There must be more than one telephone conversation because . . .
- Q. . . . I see . . .
- A. . . . in the last one he was informed that completion would now – would then take place on the 27th of January.
- Q. I see, and was anything said about what he was to do on the 27th of January, he, Mr. Shum?
- A. Yes.
- Q. What was said?
- A. I told him to go to Danny Yiu's office to . . . 20
- Q. . . . Now, don't go too fast, "I told him to go to Danny Yiu's office" –
- A. . . . to sign the purchase papers and to pay Danny Yiu's costs and to pay the balance of the purchase price which was not covered by the loan from Edward Wong.
- Q. Yes, now, pause there while people get that written down. And was he to come to your office as well?
- A. Yes, to execute the debenture.
- Q. And were the others – were his associates, Mr. Ma and Mr. Tsiang, to come?
- A. Yes, all the directors were to come because personal guarantees have to be signed.
- Q. Yes.
- A. At that time I didn't think it was decided that Mrs. Shum was going to be another 30 director.
- Q. That is Mr. Tsiang – how are you pronouncing that?
- A. (Witness pronounces in Cantonese) Shum, Mr. Shum's . . .
- Q. . . . Oh, Mrs. Shum was to be director, ah, I'm sorry, yes, but you were assuming that Mr. Chan was to be a director, weren't you?
- A. Yes.
- Q. Well, then, did they come to your office on the 27th of January?
- A. Yes.
- Q. Will you look in Bundle 2, Volume 2, page – let's look at page 43 – I think the first one is 43A – Were two accounts – those at 43A and 43B – presented to them when 40 they came to your office?
- A. Yes.
- Q. Now, did you do the presenting to them or did somebody else?
- A. I did not present them, my clerk did, my clerk David Leung.
- Q. I see. Had you seen the accounts before they were presented to them?
- A. I gave instructions for their preparation.
- Q. Yes.
- A. But I couldn't remember whether I studied them before they were presented.
- Q. Then look at the first of the accounts, will you, at 43A, dated the 26th January,

“To professional charges relating to the purchase of a shelf-company from us.”

and there is a round figure, a figure of \$2,500, and then

“To professional charges relating to the filing of the Particulars of Directors of the Company at the Companies Registry.”

with various disbursements and a total of \$3,547. Did that account – Was that the account for the work that Johnson, Stokes & Master did for the company?

A. Yes.

Q. Look at the next account, will you, 43B, now, that is an account addressed to Edward Wong Finance Co. Ltd, payable by Bovill Investments Ltd. why is the account made out in that form? 10

A. That is the way we normally present our bills when we act for the mortgagees and the mortgagor is to pay our costs.

Q. Yes, I see, so Edward Wong is your client and Bovill the mortgagor?

A. Yes.

Q. Yes, and then it says,

“To our charges for professional services in respect of:–

1. Preparing, engrossing and completing a Debenture over the assets of Bovill Investments Limited and the said property from Bovill Investments Limited to you including all relevant correspondence and other attendances. \$4,900.00”. 20

So that is the -- in respect of the debenture which we have looked at already?

A. Yes.

Q. “2. Preparing, engrossing and completing Joint and several Guarantee . . . \$250.00.”

“Preparing and completing the Particulars of the Debenture for filing with the Companies Registry and attending filing of same.”

Was that something which as solicitor to the mortgagee was appropriate for your firm to deal with?

A. Yes. 30

Q. And to charge the mortgagee?

A. Yes.

Q. And then

“Preparing and completing the Directors’ Resolutions authorising the execution of and the affixing of the Company’s Common Seal and to the said Debenture.”.

A. Yes, that is also usual.

Q. Was that also something which was appropriate for your firm as solicitors to the mortgagee?

A. Yes. 40

- Q. Now, we will look at those debentures and – at those resolutions in a moment. Was there any account from your firm to Bovill Investments in respect of the purchase of the property?
- A. No.
- Q. Why not?
- A. Because we were not acting . . .
- Q. . . . Speak up please.
- A. . . . Because we, Johnson, Stokes & Master, were not acting for Bovill Investments Ltd on the purchase. 10
- Q. Was there any account to Mr. Shum or to his – Mr. Shum and his co-directors. in respect of the purchase?
- A. No.
- Q. Why not?
- A. Because we were not acting for them in the purchase.
- Q. Yes. I notice that the account at page 43B has your reference in the bottom left hand corner with the number 78204.
- A. Yes.
- Q. Which is the number we have seen on letters relating to the mortgage?
- A. Yes. 20
- Q. The reference letter on the other account 82017 is the reference letter for the company letter is it?
- A. Yes.
- Q. Well, then, shall we pick up for the moment the bundle 4 at page 76.. Now, you have told his lordship that this was prepared by you, that is correct, is it?
- A. Yes.
- Q. At the top then “Minutes of a meeting of the Board of Directors of Bovill Investments Limited duly convened and held at No. 78 Hung To Road Ground Floor Kwun Tong Kowloon. . .”, is that – why does it refer to a meeting duly convened and held at that address or property? 30
- A. It is normal for – no matter who prepare the minutes it is automatic that we put in the registered office of the company as the place of meeting, even though the meeting might have taken place in our office.
- Q. I see. Were you present at any meeting on the 27th of January at the property– were you present?
- A. When this was signed?
- Q. Yes.
- A. Yes.
- Q. No, I am so sorry, were you present at any meeting on the 27th of January at the property? 40
- A. Oh, at the property, no.
- Q. Were you present on the 27th of January when this was signed?
- A. Yes.
- Q. And where was that?
- A. At the Kowloon office of Johnson, Stokes & Master.
- Q. At the Kowloon office of Johnson, Stokes & Master. Well then, we see against the names of those present Mr. Shum, Mr. Tsiang and Mr. Ma, we see signatures.
- A. Yes.
- Q. Were those signed in your presence?

- A. Yes.
- Q. And are they the signatures of the persons they purport to be, Mr. Shum, Mr. Tsiang and Mr. Ma?
- A. Yes, I think I took their ID card numbers and ID card.
- Q. I am so sorry I didn't hear it.
- A. I took their ID cards and made photocopies of them to make sure that the names there correspond with the names of the ID identity card.
- Q. I see, you took their identity card, I see, yes. Well, now, part of the third resolution is crossed out, do you see that? 10
- A. Yes.
- Q. The third resolution is completed as

“ . . . the Company do execute a Debenture in favour of the Financier, mortgaging the said property, to secure the repayment to the Financier of the said General Banking Facilities to the extent of HK\$1,355,000.00 and the interest thereon.”.

- Do you see that?
- A. Yes.
- Q. And what is struck out is the reference to a charge over

“all the undertaking property and assets of the Company whatsoever and wheresoever both present and future including the uncalled capital”. 20

- You will remember that in your letter of the 22nd of January to Edward Wong – Volume 2, page 27 – of which Mr. Shum and Mr. Ma had copies, you said that that credit facilities which is to be secured by a mortgage over the property and a floating charge. Now, it is not only in the resolution that the reference to floating charge is knocked out, it is also in the form of debenture that you have prepared, that appears in Volume 3 at page 39 and at page 43, clause 2 is struck out and there is a signature in the margin against the striking out. Do you see that?
- A. Yes.
- Q. Is that signature there Mr. Shum's? 30
- A. Yes.

COURT: Volume – ?

MR. PRICE: Volume 3, page 39 and page 43 – I may have called the wrong volume number; I noticed I did once or twice.

- Q. Now, tell his lordship about that then: how did it come about that floating charge – the reference to floating charge in the resolution and in the debenture was struck out at this meeting, what was said about it and by whom?
- A. When Mr. Shum, Mr. Ma and Mr. Tsiang came to my office these papers were presented; the resolution, the debenture and the guarantee as well were presented to them for signature. 40
- Q. Now, pause there while everybody gets that much down. Now continue, speaking loudly.

- A. I didn't explain every word to them but just the gist of the documents and the three gentlemen immediately objected to the floating charge because they realised that it might affect their . . .
- Q. . . . Now, don't say what they realised, say what they said.
- A. They said that if they purchased more properties they did not want those properties to be automatically charged to Edward Wong . . .
- Q. . . . Yes . . .
- A. . . . even though at that particular time the only asset of the company would be the purchase of this property. 10
- Q. Yes.
- A. They were very reluctant to sign the documents as they were; so I telephoned Edward Wong and asked for his instructions as to whether or not I could strike out the reference to the floating charge.
- Q. Did you speak to Edward Wong?
- A. I think I had difficulty finding him at first but eventually he was contacted and he agreed to the deletion.
- Q. Yes.
- A. And so all references to the floating charge were deleted.
- Q. Yes. 20

COURT: That was a suggestion or a request made direct to you by Mr. Shum?

- A. Yes.

COURT: That didn't come through the other firm of solicitors?

- A. No, because they were in my office then.
- Q. Well, now, look, will you, at Volume 2, page 32, Volume 2, page 32, and there is a copy of this at page 34 which carries at the foot on page 35 and at the foot of page 34 a signature.
- A. Yes.
- Q. Now, the signature, I think it is common ground, is that of the Danny Yiu firm – of Danny Yiu or Danny Yiu & Company? 30
- A. Yes.
- Q. Is it of Danny Yiu himself or the firm?
- A. Yes, it is the same signature as the person who witnessed the agreements.
- Q. Yes, I see, so it appears to be signed as a firm or as an individual?
- A. The letter was addressed to the firm so even if it was signed by an individual it would be signed on behalf of the firm.
- Q. Now, is this a letter that you had prepared?
- A. No, but I approved it and made some amendments to it.
- Q. I see, in its present form is it a letter for which you were responsible?
- A. Yes. 40
- Q. Was it prepared on the 27th or before the 27th?
- A. On the 27th.
- Q. Yes, I see, and was the letter with copy sent round to Danny Yiu's firm on that day?
- A. Yes.
- Q. Was that sent round before or after the directors of Bovill arrived in your office as

you met them?

A. After they have signed all the papers.

Q. Yes; and did the letter come -- did the copy letter signed by Danny Yiu & Company come back while the directors were at your office?

A. No.

Q. It didn't, I see. Now, let me -- let us look at this then: you refer to the letter of the 23rd which is the letter enclosing -- that we saw at page 27 and I think you -- and subsequent telephone conversation; and then you say

“We shall ask our clients to put us in funds with the mortgage proceeds of \$1,355,000 towards payment of the purchase price of these premises upon receipt of your undertaking that 10

1. You will within TEN DAYS upon receipt from us of our cheque for \$1,355,000.00 send us”

and then follows (a), (b), (c) and (d), references to certain documents:

“(a) The Assignment of these premises from Ho Sau Ki and Lucky Time Finance Company Ltd to Bovill Investments Limited”

and you say that was to come duly executed and attested (with the exception of the common Seal of Bovill Investments Limited)”. Why with the exception of the common seal of Bovill Investments? 20

A. The common seal was with the Kowloon office of Johnson, Stokes & Master. It is unusual for us to release the common seal before our cost was paid.

Q. So you were going to have the common seal affixed to the document when it arrived, is that right?

A. Yes.

Q. And then

“Attested Copy of Cancellation of Agreement between Lucky Time Finance Company Limited and Kai Ming Investment Company Limited and CHAN Sun Ming”.

Is that the cancellation that you referred to earlier this morning? 30

A. Yes.

Q. And then

“Original Agreement for Sale and Purchase between Lucky Time Finance Company Limited and Bovill Investment Limited in respect of these premises duly signed.”

That was to be a new direct agreement, was it?

A. Yes.

Q. And

“Certified true copy of Occupation Permit relating to these premises”. Then

look at (2), you say

“You will arrange for the Reassignment of these premises from Hang Seng Bank Limited to Ho Sau Ki, the First Assignment and the Deed of Mutual Covenant to be registered with the Land Office as soon as possible so that we can proceed with the stamping and registration of the Assignment referred to in Item (1)(a) hereof and the Mortgage from Bovill Investments Limited to Edward Wong Finance Co. Limited with the minimum of delay”.

Now, the reassignment from Hang Seng Bank to Ho Sau Ki, you appreciated that when writing this letter the premises had been subject or were subject to a Crown charge? 10

A. Yes.

Q. In favour of the Hang Seng Bank, did that information come from your – the searches that you had made or from some other source?

A. From the searches.

Vol. 5

Q. I see. Now, could you pick up Volume 5 and we will just look at what searches you had made. First of all, a search was made against North American Meat Packing Company Limited; I see that is dated on the second page 27th of January, 1976. Was that made on your instructions?

A. Yes.

Pg. 3

Q. Yes, and then a search against Lucky Time Finance Company Limited at page 3, was that made on your instructions? 20

A. Yes.

Pg. 4

Q. That is dated the 24th of January, the bottom of page 4, and then there is a search of Kai Ming Investment Company Limited at page 5; that doesn't seem to have a date on the search. Was that search caused to be made by you?

A. What – ?

Q. Or is that something not done this time?

A. I think not on my first instructions but it was probably made when the title deeds were received. 30

Q. Probably made later you say?

A. Yes.

Q. When?

A. When the title deeds were received.

Pg. 18

Q. Yes, I see. Will you turn to page 18. Now, is that – what is that document at page 18 and at page 19?

A. They are the search cards.

Q. The search cards, yes.

A. Photocopied from the Land Office.

Q. I see, I see, card number 'A', they both appear to have the same letter in the box in the top left corner and they show Kwun Tong Inland Lot No. 58, that is the Crown lease, is it, of twenty-one years renewable from the 1st of July, 1959, and it gives the name of the lease holder as Perfect Industrial Company, Sutherland Properties Limited and Ho Sau Ki? 40

A. Yes.

Q. Yes, so Perfect Industrial Company is the first proprietor until it changed its name, is that right?

A. Yes.

- Q. And on the 24th February, 1973, sold to Ho Sau Ki?
- A. Yes.
- Q. And then look at the next under "INCUMBRANCES ETC."; what is that does that show that there were outstanding charges to the Hang Seng Bank?
- A. Yes.
- Q. For a total amount of \$4,400,000, is that right?
- A. Yes.
- Q. Does that card show the date on which the search was made, 24th January, 1976, is the date stamped on the top left hand corner of the first sheet; yes? 10
- A. Yes.
- Q. So is that then – was that the source of your information . . .
- A. . . . Yes.
- Q. . . . the property was subject to a prior charge, yes, yes. The Hang Seng Bank, according to the nature of the instruments stated in the card, mortgage to secure banking facilities, second mortgage to secure banking facilities and further charge: would you infer from that that the property – that \$4,400,000 had actually been charged – had actually been advanced and were secured?
- A. That would be the maximum amount that might be outstanding .
- Q. Yes. So the actual advance might be that amount or some smaller amount? 20
- A. Yes.
- Q. Was it any concern of yours acting for the mortgagee, the new mortgagee, to find out how much had actually been advanced?
- A. No.
- Q. But it was your concern to have the premises reassigned from Hang Seng so that the mortgage was – that the earlier charge was cleared off?
- A. Yes.
- Q. And that is what you specified in – one of the things you specified in Item (2) in your letter of the 27th of January?
- A. Yes. 30
- Q. That is page 33 or 35 of Volume 2. When you wrote that letter you were getting an express undertaking from Danny Yiu, weren't you?
- A. Yes.
- Q. At least when you – you were contemplating the return of the letter which would be an express undertaking. Is the – now, is the giving of an undertaking against the receipt of money something which in your practice is the norm?
- A. Yes.
- Q. Do you always have an undertaking in this form or approximately this form when acting for a mortgagee or purchaser?
- A. More or less the same form, more or less. 40
- Q. I think it has been said in this Court that sometimes the money is sent to the vendor solicitors with a letter saying something like this, "We are sending this money against your undertaking that", but no written undertaking comes back. Is that a form that you are accustomed to as well?
- A. Yes.
- MR. PRICE: My Lord, I think there is a bundle but I am not – of a variety of forms of undertaking but I am not sure if we have it in a standard page order; it is now – may your lordship have one – I think Miss-what's-her-name have one. This hasn't been

given an exhibit number, I am not quite sure who this is really produced by.

MR. CHEUNG: The plaintiff.

MR. PRICE: I think it is really produced by Mr. Cheung but it is very much a composite document. I really don't mind how it is identified.

MR. CHEUNG: What is the next exhibit from the plaintiffs?

INTERPRETER: We have P.1, P.2.

MR. CHEUNG: P.3, your Honour.

P.3 MR. PRICE: P.3.

Q. Now, some of these are forms from letters used by other solicitors than yours. If you turn to the second page of this you see Philip Wong & Company on the 3rd November, 1973 writing to Messrs. Deacons thanking them for an earlier letter – 10

“We now enclose our cheque for \$127,000 being the balance of purchase price in respect of the above premises. Our said cheque is sent to you against your strict undertaking to send us:

1. Your official receipt of our said cheque.
2. Assignment duly executed by the parties concerned together with its Memorial duly signed and attested and your cheque covering stamp duty and registration fee.
3. Attested copy of Deed of Mutual Covenant. 20
4. All other relevant title deeds and documents.”

Is that the type of letter that you are familiar with?

A. Yes.

Q. That does not contemplate an undertaking in return in writing, does it?

A. No.

Q. Though it does contemplate a receipt for the cheque. Then look at the – there is a further letter from Philip – well, the letter from Philip Wong of 26th October, 1973; it looks as though that may be concerned – I don't know whether it is concerned with the same or a similar – that is another – Wong to Deacons – letter and it says

“We have instructions to act for the purchaser under an Agreement for sale and purchase dated the 23rd day of October, 1972, by Memorial”. 30

– the numbers given –

“in completing the assignment of the captioned premises

We shall be obliged if you will kindly send us the said agreement for sale and purchase Memorial No. 931797 and your form of assignment together with all relevant title deeds and documents to enable us to draft the necessary assignment for your approval for and on behalf of the vendor.

Kindly let us know the amount of balance of purchase price and your costs etc. payable on completion of the said assignment.”

COURT: This is not really in dispute, Mr. Price, this is universal practice.

MR. PRICE: It seems quite clear from the evidence we have got that it is universal practice. Let me just show my friend – my witness one of these letters. 10

Q. Look, from Messrs. Johnson, Stokes & Master itself, 15th of November, 1976, to Messrs. C. Y. Kwan & Co., there is . . . “M” . . . and the reference “MJET” is to your . . .

A. . . . Boss . . .

Q. . . . partner Mr. Thornhill?

A. Yes.

Q. And he then refers to a purchase; it says

“The said cashier order and the said cheque are sent to you against your firm’s undertaking”.

And there the undertaking is set out to provide documents in due course; and if you look at the very bottom of that letter on the next page we see that 20

“We, C. Y. Kwan & Co. confirm our undertaking stated above and acknowledge receipt of this letter and the enclosed cashier order”, “cheque and documents.”

Now, it is true that that is the 15th of November, 1976, which is after the time we are talking about; is the form of undertaking – is the procedure of having the undertaking letter returned with some form of endorsement one peculiar to the case we have in front of us or is it one that was used from time to time?

A. It is one used from time to time.

Q. When you wrote the letter of – when you prepared and had dispatched by hand to Danny Yiu & Company the letter of 27th January, 1979, the letter refers to \$1,355,000 and not to any larger sum, do you see that? 30

A. Yes.

Q. So when you wrote the letter were you expecting to receive from Edward Wong & Company \$1,355,000?

A. Yes.

Q. And did you then write the letter at page 38 of 27th that you have sent – that you have prepared the letter at page 38 in Bundle 2 dated 27th January addressed to Edward Wong also referring to the \$1,355,000?

A. Yes.

Q. So when that letter was prepared is this right you were expecting that Edward Wong Finance Company Limited was concerned with the provision of \$1,355,000 only? 40

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling
examination

- A. Yes.
Q. Is that Mr. Shum's signature . . .
A. . . . Yes. . .
Q. . . . on that letter?
A. Yes.
Q. Was that signature obtained at the meeting on the 27th of January?
A. Yes.
Q. And was the letter then sent round to Edward Wong?
A. Yes.

- Q. At what stage did you become aware that Edward WONG – At what stage in the meeting on the 27th January did you become aware that Edward WONG were concerned not with providing merely \$1,355,000 but that \$1,665,000 was coming from them in the form of drafts?
- A. It was not until Edward WONG himself came down with three cashier orders and added up to that sum.
- Q. Now you've told his Lordship that you had indicated on the telephone to Mr. Shum, that before the 27th January, that on the 27th January it would be necessary for them to go to Danny YIU's office to sign documents to pay the balance of the purchase price over and above that provided by Edward WONG and to pay Danny YIU's costs? 10
- A. Yes.
- Q. At the meeting did it – On the 27th did it become apparent to you that they had not yet been to Danny YIU to pay the balance of the purchase price?
- A. When I received the three cashier orders for such a large amount then I realised that the directors of Bovill had not been round to Danny YIU's office to pay him.
- Q. And was that a surprise to you?
- A. Yes.
- Q. It was Edward WONG himself who brought the drafts round, was it – the cheques round? 20
- A. Yes.
- Q. Those are the cheques we have photo copies of at pages 40 to 42 in bundle 2, are they not – the Chartered Bank cheque for \$1,000,000 and two Bangkok Bank Limited cheques, one for \$370,000 and one for \$295,000 – are those the three cheques?
- A. Yes.
- Q. When he brought those cheques did you ask him about the additional money?
- A. I told him that anything over and above the \$1,355,000 would not be secured, would he like me to increase the amount secured straight away by amending the debenture. Then Edward WONG said no, he is not worried; he has made his own arrangement and he did not require me to amend the debenture. 30
- Q. Now pause a moment. I am not sure whether you said Edward WONG said or everybody said?
- A. Edward WONG said.
- Q. Edward WONG said, yes, good. Had you already sent the letter to Danny YIU indicating that \$1,355,000 would be coming?
- A. Yes.
- Q. So when you had, and Mr. Wong produced in favour of Danny Yiu and Co., these three cheques totaling \$1,665,000 did you get in touch with Danny YIU? 40
- A. Yes, I telephoned him and asked him whether he still required that amount, whether that was the balance of the purchase price, and he went off the telephone for a few seconds to check and then he came back and confirmed yes, that was the amount.
- Q. And so look in bundle 2 at page 39, did you have that letter of the 27th January prepared and sent round to Danny YIU with the three drafts?
- A. Yes.
- Q. When that letter and the drafts were sent off was Edward WONG still with you?
- A. No.

- Q. What about the three directors?
- A. They were all gone by the time this letter was dispatched.
- Q. And in respect of time was that letter sent before or after the return of the signed copy undertaking?
- A. It was before.
- Q. Did the signed copy undertaking come back on the same day, 27th January?
- A. Yes.
- Q. When the three directors left you where were they going to, did you know?
- A. No. 10
- Q. They have told his Lordship that they went from your office straight to Danny YIU and indeed they told his Lordship that you told them to get across there as quickly as they could. What do you say about that?
- A. I think it was before they came to my office at all, in fact I told them before the 27th January to go to Danny YIU's office.
- Q. You told Mr. Shum?
- A. Told Mr. Shum.
- Q. Yes?
- A. But on the actual date of the 27th January I do not remember telling them to go to Danny YIU's office. 20
- Q. Well now you had a telephone conversation with Danny YIU on that day, was anything said in the course of that conversation to indicate that they were still expected at Danny YIU's office?
- A. The only telephone conversation I had on the 27th, if I remember right, was just one telephone conversation to check the balance of the purchase price.
- Q. Now let us look at the position at the end of the 27th January. So far as you were aware the documents that you were responsible for were completed, is that right – the documents you had prepared?
- A. Yes – well, completed in the sense that were all signed, but I couldn't date them until – 30
- Q. You couldn't date them?
- A. Well, specially the debenture – until I had got the title deeds.
- Q. And you had despatched certainly the mortgage money provided by Edward WONG to Danny Yiu & Co.?
- A. Yes.
- Q. And on the assumption that the others, the three directors, had attended at Danny Yiu Company's office and had signed the necessary documents and had provided the balance of the purchase price, is that right?
- A. Yes.
- Q. The transaction was, according to Hongkong ideas, complete, wasn't it? 40
- A. (Pause)
- Q. Well,, it was completed treating the exchange of money and undertaking as equivalent to completion, is that right?
- A. Yes.
- Q. But the actual completion of the transaction required Danny YIU to comply with his undertaking, didn't it?
- A. Yes.
- Q. Was there any respect in which at the end of the 27th January you regarded yourself as having acted otherwise than in accordance with ordinary Hongkong professional

- procedure?
- A. No.
- Q. Now I asked you that in relation to your mind at the 27th January. Looking back on the transaction now, with the benefit of hindsight, was there any respect in what you had done on behalf of Edward WONG differed from ordinary professional procedure in Hong Kong?
- A. I don't think there is any.
- Q. There isn't. Now can I ask you to pick up volume 4, first of all, page 101, which is dated 28th January, 1976, and that has at the bottom the typed signature Cecilia TSU. Who is Cecilia TSU? 10
- A. She was and is the chief clerk in the company's department of the Kowloon office.
- Q. And this note acknowledges that she received from you the file enclosed with the following documents concerning the company, and then the reference to the documents is set out and, secondly, "received instructions from Miss Leung to take clients' further instructions, details of which were shown on the Attendance Note enclosed herewith." Now the Attendance Note, is it that at page 86?
- A. Yes.
- Q. I see the Attendance Note does carry your company's reference number as on the bill that had been delivered – dated 26th January, WLL-82017? 20
- A. Yes.
- Q. So are you able to say when you handed over the file and gave instructions to Cecilia TSU?
- A. Most probably the 28th January.
- Q. Before you gave her instructions had she been concerned with those instructions, had she been concerned with the matter in any way?
- A. No.
- Q. Now early in February or during February was there concern about this matter of the transaction that had been completed on the 27th January?
- A. Not until Mr. Shum telephoned me. 30
- Q. Not until Mr. Shum telephoned you. Are you able to say roughly when Mr. Shum telephoned you?
- A. It was after the Chinese New Year, but I couldn't remember when exactly.
- Q. Look at your letter at page 46 in bundle 2 addressed to Danny Yiu & Co. That letter you write to Danny YIU saying: "Referring to the letter of 27th January and would be glad to hear from you as soon as possible with the balance of the title deeds. We are informed by the mortgagor (the purchaser) that part of the premises is subject to tenancy. Please let us have details of the same and confirm that no construction or key money has been accepted from the tenant." What does that business "subject to tenancy" refer to? 40
- A. As I understood it from my telephone conversation with Mr. Shum he was very annoyed that the tenant wouldn't pay him rent, but it might be that I misunderstood him on the telephone having heard his evidence. But the long and short of it was there was some problem with the tenancy.
- Q. At the moment when you wrote this letter had you been alerted to any doubt or suspicion about Danny YIU?
- A. No.
- Q. Did Mr. Shum tell you at any time that he had been to – he or somebody had been to Danny YIU's residential address?

- A. Yes.
- Q. When was that?
- A. That was in the morning – it's probably the morning of the 17th February.
- Q. And on the morning of the 17th February what happened; you received a message or a visit or what?
- A. Mr. Wong and Mr. Shum were waiting in the waiting room in the office before I got back to the office in the morning – it was about 9.15 in the morning – and they were very, very anxious and looking extremely worried and told me that they couldn't find Danny YIU and they thought he might have run away. 10
- Q. And what was your reaction that morning?
- A. At first I didn't believe them and I told them, "Oh, it's quite possible for a sole proprietor not to be contacted for some time because he might be in court, he might be on holiday; let me find out about it," and I sent them away so that I could find out more about it. But later on in the day it became apparent that Danny YIU had actually run away.
- Q. Did you telephone Danny YIU's office?
- A. Yes, several times.
- Q. And to whom did you succeed in speaking?
- A. I think a couple of times it was a woman's voice and then in the end it was a man's voice who told me that he could not find him either, in a sort of worried voice as well – he sounded worried himself, who was an employee in the office. 20
- Q. And so what did you do then?
- A. I couldn't remember whom I rang first, it was either Lo and Lo first or the Commercial Crimes Bureau.
- Q. Why Lo and Lo; why did you ring them?
- A. Because I couldn't remember where I got the information, but I knew Lo and Lo was acting for the purchaser of the remainder of – either for the purchaser or somehow the mortgagee or – I don't know, but somehow he was –
- Q. For the upper floors? 30
- A. For the upper floors.
- Q. The portion that Kai Ming had . . .
- A. Yes.
- Q. So you telephoned you say, you couldn't remember which you phoned first?
- A. Which one first – no.
- Q. You phoned Lo and Lo?
- A. Yes.
- Q. And what did you ascertain by telephoning them?
- A. That they had also sent the money to Danny YIU and that they had also reported the case to Commercial Crimes Bureau. 40
- Q. Who apart from Lo and Lo did you get in touch with? Did you get in touch with the police?
- A. Yes, and the Commercial – I couldn't remember whom I talked to either, there must be an entry somewhere – to Commercial Crimes Bureau and they said Lo and Lo has reported this matter to them that Danny YIU has absconded with the money.
- Q. Who else did you speak to?
- A. I also spoke to C.Y. Kwan and Co. acting for Hang Seng Bank.
- Q. Did you speak to a partner in your own firm?

- A. I also spoke to Mr. Thornhill.
Q. Did he come to your office?
A. I went to his office . . . Mr. Thornhill?
Q. Yes, Mr. Thornhill.
A. Well his office is just next door to mine.
Q. And did he come and talk to Mr. Wong or to Mr. Shum?
A. I think he went to talk to both of them.
Q. In your presence?
A. Yes.

10

MR. PRICE: My Lord, I have a few more questions. I don't know whether I have gone on long enough for a short break?

COURT: Well, take a short break.

3.45 p.m. Court adjourns.

4.05 p.m. Court resumes.

Appearances as before.

D.W. LEUNG Wai-ling o.f.o.

XN. BY MR. PRICE (Continues):

- Q. Miss Leung, when you realised that Danny YIU had or appeared to have absconded was that a matter of surprise to you?
A. Yes.
Q. Had you any previous knowledge or experience of a solicitor having received money against giving an undertaking and then failing to provide with his undertaking and absconding with the money?
A. Not to my knowledge.
Q. When Mr. Shum came to you in February of 1976 would it not have been sufficient for you to have said to him that "Johnson, Stokes & Master were not acting for you in the purchase of the property"?
A. I don't remember what I said to him.
Q. My question was would it not have been sufficient for you to say that?
A. Yes.
Q. Did you say that or anything like it to him?
A. I don't know if I said it on that occasion, but I definitely remember I said it on a number of occasions to Mr. Thornhill, to the clerk who prepared the debenture and also to Mr. Shum probably.
Q. What did you say to Mr. Shum, that is the most important thing?
A. When he telephoned me about the payment of rent regarding the tenancy I asked him to telephone Danny YIU because I was not acting for him on the purchase.
Q. Subsequently he came back to you and said, "But I can't find Danny YIU; I can't get hold of Danny YIU"?
A. Yes.

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30

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In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling cross-
examination

Q. Have you a copy of the third party amended statement of claim that you could refer to?

A. Yes.

Q. In paragraph 9 – this is a matter of introduction, not a question – the third party, that is, Bovill – I am so sorry, Bovill against the third party – Bovill as the first defendant, pleads that it “needed and the Plaintiff was willing to advance credit facilities to the extent of \$1,355,000 to enable the 1st Defendant to complete the purchase (the 1st Defendant paying \$310,000 out of its own funds to make up the said balance of the price) on the security of a legal mortgage of the premises and guarantee executed by the 2nd, 3rd and 4th Defendants in respect of such credit facilities to the 1st Defendant,” and asserts “the defendants were willing to accept such credit facilities and to provide the said security.” If you turn to paragraph 11, it says: “The Defendants retained and employed the Third Party as their solicitors for reward,” now I will ignore the next thing, “to advise them on the legal aspects of all the matters and proposed transactions referred to in paragraph 9.” Miss Leung, you were the solicitor concerned at Johnson, Stokes & Master, was your firm retained by the 1st defendant to act for them on the legal aspects of all the matters and proposed transactions referred to in paragraph 9?

A. Paragraph 9 being the legal mortgage?

Q. Yes. Mr. Shum and his company – were you retained to advise Mr. Shum and his company, new company, on the legal aspects of any of those matters?

A. No.

Q. Were you asked by Mr. Shum to advise on those matters or any of them?

A. No.

Q. And then it continues by saying that your firm was retained to advise them on the means by which. . . and that means to advise Mr. Shum and his company, “on the means by which those matters could be effectively achieved.” Were you retained or asked to advise Mr. Shum on those matters?

A. No.

Q. And that you were retained by Mr. Shum and his company “to draft the necessary documents”. Did you draft the necessary documents on their behalf?

A. No.

Q. Were you asked to do so – to draft the necessary documents on their behalf?

A. No.

MR. PRICE: I have no further question for Miss Leung. I tender her for cross-examination.

XXN. BY MR. CHEUNG:

Q. Miss Leung, at the first meeting between Mr. Wong and Mr. Shum and yourself relative to this transaction did Mr. Wong telephone you in advance before he came to your office?

A. I have no recollection at all.

Q. So you will not dispute his evidence that at any rate he telephoned you before he brought Mr. Shum to your office?

A. That is very probable, yes.

Q. And when he came, can you please tell his Lordship as briefly as you can what occurred on that first occasion?

- A. You mean in addition to what I have said?
- Q. No, I would like you – because you skipped over this rather quickly in your evidence in chief, will you please repeat, say as briefly as you can what occurred on that occasion, in your own words, according to your best recollection?
- A. According to my best recollection, Mr. Shum and Mr. Wong came to my office and Mr. Wong said Mr. Shum was purchasing a property and he would like to assist him in the purchase but he would like his loan to be secured by the first legal mortgage over the property that Mr. Shum was purchasing, and then in the course of the conversation Mr. Shum informed me that he would like to use North American Meat to purchase the property and that this probably would be the first of a series of purchase and that North American Meat would be intended to be a property holding company. Then eventually after a little discussion between them, to which I did not join, Mr. Wong indicated that Mr. Shum would be purchasing a new shelf company from J.S.M., and I took brief instructions from Mr. Shum regarding the directors and so on, but he was not quite sure what sort of instructions he would give me. So he said he would later confirm with his friends and then would come back to me later on with further instructions. 10
- Q. Relative to what?
- A. Relative to the company's structure because I needed to have the names of the directors and their addresses to fill in. The most basic thing I was concerned about was that there should be directors appointed on the date of the debenture. So I was only concerned with the details of the directors knowing that the other details would be attended to by the clerk in the Companies Department. The amount of the loan was not specified. It was a rough figure and I had to confirm – Mr. Wong said that he would confirm the exact figure later on, but I knew I had to put the instructions down in writing because Mr. Wong himself was not going to do it. So I pressed him to give me a figure which he did eventually and that's why the letter was written one day after the meeting. 20
- Q. You had acted for Mr. Wong in a number of previous transactions? 30
- A. Yes.
- Q. Mortgages?
- A. Yes.
- Q. Mr. Wong would tell you in essence what the transaction was?
- A. Yes.
- Q. He would tell you who the other party was?
- A. Yes.
- Q. And he would leave it to you to do such things as search the register in the Land Office, correspond with the solicitors on the other side and put the necessary documents together and get them executed, is that not right? 40
- A. Yes.
- Q. He left the entire business of the nuts and bolts to you?
- A. Yes.
- Q. Have you on previous occasions acted for Mr. Wong as a mortgagee and at the same time act for his mortgagor?
- A. Not to my recollection, no.
- Q. Did you ask Mr. Wong or Mr. Shum whether anybody represented Mr. Shum or his companies in the proposed mortgage?
- A. No, it is not usual for a mortgagor to be represented on a mortgage.

- Q. You say it is most unusual for a mortgagor to be represented on a mortgage?
- A. Yes.
- Q. Was that your reason why you didn't enquire whether he was represented by anybody or not?
- A. I did make some enquiries with Danny Yiu later on as to whether or not – are you talking about the mortgage or the purchase?
- Q. I am talking about the mortgage and I am talking about your first meeting with Mr. Shum and Mr. Wong.
- A. That's why I did not make any enquiries as to whether or not anyone was acting for Shum on the mortgage. I did not make any enquiries. 10
- Q. Because in your experience mortgagors are not represented?
- A. Yes, that's right.
- Q. Were you in court when Mr. Edmund Cheung, President of the Law Society, gave evidence?
- A. Part of the time, yes.
- Q. Did you hear him say that if the mortgagee brought along the proposed mortgagor he would invariably ask who represented the mortgagor, if anybody?
- A. I did not hear that.
- Q. You did not hear that? 20
- A. If I did, I would assume that his firm has a different practice from J.S.M.
- Q. So the practice in J.S.M. is to make no enquiry at all whether the mortgagor was being represented?
- A. Yes.
- Q. Because you would not expect the mortgagor to be represented at all?
- A. Yes. If the mortgagor was represented he would make his own request to us that the mortgage document be sent to his solicitor for approval.
- Q. If he just goes to you, he was represented by another solicitor would you think it proper to take instructions from him or speak to him?
- A. On the same matter, no. 30
- Q. So in that respect you would agree with Mr. Edmund Cheung, would you?
- A. Sorry?
- Q. If you knew he was represented by another solicitor you would not take instructions from him?
- A. No.
- Q. That's what Mr Edmund Cheung said, do you remember?
- A. I wasn't there. I don't think I was here the full time he was talking.
- Q. You don't remember that particular piece of evidence?
- A. No.
- Q. Do you, as a firm, get paid the same amount of costs whether you act just only for the mortgagee as when you act for both mortgagee and mortgagor? 40
- A. There was no incident to my knowledge and recollection and in my experience where we acted both for the mortgagor and the mortgagee.
- Q. You have no experience of it?
- A. No.
- Q. And you say you have never acted both for mortgagor and mortgagee at the same time?
- A. That's right, but we might be acting for the mortgagee and the purchaser on the purchase and this same purchaser might be the mortgagor.
- Q. No, I am just talking of mortgagee and mortgagor. Do you say categorically that 50

in your experience with Johnson Stokes you never acted for mortgagor and mortgagee at the same time?

A. Yes, I say that.

Q. Do you know it is the general rule in Hongkong that if a solicitor acted for mortgagor and mortgagee they would get one set and one set of costs only; do you know that?

A. No, because I have never considered the problem.

Q. Did you advise the mortgagor to get a solicitor to represent him?

A. No.

Q. You were told, were you not, that the agreement between Mr. Wong and Mr. Shum was that the principle should be repaid by instalments over a period of years?

A. I think Mr. Wong told me that at the first meeting.

Q. And was the period 7 years?

A. If he said so. I couldn't remember, but I read my own memorandum this morning and it said 7 years.

Q. And it was contemplated that there would be equal repayments or equal instalments repaying the principle, is that correct?

A. I don't think I let Mr. Wong went as far as that because as soon as he mentioned the instalment loan then I enquired as to whether or not they had continuing business relationship which Mr. Wong said yes, and then the whole idea of instalment loan was grabbed as far as Mr. Wong was concerned.

Q. You were told by Mr. Wong in Mr. Shum's presence that there would be an instalment plan for repayment of this mortgage?

A. Yes, even under the G.B.F. form which we have which we do for a number of other clients, it is always possible for the mortgagor and mortgagee to come to a private arrangement between themselves as to the terms of the repayment which is not shown in writing in the mortgage.

Q. But the original concept was that there should be payment by equal instalments of capital, was it not?

A. That was the original intention, yes.

Q. If there were to be equal instalments of payment of capital there would be a reducing balance of capital owing, is that not correct?

A. If there was, yes.

Q. And if, there was, and if the instalments were paid, the amount of interest payable each month, assuming the monthly instalments, would be reduced from month to month, is that not correct?

A. Yes.

Q. And you say it was on your initiative that you enquired whether there would be continuing transactions between Mr. Wong and Mr. Shum?

A. Yes.

Q. What prompted you to ask that?

A. From previous transactions because all Mr. Wong's mortgagors were – have been his business associates.

Q. How does that lead you to think that this one would continue to have continuing business relationships with him?

A. That's why I asked. It was just a guess and then I asked and it was confirmed.

Q. Both by Mr. Shum and by Mr. Wong?

A. By Mr. Wong.

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Q. And both of them agreed that there should be no mention of instalments in the mortgage deed or debenture?

A. I asked Mr. Wong if he could deal with the instalment loan himself so that the mortgage is to be a continuing security to his benefit and Mr. Wong agreed to it.

Q. Did you ask Mr. Shum whether he would agree to it?

A. He did not object.

Q. But did you specifically ask him whether he was content to do away with the provision which would allow him to pay by regular instalments rather than the whole lot on demand as this mortgage deed?

A. No.

Q. Did you not think that the present mortgage deed is more disadvantageous to the mortgagor than what he had verbally agreed with Mr. Wong when they stipulated for instalment payments?

A. It is a more flexible arrangement for both parties, but if you insist on saying that if the mortgage loan is to be repaid on demand and that is a disadvantage for the mortgagor then I agree to it, but he can always – if he is demanded to repay immediately then he can always find another financier at a cheaper interest rate.

Q. That's what you think?

A. Yes.

Q. If he could not find another financier he would be met by a mortgage deed which enabled the mortgagee to demand repayment of the whole rather than the instalments that were due, is that correct?

A. That's correct.

Q. And you agree that would be a disadvantage to the mortgagor?

A. Yes.

Q. You realise that if the debenture or mortgage had stipulated that there shall be equal monthly instalments repaying the principle then the mortgagee cannot demand payment of the whole unless there was some default on the part of the mortgagor, isn't that correct?

A. Yes.

Q. You did not seek to explain this disadvantage to Mr. Shum?

A. No, but it was not possible on the date, on the 21st January – well I suppose it would become possible on the 22nd January to prepare the instalment loan because the amount of the loan was then ascertained, but as on the 21st January, I don't think I could agree to prepare for Edward Wong an instalment loan mortgage because even the amount of the loan has not been ascertained.

Q. You only intended to prepare the mortgage deed after you had ascertained what the exact amount was, isn't that right?

A. Yes, that's true.

Q. Once you knew that you could have prepared an instalment repayment document, could you not?

A. Yes – well, either way, there are forms for it and I don't think I am trying to get less work or more work or getting more money or anything. I don't get any advantage by doing either of those.

Q. I am not asking you whether you get any advantage or not. I am asking you whether you expressed the point or not to Mr. Shum that he would be at a disadvantage?

A. No. I didn't.

Q. And yet you took it upon yourself to say it was inappropriate for the North

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- American Meat Company to own property, is that right?
- A. Yes.
- Q. You were handed the Memorandum and Articles of Association?
- A. Yes.
- Q. And you say you were reading it, is that correct?
- A. Yes.
- Q. Did you read right through the Memorandum and Articles of Association?
- A. No, I didn't, not word by word.
- Q. How far did you go? 10
- A. Just flipping through the Memorandum.
- Q. You looked at the objects clause?
- A. Yes.
- Q. You looked at the beginning?
- A. Well, right through, it has a power to mortgage and it has a power to purchase property, but then the main object is ridiculous for this situation.
- Q. You say you did read right through the objects clause?
- A. I flipped through it. I can't say that I read every word of it.
- Q. Did you or did you not read it carefully?
- A. I did not read it carefully. 20
- Q. Did you read the end of the objects clause?
- A. No.
- Q. Are you not familiar that the end of most objects clause would state that each of the objects was independent of each other?
- A. Yes.
- Q. Did it not occur to you that those words would be found in this Memorandum of Association?
- A. Yes, it occurred to me that it might be there.
- Q. But you didn't even bother to find out?
- A. No. 30
- Q. If it had been there then there could not be any primary objects of this company?
- A. Not on account of – perhaps not so much on the Memorandum, but you must remember that I was pressed for time to complete this matter and it would take me, say, some time to read through the Memorandum and Articles of Association of North American Meat and this Memorandum and Articles being prepared by accountants sometimes you have to check because they always adopt table A so that you have to check with table A and their own Articles to see what clauses have been deleted and what clauses have been modified to make sure that Article 69 doesn't apply and make sure that the directors don't require clarification shares and so on. It is time consuming as opposed to having a clean shelf company which you know you don't have to look at and it would be O.K. 40
- Q. I was merely referring to the Memorandum of Article and not the Articles of Association, Miss Leung. You read far enough to realise this company had power to buy properties and mortgage properties?
- A. Yes.
- Q. In your normal experience you would expect a sweeping up clause at the end of the objects clause saying that each object would be a main object?
- A. Yes.
- Q. And that each object would be construed independently of any other paragraph, is

- that not right?
- A. Yes.
- Q. So if you have found out that much there would have been nothing inappropriate about this company owning property or mortgage, would it?
- A. No, but I was not insisting on their getting a company from us. I was keeping quiet all the time. I didn't suggest that they should get a shelf company from J.S.M.
- Q. You were very reluctant to sell them one, is that right?
- A. I wasn't keen on selling it.
- Q. Because it would entail more work on your part, is that right? 10
- A. It wouldn't be more work. It would mean I have to ask somebody else to do it in the Kowloon office.
- Q. Both Mr. Shum and Mr. Wong say you positively encouraged Mr. Shum to buy a shelf company from Johnson Stokes on the grounds that it didn't sound nice for a meat company to own property or that it was inappropriate for a meat company to own property. Do you disagree with that?
- A. I think I did comment that it didn't sound very nice nor was it appropriate, but I don't think I was encouraging them to buy a company from us.
- Q. Johnson Stokes have a large number of shelf companies ready to be sold, have they not? 20
- A. Yes.
- Q. And they prepare these shelf companies in order to make money selling them?
- A. Yes.
- Q. Not only in selling a incorporated company but in all the attendant work that would go with the documentation, is that not right?
- A. Yes.
- Q. And in this case Johnson Stokes did make money selling the shelf company and putting through various resolutions and filling various documents, is that not correct?
- A. Yes. 30
- Q. And is it not part of your duty, if possible, to try and make some money for your principals?
- A. I have always had more than my fair share of costs. I don't need to get more costs to justify my salary.
- Q. I am not suggesting that you were going to benefit personally. I am suggesting wasn't it your duty to try and make money for your principals if it could be done?
- A. Yes, my duty would be to generate costs by conveyancing.
- Q. Or by selling shelf companies?
- A. That would not be within my mandate.
- Q. You realise now, do you not, that the name of the North American Meat Company 40 could be quite easily changed?
- A. Yes.
- Q. Just as easily as you change Bovill's.
- A. Yes.
- Q. I suggest to you the only reason why Mr. Shum in the end decided to buy a shelf company from you was that you were keen to earn some profits for your principals.
- A. I don't think so.

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MR. CHEUNG: My Lord, would this be a convenient point?

COURT: 10 o'clock.

4.40 p.m. Court adjourns.

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10:06 a.m. Court resumes

Appearances as before.

D.W. 3 – LEUNG Wai-Ling (o.f.o.)

XXN BY MR. CHEUNG (Continuing)

- Q. Miss Leung, you said yesterday that at the first meeting with Mr. Wong and Mr. Shum no mention was made of the Guarantee which is now to be found in Volume 3, page 60, is that correct?
- A. Yes, that's my recollection – that was my recollection. 10
- Q. And you cannot now remember whether, you yourself prepared it or whether a clerk in the Conveyancing Department prepared it, is that correct?
- A. Yes.
- Q. And I think you told my Lord yesterday that you did not explain that Guarantee line by line to Mr. Shum or to his associates, is that correct?
- A. Yes, that's right.
- Q. You explained the gist of it, is that correct?
- A. Yes.
- Q. Now, I find that on re-reading the notes on their evidence, they agreed with you that no mention had been made of a Guarantee on the 21st of January, the date of the first meeting. Does your recollection also accord with this that on the 27th of January you said to them, "This is a Guarantee whereby you would be personally liable to pay if the instalments were in default."?" 20
- A. I don't think I mentioned the instalments but I did say that it is a guarantee under which the directors would be jointly and severally personally liable.
- Q. They are quite positive, both of them, that you said they would be liable if the instalments were not paid; you yourself said you cannot remember whether you mentioned instalments or not, is that right?
- A. I think I put the matter of instalments out of my mind ever since the first meeting.
- Q. That's not an answer to my question if you please. Do you now not remember whether you said to them that if the instalments were in default, they would have to pay up personally? 30
- A. No, I do not remember.
- Q. Now, in between that first meeting and the 27th of January when they signed that document, did you communicate with them to tell them that that would be one of the documents they would have to sign?
- A. I do not remember whether I mentioned it or not. It's more likely that I did not mention it.
- Q. More likely that you did not?
- A. Yes. 40
- Q. Now, if you did not actually prepare this document yourself, did you go through it before you asked them to sign it?
- A. No, I did not go through it.
- Q. Can you explain to my Lord how in the third paragraph on page 60 it came about

that the interest rate was made to be 2.1% from the date of demand by you for payment?

COURT: It's bundle . . .

MR. CHEUNG: Bundle 3, page 60.

- A. This Guarantee was adapted from previous Guarantees given by other companies in favour of Edward Wong Finance and in the previous transactions the interest rate charged by Edward Wong was 2.1% per month – 2.1%, it doesn't say "per month" here, and that's why somehow this was carried over into this Guarantee by mistake.
- Q. You didn't check yourself whether the amount of interest-rate of interest was correctly stated. 10
- A. No, I did not.
- Q. You didn't yourself check what the period for 2.1% was.
- A. No.
- Q. So as far as Edward Wong & Company were concerned, if they tried to sue on this agreement, there would be an ambiguity as regards whether 2.1% was for one month or per annum or some other period, is that right?
- A. Yes.
- Q. You admit that that was careless.
- A. Yes. 20
- Q. But you were paid or Johnson, Stokes were paid to exercise reasonable care and skill in this transaction on behalf of Edward Wong & Company.
- A. Yes.
- Q. How is it that you allowed that careless mistake to go by?
- A. I don't know.
- Q. Perhaps you were too busy, were you?
- A. Not more busy than any other year, any other same month in the other years. Just before Chinese New Year, that's the usual business.
- Q. Because the rate of interest was stated to be 2.1%, I take it you did not yourself prepare this agreement but some clerk in the Conveyancing Department. 30
- A. Or it may be my secretary but looking at the typing, it's more likely that it's the clerks. It's the typing pool's typewriter rather than my secretary's typewriter.
- Q. I see. It looks as though this came from the typing pool . . .
- A. Yes.
- Q. . . . probably using some IBM repetitive typewriter.
- A. We didn't have any IBM for the typing pool then. It's just ordinary electric typewriters.
- Q. So you just assumed that the typing pool or whoever prepared this would follow your instructions.
- A. Yes. 40
- Q. Now, you remember that later you wrote to Danny Yiu & Company asking for his undertaking which is page 34 in Bundle 2. You see that paragraph which says: "We shall ask our clients to put us in funds. . ." etc. ". . . upon receipt of your undertaking that:– (1) you will within TEN DAYS upon receipt of our cheque send us the following documents:–" You see that?
- A. Yes.

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- Q. And you see the last paragraph but one which is sub-paragraph(3) on page 35 which says, "If you are not in a position to send us all the documents as stated above within the above-mentioned period, you will hold the said sum of \$1,355,000 to our order and will not release the same to your clients" Do you see that?
- A. Yes.
- Q. And in the result you did send over the money, three cashier orders, on the 27th of January.
- A. Yes.
- Q. Did you make enquiry after 10 days had elapsed of Danny Yiu & Company whether he had completed the assignments and arranged for the reassignment from the Hang Seng Bank? 10
- A. I did not personally make enquiries, but the file was immediately after completion left with my clerk and I would assume that he would take up the matter after the ten day period. I understand that he made some telephone enquiries.
- Q. Which clerk was this?
- A. David Leung.
- Q. He's the man who's alleged to have presented the bills. . .
- A. Yes.
- Q. . . . to Mr. Shum. 20
- A. Yes, the same person.
- Q. And he's going to be a witness here, is he?
- A. I think our counsel is going to call him.
- Q. Did you actually check with Mr. Leung whether he had made telephone enquiries?
- A. Yes, because I think Mr. Shum telephoned about the tenancy and then I remembered the case so I asked David Leung, "Have you checked? Have we got the title deeds, and so on," and he said, "Yes." but I don't think – I cannot now remember whether it was immediately on the expiry of the ten days' period or whether it was shortly after that.
- Q. I see. You made enquiry of Mr. Leung after you say Mr. Shum had telephoned you about some tenant, is that correct? 30
- A. Yes.
- Q. And that was on the 16th of February.
- A. No, it would be a number of days earlier. I could not remember – I think he rang me at least twice after completion, one to talk about the tenancy and then I told him to go to Danny Yiu because I didn't act for him on the purchase and then he rang again to say that he could not find Danny Yiu or something, something like that.
- Q. Well, the first time you mentioned any tenancy to anybody is in your letter of the 16th of February 1976, page 46 in that file. 40
- A. I am not absolutely certain – I cannot say for sure but I think at the first meeting the matter of the tenancy was raised but I could not swear to it.
- Q. What I am interested at the most, Miss Leung, is when did you first check with Mr. Leung, as you say, whether Danny Yiu had fulfilled his undertaking?
- A. It would be about, I think, 10th of February.
- Q. I see. Until then you had forgotten about the matter, is that right?
- A. That's normal because as soon as I consider the case completed, then the file is left with a clerk and he would follow up the matter. In fact, we now have a – but that's irrelevant.

- Q. You now have an automatic system – automatic reminder.
- A. No, not an automatic reminder but we have a solicitor personally responsible for post-completion work.
- Q. That's since Danny Yiu disappeared?
- A. No.
- Q. When was that instituted?
- A. About two years ago.
- Q. So according to your best recollection, Mr. Shum rang you about the 10th February, is that right? 10
- A. Yes, it would be about that time.
- Q. And on that occasion did he only mention this question of a tenancy or did he also mention he could not find Danny Yiu?
- A. No, I think he just – at the first telephone conversation he just mentioned about the tenancy.
- Q. I see and did you at once or was it much later that you checked with your clerk, Mr. Leung, whether Danny Yiu had complied with his undertaking?
- A. I think it was at once.
- Q. Can you remember what reply he gave you?
- A. No. 20
- Q. Did you ask him how many times he had rung up Danny Yiu?
- A. No.
- Q. Did he tell you that he was unable to get in touch with Danny Yiu?
- A. No.
- Q. Did you ask him to follow up and chase Danny Yiu?
- A. Yes.
- Q. How many times did you do that?
- A. I think a couple of times.
- Q. And what response did Mr. Leung report back to you?
- A. It was a negative response. 30
- Q. Did he say anything about being unable to contact Danny Yiu on these two subsequent occasions?
- A. No.
- Q. What did he say?
- A. I cannot remember. I think I just asked him to chase for the deeds and he said, "Yes, I'll do it."
- Q. Did you ask him to report back?
- A. No.
- Q. You just left it to him?
- A. Yes. 40
- Q. And as for this matter of the tenancy, you did not take any action about it until the 16th of February, is that right?
- A. Yes.
- Q. And you now admit it's possible you misunderstood what Mr. Shum said to you on the telephone, is that correct?
- A. Yes.
- Q. It is possible, according to his recollection, that he complained that someone was still trying to collect rent from him after he had purchased the premises, is that correct?

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- A. It is possible, yes.
- Q. But that did not make an impression upon your mind.
- A. Because I misunderstood him.
- Q. I see, and you regarded you were fulfilling your duties towards Edward Wong & Company simply by leaving it to your clerk to find out from Danny Yiu whether the deeds were ready and to chase him up, is that right?
- A. Yes.
- Q. You did not take the trouble yourself to find out.
- A. No. 10
- Q. Did you expect that undertaking to be honoured within ten days?
- A. It is possible to honour that undertaking but I must admit I did not expect it to be fulfilled within the ten days.
- Q. Why not?
- A. Because he had a lot of people to line up and a lot of papers to prepare, a lot of documents to sign.
- Q. Did he ever – In answer to your letter of the 27th of January, the one asking for an undertaking, did he ever point out to you that it was not possible to comply with your undertaking within ten days?
- A. No. 20
- Q. So he did not tell you that he had any difficulty in lining up his clients or making the necessary arrangements for re-assignment, is that right?
- A. Yes, that's right.
- Q. You did not seriously expect, is that right. . .
- A. No, I did not.
- Q. . . . that the undertaking would be complied with?
- A. No.
- Q. In other words, it's just a form of words, is that right?
- A. Yes.
- Q. Just as in the minutes of the meeting of the Directors of Bovill which you looked at yesterday you always state that the meeting was held at the registered office of the company no matter where it was held. 30
- A. Yes.
- Q. That was the Johnson, Stokes & Master's practice.
- A. Yes.
- Q. And is it not also just a form of words that in the bill that you render to the – that you ask a mortgagor to pay you address it to the mortgagee payable by the mortgagor. It's just a form. . .
- A. That's a JSM practice.
- Q. . . . whether you were acting for a mortgagor or not? 40
- A. We never act for the mortgagor.
- Q. I am interested in that reply further. You say for sure that you have never acted for a mortgagor in a transaction.
- A. In a mortgage, yes.
- Q. In a mortgage transaction.
- A. Yes.
- Q. That's what I said, a mortgage – a mortgagor. Can you say that that was the similar express of all other solicitors in Johnson, Stokes.
- A. I am afraid I don't have the knowledge. I can only say that in the Kowloon Office

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- that is the JSM practice.
- Q. Was it laid down as a directive from some partner that your firm was not on any account to act for a mortgagor?
- A. No, it was not.
- Q. Was any direction given to you that under no circumstances were you in the Kowloon Office to act for a mortgagor?
- A. No.
- Q. How did this practice then grow up?
- A. I don't know. I came into the practice. 10
- Q. But even now can you say whether all solicitors in the Kowloon Office did not act for mortgagors or are you restricting your reply purely to your own experience?
- A. I can say that for all bank clients. We do not act for the mortgagor in all solicitors but I can only say that for other clients who are not banks that I can only limit to my own experience.
- Q. So as regards the Kowloon Office where the mortgagee is a bank, you can say positively that none of the solicitors there would, if asked, act for mortgagor, is that correct?
- A. Yes.
- Q. But where the mortgagee client is not a bank, you cannot say for sure what the experience of other solicitors was. 20
- A. Yes, that's right.
- Q. And can you speak as regards the practice of the office in Hong Kong?
- A. No.
- Q. Can you speak of the practice in other offices of Johnson, Stokes within the territory of Hong Kong?
- A. No.
- Q. Johnson, Stokes have other branches apart from the Hong Kong and the Kowloon Office.
- A. Yes. 30
- Q. Now, you say that Mr. Shum telephoned you twice in the week, about seven days, prior to the 16th of February when you wrote that letter about the tenancy, is that correct?
- A. Yes.
- Q. And the first time, according to your recollection, he didn't refer to anything else except a tenancy.
- A. That's my recollection.
- Q. He didn't ask you whether the title deeds had been sent over from Danny Yiu -- the first time we're talking about.
- A. I cannot remember. 40
- Q. It is possible?
- A. It is possible, yes.
- Q. At any rate, he rang up the second time?
- A. Yes.
- Q. Was that prior to your writing that letter of the 16th of February?
- A. I cannot remember but when I wrote that letter of the 16th of February I still had no reason to suspect Danny Yiu was dishonest.
- Q. No, I am asking whether when you wrote that letter of the 16th of February whether Mr. Shum had enquired of you whether the title deeds had come back from

- Danny Yiu. You try and answer please that question?
- A. I cannot remember definitely, but it is more likely that I would write that letter after two telephone calls than after one telephone call.
- Q. Especially two telephone calls enquiring whether you had got the title deeds, is that not right?
- A. That is a possibility but I cannot remember.
- Q. Did you feel that Mr. Shum was beginning to pester you about getting the title deeds back from Danny Yiu or was he, in your view, being just a little too pressing, too particular, at that time? 10
- A. Very few mortgagors would ring me twice after a mortgage, no matter about what.
- Q. You were getting unusual treatment from a mortgagor, is that correct?
- A. Yes.
- Q. And you rather resented it, is that not correct?
- A. I don't think I resented it.
- Q. At any rate, was it on the 17th of February that you saw Mr. Wong and Mr. Shum?
- A. Yes.
- Q. Now, on this occasion did you say to Shum words to this effect: "Don't press me so hard. I would sort it out for you."
- A. I don't remember what my exact words were. 20
- Q. I see. It's likely that your client who does not deal very often with solicitors might remember better what you said than you yourself would remember, is that correct?
- A. Can you repeat your question? Sorry.
- Q. Mr. Shum is not a person who frequently deals with solicitors. Is it more natural that he would probably better remember what you, a solicitor, said than you would remember saying to a particular client on a particular date?
- A. I can only say for myself that I could not remember what I said to him.
- Q. Can you remember saying to him or to Mr. Wong, "You don't have to be so nervous."
- A. I can't . . . 30
- Q. Is it possible?
- A. I can't remember saying that.
- Q. Is it possible?
- A. I don't think I would say that to a client telling him that he's nervous.
- Q. But you were getting very unusual treatment, were you not, from mortgagor and mortgagee pressing you about title deeds and execution?
- A. As lawyers, we are getting unusual treatments all the time. It's either this or that. I don't think I was unduly disturbed by this treatment.
- Q. But you can't say positively you didn't use words like: "You don't have to be nervous." even to calm him. 40
- A. I don't remember but I don't think this is something that I would have said.
- Q. But as far as you knew at that time Danny Yiu was all right and absconded, is that correct?
- A. What do you mean by he's all right and absconded?
- Q. At the time that Mr. Wong and Mr. Shum saw you on the 17th. . .
- A. Yes.
- Q. . . . you had no knowledge that Danny Yiu had absconded.
- A. No.
- Q. You had no reason to believe that Danny Yiu was dishonest.

- A. No.
- Q. You had no reason to believe that Danny Yiu would not fulfil or comply with his undertaking.
- A. Apart from the time limit, yes, I would expect him to fulfil the undertaking to the letter.
- Q. So isn't it natural for you to say, "You don't have to be nervous."
- A. I don't think this is something I would have said.
- Q. Not even to reassure them or to calm them?
- A. I don't think so. 10
- Q. But am I right in saying that Mr. Wong certainly was very agitated?
- A. Yes, I could tell that he was very agitated.
- Q. Did you try to calm him down?
- A. I could not remember what I did exactly but I remember I had other things to do that morning and because they came down even before I arrived, waiting for me to come in and broke the news to me that they thought that Danny Yiu had absconded, I didn't believe them. I needed time to sort out matter. So I asked them to go away.
- Q. And not bother you for the meantime.
- A. So that I can find out what's happening.
- Q. That's right, so you said to them, "Please leave me alone. Don't bother me for the moment whilst I find out what's happening." some words to that effect. 20
- A. Some words to that effect, yes.
- Q. And in fact, do you remember Mr. Wong being quite sharp with you speaking rather loudly to you that this was a very important matter and that you should attend to it?
- A. I did attend to it. I think he probably did say something like that that it was very important.
- Q. Now, yesterday in answer to Mr. Price dealing with the documents that Danny Yiu had sent with his letter of the 23rd of January, page 28 in the same bundle, you said in answer to Mr. Price that you thought it would be proper for Mr. Chan to be joined as second confirmor in the Assignment, is that correct? 30
- A. Yes.
- Q. Do you still hold that view now that Mr. Chan ought to be joined?
- A. Yes.
- Q. And in fact you went so far as to telephone Danny Yiu about it.
- A. Yes.
- Q. And you said he was reluctant to joint Mr. Chan as second confirmor.
- A. Yes.
- Q. Did you reason with him that the proper thing to do was to join Mr. Chan as second confirmor? 40
- A. I could not remember what I said. I could have reasoned with him but I don't think I was very insistent because after all that's his document.
- Q. That was the document that would confer title on Bovill which in turn would convey a legal estate to Edward Wong & Company.
- A. Yes.
- Q. Didn't you think that for the protection of Edward Wong & Company you ought to have been insistent that the Assignment to the mortgagor should have the proper parties?
- A. Yes.

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- Q. Did you not press that point on Danny Yiu?
A. No.
Q. Why not?
A. Because we found another way out.
Q. What was the other way?
A. The other way is cancelling the agreement between Lucky Time and Kai Ming and Chan Sun-ming.
Q. Cancelling in the sense of treating Chan as a broker?
A. Yes. 10
Q. Cancelling in the sense of treating the profit he made as commission rather than profit on re-sale.
A. Yes.
Q. And you agreed to that course rather than insist on what you had thought would be the proper form of Assignment.
A. Yes.
Q. Did you give in easily to Mr. Yiu?
A. I think I easily – more readily agreed to it because I didn't like the Chinese agreement between Kai Ming and Chan Sun-ming partitioning the ground floor for Chan Sun-ming and the upper floors for Kai Ming because in the Agreement by the two of them with Lucky Time there was no mention of the proportion each is to be responsible and the consent of Lucky Time was not obtained to that partition. If I were acting for Lucky Time, I would like to be able to say that I hold them liable either jointly or severally or in equal shares or I don't know what the presumption is. Therefore, in that sense even if Chan Sun-ming is to join in as a party to the Assignment, I am not so sure whether I would not even have to pull in Kai Ming as another party to confer that that one/fifth share has been agreed. 20
Q. That would have been the only other proper thing to do to join in Kai Ming as . . .
A. . . well, yes. 30
Q. . . a second confirmor, is that right?
A. The second confirmor would consist of two parties, yes.
Q. That's right. Did you actually mention that Kai Ming should also be joined as a second confirmor to Danny Yiu?
A. No, because I didn't like the Chinese Agreement and somehow I want to ignore it somehow although I didn't . . .
Q. You didn't like the Chinese Agreement.
A. No.
Q. I see. Let's examine your reasons for dislike of agreements made by laymen. They had agreed to buy the property jointly from Lucky Time, had they not? 40
A. Yes.
Q. And surely, purchasers are able to deal with the property in such manner as they wish, are they not?
A. Yes.
Q. They can re-sell it.
A. Yes.
Q. They can partition it.
A. Yes.
Q. And they had agreed to partition it with the statement that Chan should get the

- ground floor and Kai Ming the upper floors, is that not right?
- A. Yes, that's what the Chinese Agreement purports to do.
- Q. And it provided what Chan should pay and what Kai Ming should pay.
- A. Yes.
- Q. I fail to understand why a feeling of dislike for this Agreement should have kept up or influenced you. I would like you to explain further that dislike of this Chinese Agreement.
- A. Because Lucky Time's consent was not apparent on the Chinese Agreement.
- Q. What consent was required from Lucky Time in order that Kai Ming and Chan should partition, tell me. 10
- A. If, say, for instance, the matter stops at Chan Sun-ming and Kai Ming and Chan Sun-ming has not resolved and Chan Sun-ming is to default in paying his one/fifth share, then I think Lucky Time would be able to sue Kai Ming for it and if Kai Ming defaults in payment of his four/fifth shares, Lucky Time could sue Chan Sun-ming for it.
- Q. But all this could have been sorted out in the Assignment which would spell out formally in legal language what the respective rights and liabilities of Chan, Kai Ming, Bovill well.
- A. But we haven't got to the assignment stage on the 23rd of January. 20
- Q. Forgive me. On the 23rd of January – I am not talking of the 21st of January, I am talking of the 23rd of January after you had got a copy of the Assignment from Mr. Ho, document No. 8, page 28, file 2.
- A. Yes.
- Q. Am I not right or have I been misunderstanding you, Miss Leung, that it was after you had received that copy of the draft Assignment from Mr. Ho Sau-ki, document No. 8, that you rang Danny Yiu about joining Chan as second confirmor.
- A. Yes.
- Q. Do you suggest that it was beyond the wit of yourself and Mr. Yiu to word the Assignment in such a way that the rights and liabilities of Kai Ming, Chan and Bovill could be properly sorted out? 30
- A. I think I did attempt – Danny Yiu and I did attempt to sort it out in the way spelled out in my letter of the 27th of January.
- Q. But at any rate you suggested Chan should be a second confirmor and you allowed Danny Yiu to talk you out of it, is that right?
- A. Yes.
- Q. You realised, of course, that the Assignment would understate the real consideration that was being paid by Bovill.
- A. That is one way of putting it.
- Q. That is, I suggest to you, the only way of putting it. Mr. Shum on behalf of Bovill had agreed to pay 1.85 million, the Assignment stated the consideration was 1.74 million, it's not the only thing to label that as understating the consideration. 40
- A. The structure of the whole transaction has changed by the scheme as set out on the 27th of January.
- Q. Nevertheless, the \$110,000 which Chan made was not included in any of the documents.
- A. As this is a payment by a company, it will have to come out in the accounts and, presumably, I don't know, that would be something which is entirely up to Danny Yiu. He would ask Chan Sun-ming to give a receipt for the money that he received

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- as commission.
- Q. But wasn't understating the consideration an offence under the Stamp Duty Ordinance?
- A. Under the new structure as set out in the letter of the 27th of January, that would not be understating the consideration.
- Q. Where would the stamp duty on the \$110,000 be paid under your new structure?
- A. It would be paid under a different – firstly, it would be paid by way of profits tax by Chan Sun-ming. Secondly, it would again be paid on assessment by the Inland Revenue on the market value of the property. 10
- Q. Will you leave alone profits tax for the moment because that was payable by Chan in any event, wasn't it? If he made a profit, he would have to pay profits tax.
- A. Yes.
- Q. Just concentrate on whether he made it by way of commission or whether he made it by way of resale at a higher price, isn't that correct?
- A. Yes.
- Q. Just concentrate your mind, if you would, please, on the question of stamp duty. How was Government to be made manifestly aware that \$110,000 extra was being paid by Bovill which was not stated in the draft Assignment?
- A. As I said, the structure of the transaction has changed and Bovill will be getting an Agreement directly from Lucky Time for that amount for that premises. So it would not be right to say that it was understating the consideration because that was the consideration paid by Bovill to Lucky Time. 20
- Q. Bovill would be getting an Agreement stating they had paid 1.85 million.
- A. No. 1.7 . . .
- Q. 1.74?
- A. Yes, 1.74.
- Q. Where would the \$110,000 that Chan made appear in the conveyancing documents?
- A. It will not appear in the conveyancing document.
- Q. It would not appear in the new Agreement which you and Danny Yiu agreed should be made between Lucky Time and Bovill. 30
- A. No, no.
- Q. That would also state that the consideration paid by Bovill was 1.74 million, is that right?
- A. I was not supplied with a copy of the draft new Agreement but presumably, that would be the consideration in the new Agreement because that's the money that Lucky Time is getting.
- Q. You were not concerned that the Collector of Stamp Duty should be apprised of the fact that Bovill had paid \$110,000 more than was stated in these two documents. 40
- A. No, because that would be commission.
- Q. That was in fact profit but you and Danny Yiu decided to treat it as commission, is that correct?
- A. Yes.
- Q. You say you were not supplied with a copy of the Agreement between Bovill and Lucky Time.
- A. No.
- Q. Did you ask for it?
- A. I think my clerk did.

- Q. Can you positively say your clerk did?
A. No.
- Q. Do you know whether he obtained a copy?
A. He did not obtain a copy because it is not on the file.
- Q. In protecting Mr. Wong's company's interests, wasn't it your express duty to see that everything was above-board and that the title was secured?
A. Yes.
- Q. And you thought it would be secured notwithstanding that the consideration stated was \$110,000 less. 10
A. Yes.
- Q. You left it, in other words, to the Stamp Duty Office to make an assessment if they thought that the consideration was too low.
A. Yes.
- Q. Now, you had a search made in the Land Office register for this property, or you caused the Hong Kong Office to have a search made.
A. No, I think it's the Kowloon Office.
- Q. But you did have a search made?
A. Yes.
- Q. I wonder whether I was failing to express myself correctly when you took such a long time to answer that question. Now, the search card, you remember referring my Lord to this, showed three charges, I think, that were in favour of the Hang Seng Bank, is that not correct? 20
A. Yes.
- Q. The first one, I think, was to secure banking facilities, a mortgage to secure banking facilities to the extent of 2,400,000. My Lord, this is page 19 in Volume 5. Now, reading that search card in that form, would you understand that it was the amount of capital – Would you like to look at it first? The second entry on the page of Incumbrances, "MORTGAGE TO SECURE BANKING FACILITIES, HANG SENG BANK, Extent 2,400,000." Do you see that? 30
A. Yes.
- Q. Reading that alone, would you understand that it was the capital to be advanced which was not to exceed 2.4 million?
A. Yes.
- Q. You would expect that the deed would also secure any interest which was outstanding?
A. Yes.
- Q. Likewise, the second Mortgage, the one million dollars was the maximum capital to be advanced.
A. Yes. 40
- Q. And the same for the further charge of one million.
A. Yes.
- Q. And all three of them would secure outstanding interest and charges.
A. Yes.
- Q. So looking at this search card, you said yesterday it was possible that the amount advanced by the Hang Seng Bank was less than 4.4 million, is that correct?
A. Yes, it is possible.
- Q. Equally, it could have been up to 4.4 million.
A. Yes.

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- Q. Plus any interest that was outstanding.
- A. Yes.
- Q. Did you ask Danny Yiu how much was outstanding?
- A. No.
- Q. Under the Mortgage.
- A. No.
- Q. You weren't interested?
- A. No, apart from getting a reassignment from Danny Yiu.
- Q. You know very well, do you not, that in Hong Kong no bank would reassign unless it were paid in full, every cent that was owed to them, together with all costs? 10
- A. Yes.
- Q. And you weren't interested in finding out how much was owing to the Hang Seng Bank from Danny Yiu?
- A. No, I did not enquire.
- Q. You weren't interested in finding out either, were you?
- A. I did not consider it my responsibility to enquire.
- Q. You did not consider it was necessary in order to protect the plaintiff company to find out whether Ho Sau Ki and Lucky Time could discharge the outstanding indebtedness to the Hang Seng Bank. 20
- A. No, I did not enquire.
- Q. You did not regard it as part of the ordinary care you should exercise on behalf of a mortgagee client.
- A. Of a new mortgagee.
- Q. Of a mortgagee client, Mr. Wong.
- A. No.
- Q. I take it if you did not enquire of Danny Yiu, you did not enquire of the Hang Seng Bank, is that correct?
- A. No, I did not enquire from Hang Seng Bank either.
- Q. Did you enquire of Messrs. C.Y. Kwan & Company, Hang Seng Bank's solicitors? 30
- A. Not until after Danny Yiu – when it'd known to me that Danny Yiu had run away but not before.
- Q. You did not regard it as prudent to enquire of any source whether there was sufficient money from all sources to discharge the indebtedness to the Hang Seng Bank. That's your answer is it not?
- A. I think I had a rough idea that Lucky Time's total sale proceeds would be in excess of 4.4 million but I must admit that I did not apply my mind to really thinking about it at the time.
- Q. You were perfectly correct that Lucky Time would receive more than 4.4 million but did you see that Lucky Time was not the registered owner and was not the mortgagor of this piece of land? When you were dealing with this matter, did you think that Lucky Time was the mortgagor? 40
- A. No.
- Q. Then what had your idea that Lucky Time's proceeds of sale would exceed 4.4 million – how was that relevant to the question whether there was enough money to discharge Ho Sau Ki's indebtedness to the Hang Seng Bank?
- A. It was part and parcel of my attitude that I don't need to concern myself with a previous – with an existing encumbrance when I don't act for the vendor.
- Q. But you acted for a mortgagee whose security depended on the mortgagor having

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a good title, did you not?

A. Yes.

Q. You were perfectly aware from the documents Danny Yiu had sent you that Ho Sau Ki had agreed to sell the property for much less than 4.4 million, were you not?

A. Yes.

Q. Weren't you in those circumstances even moved to enquire of Danny Yiu whether there was sufficient money to pay off the mortgage owing to the Hang Seng Bank by Ho Sau Ki?

10

A. No.

Q. You were quite indifferent.

A. Yes.

Q. If there wasn't enough money to pay off and Hang Seng Bank wasn't paid off, too bad for the plaintiff company, wasn't it?

A. But that's part of Danny Yiu's undertaking that he would give me a reassignment of the premises.

Q. Instead of taking simple steps to find out, you put everything in one basket, namely, your trust in a fellow solicitor, is that right?

A. It is my usual practice, yes, of leaving the – sorting out of the reassignment to the vendor solicitors or the purchaser's solicitors.

20

Q. And if your clients don't get a good title, that's just too bad for them. Johnson, Stokes would shrug their shoulders and say, "This is the usual Hong Kong practice." Was that your attitude?

A. No.

Q. Isn't that what Johnson, Stokes are saying in this case. "Too bad if our assistant, Miss Leung, wasn't even curious enough to find these things out. If the money is lost, you, the client, bear the loss." Is that not Johnson, Stokes' attitude in this case?

A. No.

30

Q. No, are they willing to bear the risk of this loss and see that my client recovers his money and interest thereon? Are you saying that that's Johnson, Stokes' attitude in this case?

A. No.

Q. What do you say Johnson, Stoke's attitude is? I put it to you that my first hypothesis is correct: If anything goes wrong, let the loss fall on them and if they don't like it, let them sue. Isn't that the attitude that your Kowloon Office, at any rate, adopted?

MR. PRICE: My Lord, I don't think this question needs an answer because my learned friend has only to look at the Pleadings.

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COURT: I think, perhaps, let us find out from the Pleadings.

MR. CHEUNG: The silence of course is deafening.

Q. Did you ever think of having the cheques made out payable to the Hang Seng Bank?

A. No.

Q. Would you agree that that would be an additional precaution in seeing to it that

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there would be a reassignment?

- A. Yes, that is why after the event, yes.
- Q. Equally, you did not think of making the cheque payable to Hang Seng Bank's solicitors, C.Y. Kwan & Co., which is what is often done, is it not, in paying off the Hang Seng Bank?
- A. Since I did not know how much the amount was outstanding, there was no way that I could make out the cheque in favour of Hang Seng Bank. There would be at least three people's consent to think of before I can make out a cheque in favour of Hang Seng Bank. I'll have to get consent from Ho Sau Ki, I'll have to get consent from Lucky Time and Chan Sun-ming and for whom I don't act. 10
- Q. Well, you could have got their solicitors to get their consent, could you not?
- A. Yes, I could ask Danny Yiu but then again I'm trusting Danny Yiu.
- Q. But it was too much of a bother to do that.
- A. It did not occur to me that Danny Yiu would run away. If I did, I would have behaved differently.
- Q. Now, you were aware, were you not, of circulars which had been sent out by the Law Society about formal completion at that time in January 1976, were you not? If need be, I'll refer you to the actual circular in question. I think it's Volume 5. Page 20 if you would please. At the time you acted for the plaintiff company, 20 had you read that circular at any time previously?
- A. No.
- Q. Were you aware of its existence?
- A. No.
- Q. Was it anywhere on file in the Conveyancing Department of Johnson, Stokes in Kowloon?
- A. I am not aware that there is such a file.
- Q. No partner in Johnson, Stokes had drawn your attention to it when you were put in charge of the Conveyancing Department?
- A. No. 30
- Q. Let's take a look at a later circular, page 46. Had you read that circular before you dealt with this transaction?
- A. No.
- Q. Your attention had never been drawn to it?
- A. No.
- Q. Do you know whether other solicitors in the Kowloon Office of Johnson, Stokes were aware of the existence of this circular?
- A. I cannot say for them – I cannot say for other people.
- Q. You have never discussed matters dealt with in these circulars with any other solicitors in the Kowloon Office. 40
- A. No.
- Q. Nor with any partner?
- A. No.
- Q. Tell me after the event. . .

MR. PRICE: I should not let that last question and answer go without drawing attention to the generality of the question. "You have never discussed matters dealt with in the circular." My Lord, the matters dealt with in the circular include completion of conveyancing transactions, identification of parties. If my friend is putting to the

witness, "Did you discuss the content of this circular?" that is one thing. If he is asking – and if that is how the question is understood, the answer is all right. If the question and answer are understood as referring to the matters, for example, Law Property Act and that sort of thing that are touched upon in this circular, then it ought to be gone into in a little more detail.

Q. Miss Leung, during the course of this litigation you have read through this circular, have you not?

A. Yes, I have roughly read through it.

Q. Only roughly?

10

A. Yes.

Q. In the two months since we started the hearing of this case, have you gone through the parts that deal with formal completion rather more than roughly in this period?

A. Yes, yes.

Q. Take page 22 as your Counsel insists. Have you discussed with any partner in Johnson, Stokes the sentence – or the subject matter of that sentence, namely, "The practice adopted by solicitors in the matters of completions has grown up in Hong Kong merely as a matter of convenience. . ." Have you discussed that with a partner in Johnson, Stokes?

A. Yes.

20

Q. You have?

A. Yes.

Q. When was that?

A. After the Danny Yiu incident.

Q. But not before?

A. No.

Q. I see. Was your attention ever drawn to the statement there: ". . . mere compliance. . . may leave a practitioner open to claims if completion in the fullest sense miscarries." Have you discussed that with any partner in Johnson, Stokes prior to this affair?

30

A. No.

Q. Did you discuss it with other solicitors?

A. No.

Q. Not a matter of general conversation in the Kowloon Office of Johnson, Stokes?

A. No.

Q. What about the statement later on? Sub-paragraph (i), the last two lines: ". . . it is unethical for any of the other solicitors concerned to object or refuse to comply with such request; . . ." Did you discuss that subject with a partner in Johnson, Stokes. . .

A. Yes.

40

Q. . . . before this . . .

A. No, after . . .

Q. Miss Leung, will you please for the moment treat my questions as being directed to what had happened before this incident – this transaction?

A. O.K.

Q. You had not?

A. No.

Q. Nor the next page, sub-paragraph (iii): "Solicitors must further be aware that

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the practice of accepting other solicitors' cheques does not relieve them from being responsible to their clients and possibly others for the actual cash. . .”

A.

No.

Q.

That subject discussed?

A.

No.

Q.

Well, at any rate, you have read through the relevant part of the circular which deals with completion and exchange of cheques for documents and you confirm that up to the time of this transaction these matters were never brought to your attention by any partner or any other senior solicitor in Johnson, Stokes?

10

A.

I confirm.

Q.

Not only solicitors and partners in the Kowloon Office but none of the partners in the whole firm in Hong Kong. Will you confirm that? You seem to be having some difficulty in answering that question.

A.

Because I spent a few months with – in the Hong Kong Office reading up old cases and reading up – trying to familiarize myself with the practice of conveyancing in Hong Kong, it is conceivable that during that period I could have read it and forgotten about it as I am not – I do not have a very good memory. It is possible that I have read it and then clearly forgotten it.

Q.

And certainly did not give effect to the warning.

20

A.

No.

Q.

And the same with the second circular dated 30th of March 1966, page 53 in file No. 5. Conceivably, you might have read it at some time.

A.

It is possible but I can't remember having read it before the Danny Yiu's incident.

Q.

If you had, you had completely forgotten about it . .

A.

Yes.

Q.

. . . and not giving it any effect.

A.

No.

Q.

Now, you started practice in Hong Kong, I think, you said in 1973, is that not correct?

30

A.

Yes.

Q.

Between the time you started practice and this Danny Yiu affair did you hear the absconding of one Reginald Siu? Not heard of it?

A.

If I have heard of it, I must have forgotten.

Q.

I am talking of the first abscondment of Mr. Reginald Siu.

MR. CHEUNG: My Lord, may I just check the date and if this may be a convenient moment to rise for a few minutes?

COURT: Yes.

11:21 a.m. Court adjourns.

11:50 a.m. Court resumes.

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Appearances as before.

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XXN BY MR. CHEUNG (Continuing)

- Q. Do you remember the striking off the roll of a solicitor, Mr. Reginald Siu?
A. No.
Q. The evidence in this case is he was struck off in 1974 which is after you had started practice. You don't recollect having heard anything about that before you dealt with this transaction?
A. No, I have no recollection that I have heard about it.
Q. Had you any recollection that he had run away absconding with client's money?
A. No. 10
Q. Were you ever informed of it by anybody in Johnson, Stokes senior to yourself?
A. No.
Q. Or anybody else?
A. No.
Q. Had you heard of the case of the late Christopher Carr who was also struck off and imprisoned for embezzlement or some dishonest deal of that kind? You don't recollect ever having been told of the circumstances in which he was struck off and imprisoned.
A. No.
Q. Nobody drew your attention to it? 20
A. No.
Q. Had you heard before you handled this transaction that Mr. Danny Yiu was a gambler?
A. No.
Q. Were you aware that he gambled at the races?
A. No.
Q. Or in Macau?
A. No.
Q. There was no warning from any partner or any senior person in Johnson, Stokes that Danny Yiu had gambling habits? 30
A. No.
Q. Did you maintain any kind of lists in your Kowloon Office that the trustworthiness of some solicitors might be in question?
A. No.
Q. Not even an oral list?
A. No.
Q. You are quite sure you were not warned about any particular solicitors at all that in dealing with them you have to be careful. That is correct? You were not warned?
A. No.
Q. So you were to treat every solicitor who was on the roll as being somebody trustworthy. 40
A. Yes.
Q. Was there any directive from above in Johnson, Stokes that you should make enquiry as to the trustworthiness of a solicitor before accepting their undertaking?
A. No.
Q. Everybody was to be treated the same.
A. Yes.
Q. Without enquiry?

- A. Yes.
- Q. Now, you say that once or twice a year you did resort to formal completion.
- A. Yes.
- Q. In those cases, was it because the trustworthiness of the solicitor on the other side was in question?
- A. Yes but that's post the Danny Yiu's incident.
- Q. I understood your answer yesterday to be perfectly general that in one or two cases a year you resorted to formal completion. You say that only occurred after the Danny Yiu case. 10
- A. Yes.
- Q. So the practice after Danny Yiu is different from what it was before Danny Yiu.
- A. Yes, slightly, yes.
- Q. You agree with Mr. Wong that since this case you have been or you have given him the impression of being extra careful.
- A. I have not acted for him ever since the Danny Yiu's case.
- Q. You have not?
- A. No.
- Q. But you have been extra carefully, have you not, since the Danny Yiu case?
- A. Yes. 20
- Q. So since 1976 there have been six or ten cases where you have resorted to . . .
- A. Yes.
- Q. Was it as a result of enquiries you yourself made or was it because you had been alerted by the firm?
- A. I had been alerted by the firm.
- Q. And those solicitors would now be on some kind of a list within the firm for internal circulation?
- A. It's not so much as a list as there's no direction, no circular about who's to be trusted, who's not. There is only a list for the Accounts Department in respect of cheques received from certain solicitors. We are to draw against some solicitors' cheques immediately and without waiting for the exact number of days for it to clear and in some cases we are not to draw against the cheque until the cheque is cleared, that's the only – it is not a circular to solicitors but solicitors can have access to that list of names. No direction is given as to whether or not we are to formally complete in respect of any one firm. It is very much left to our discretion of individual solicitors. 30
- Q. If you have any doubts at all, you can refer to somebody more senior to yourself.
- A. Yes
- Q. That's the system now in operation.
- A. Yes. 40
- Q. And as regards transactions involving a prior encumbrance, is your practice now to make cheques payable to the prior encumbrancer?
- A. Not in every case but in some cases, yes.
- Q. In case where the solicitor on the other side is on the list in the Accounts Department?
- A. It may be just because of the time factor at the request of the Mortgagor. It can be for a number of reasons but yours can also be a reason.
- Q. It can be a reason because his integrity might be just slightly doubtful, is that right?
- A. Yes.

- Q. Or it may be that he is a small firm and the transaction might be too large for such a small firm to carry if something went wrong.
- A. Yes.
- Q. Now, at any rate at the time that you did this transaction for the plaintiff company you regarded Mr. Yiu's undertaking as being as good as anybody else's?
- A. Yes.
- Q. And in your experience up to that time nothing had gone wrong.
- A. No.
- Q. In other words, you regarded the whole system of exchanging or sending cheques 10
against undertaking as being safe as houses.
- A. It had been working satisfactorily.
- Q. Did you regard it as being safe as houses?
- A. What does that mean?
- Q. Very secure?
- A. I had never been taken advantage of until the Danny Yiu case.
- Q. But you regarded that method and the undertaking given by a solicitor as being secure?
- A. Yes.
- Q. I'll be interested to know what Johnson, Stokes' insurers thought of the risks. 20
Johnson, Stokes are insured against negligence, are they not?
- A. Yes.
- Q. Did you know what the premium payable in 1976 was in respect of negligence?
- A. No.
- Q. You don't handle that aspect of the matter yourself.
- A. No.
- Q. And you are not concerned with it.
- A. What do you mean by insurance premium? You mean the insurance premium of the firm against negligence?
- Q. Yes, the amount of premium Johnson, Stokes have to pay to insure against 30
negligence.
- A. I don't know.
- Q. You don't know because it's not handled by you.
- A. No.
- Q. All you know is that Johnson, Stokes are insured.
- A. Yes.
- Q. Do you know whether the premium has been raised recently?
- A. That I don't know.
- Q. Not your concern at all?
- A. No. 40
- Q. Very well. I just want to be clear about one point in your evidence which you gave yesterday. Mr. Shum and his associates came in the afternoon, is that correct?
- A. I can't say when they came. Did I give the impression that they came in the afternoon?
- Q. Well?
- A. I could not remember when they came at all.
- Q. Did you not say to them, "You'd better hurry up to go to Danny Yiu's office because it's about 5 o'clock and they are about to close."
- A. No, I did not say that, no, no. I wasn't even aware that they were going to Danny

Yiu's office.

- Q. Did you not tell them to go over to Danny Yiu's office to pay the stamp duty?
A. I told them to go to Danny Yiu's office in a telephone conversation which I had with Mr. Shum but I could not remember now whether or not I told them to go when they came to my office and, if I remember correctly, I did not know they were going to Danny Yiu's office after they came to my office.
- Q. Let me clear this up. You certainly said yesterday that you rang Danny Yiu after Mr. Edward Wong came with the cashier orders.
A. Yes. 10
- Q. And you say that Mr. Shum and his associates were there at that time.
A. Yes.
- Q. Are you now saying – I may have misunderstood you yesterday – are you now saying you don't recollect whether at any time during that interview that afternoon you told them to go over to Danny Yiu's office to pay the stamp duty?
A. Yes, that's – I don't remember saying that – telling them to go at that meeting.
Q. And you have no recollection of telling them to hurry because it was 5 o'clock.
A. No.
- Q. And you can't now remember what time of day it was that they came to your office? 20
A. No.
- Q. Do you remember what time of day you sent the letter asking for Danny Yiu's undertaking?
A. I think it is before they came – before Mr. Ma, Mr. Shum and Mr. Chan came – the first letter.
- Q. So far as I am aware, nobody has challenged their evidence in the witness box that you told them to hurry over to Danny Yiu's office and pay the stamp duty and other charges before they closed as it was getting near to 5 o'clock. Are you surprised that that evidence was not challenged? You have no recollection at all when they came? 30
A. I have no recollection at all.

- Q. But you do recollect that you sent the cashier orders over to Danny Yiu before you got back the signed letter?
- A. Yes.
- Q. So what is stated at page 73 in volume 2 of these documents – would you look at the end of the first paragraph on that page: “Messrs. Danny Yiu & Co. duly returned the copy letter of undertaking, countersigned on every page, and upon receipt thereof we forwarded the three drafts totalling (so much) on the 27th January, 1976.”
- A. Yes. 10
- Q. So what is there stated is, according to your evidence, untrue?
- A. It is true in the sense that when the first letter was dispatched I told the messenger to telephone me when Danny Yiu had signed the undertaking and he did telephone me to say that he had signed.
- Q. That’s not what that letter says?
- A. So he had had it in his hands. So it was received on behalf of J.S.M.
- Q. And you hadn’t seen it?
- A. No, I had not seen it.
- Q. How did the messenger know it had been signed by Danny Yiu?
- A. He was in Danny Yiu’s office and I think it was Danny Yiu who connected the line for him. 20
- Q. Anyway, your evidence now is you did not actually see his signature before it was sent, before you sent over the drafts?
- A. Before the second letter was sent, yes.
- Q. Now you were in court during most of these proceedings, were you not?
- A. Yes.
- Q. And if you were not in court you could have had made available to you the notes of the evidence which have been taken in court by the solicitors acting for you?
- A. Yes.
- Q. So apart from what you actually heard information was available to you as to what the evidence had been in this case? 30
- A. Yes.
- Q. Now you said yesterday that the agreement between Wong and Shum as to instalments were dropped because it was contemplated that there would be further transactions between the two parties?
- A. Yes.
- Q. Is that correct?
- A. Yes.
- Q. Would you be surprised to tell you that that major point has not been made at any time in the cross-examination of any of the witnesses for the plaintiff or for the other defendants? 40
- A. I don’t understand.
- Q. Is it something you have – has come to your recollection since this case was adjourned on the 13th June?
- A. No.
- Q. You say that as far as you were concerned that was your story or what?
- A. That is my recollection.
- Q. That has been your recollection ever since this case was prepared for trial?
- A. Ever since the 21st January, 1976.

- Q. And you categorically denied to me yesterday that you did not take away the provisions for instalment payments to give an advantage to Mr. Wong, or Mr. Wong's company, that is so, isn't it?
- A. No, I did not say that, and I think I omitted that by taking away the instalment payments. I was doing -- I was taking away something from Mr. Shum because it's repayable on demand.
- Q. But that was because there was an express agreement between Mr. Shum and Mr. Wong made in your presence that the instalment provisions should be done away with?

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MR. PRICE: No, my Lord. What was said yesterday was that Mr. Shum did not object not that there was an express agreement. That was what was said in answer to my learned friend's cross-examination in yesterday afternoon.

COURT: I think that is so.

MR. CHEUNG: That is right.

- Q. And the fact that he didn't object led you to consider that he had agreed?
- A. That he would be prepared to sign the document which does not set out instalment payments.
- Q. And you completely repudiate any suggestion that you, without him knowing it, had taken the instalment payment provisions away to give Mr. Wong an advantage which is something your counsel, or counsel for the 5th defendant, put to my client?
- A. That is too long a sentence to me. I don't --

20

MR. CHEUNG: I have checked my notes, my Lord, and your Lordship will find it.

COURT: It was put to Mr. Wong that --?

MR. CHEUNG: It was put to Mr. Wong that the provisions, the agreement for instalment payments was taken away from whatever was to be drafted in order to give an advantage to Mr. Wong's company. My Lord, your Lordship will find it on the notes for the 4th June, in the afternoon, when my friend Mr. Price was cross-examining Mr. Wong, I would think, my Lord, about 4 o'clock or 3.30. Shall I read my notes to your Lordship?

30

COURT: Yes.

MR. CHEUNG: This is how the matter rose. It's a question from Mr. Price: "By the end of the first meeting with Miss Leung it was clear the document would not provide for 7 years?" Answer: "It was mentioned that loan was to be repaid by monthly instalments. However, in order to protect the finance company the solicitor would prepare the document with the wording 'on demand'," and I put that in quotations. Question: "Was it your insistence that document provided loan should be repayable on demand?" Answer: "No, not our insistence." Question: "But it was for your protection?" Answer: "I believe that is what the solicitors did, to protect our

40

interests.”

- Q. You say you did not do it to protect Mr. Wong's interests but because Mr. Shum did not object to what was being proposed?
- A. I didn't say that either. I said – yesterday all I admitted was that by doing away with the instalment payments I would be taking something away from Mr. Shum. I don't think I commented anything on the position of Mr. Wong yet so far.
- Q. What you did say yesterday afternoon, Miss Leung, was you crossed out the notes about instalment payments because you learned that there would be further finance transactions in the future between the parties? 10
- A. Yes, between the parties.
- Q. You say that was mentioned at that first meeting?
- A. Yes.
- Q. And it was in order that this debenture could cover further advance that you left out “instalment payments”?
- A. Yes.
- Q. And that was a suggestion to which Mr. Shum made no objection?
- A. Yes
- Q. So you therefore disagree that you put it in, you took away the ‘instalment payments’ of your own initiative in order to give protection to the finance company? 20
- A. It's more than giving protection to the finance company. It would be making the relationship much more flexible and also it would be easier for Shum to get more money from Wong later on because Wong would feel that whatever he advanced within the limit of that facilities would be secured.
- Q. I see, whatever the truth of it may be, at the end of that first meeting you were under the firm impression that Mr. Wong would not want the instalment payment provisions in and Mr. Shum would not object?
- A. Yes.
- Q. Was it or was it not your impression that they still intended to adhere to the instalment repayment plan? 30
- A. That is my impression and I asked them to make their own arrangement to confirm in writing.
- Q. To be – ?
- A. To be confirmed in writing between them.
- Q. And that writing to be settled by whom?
- A. Between them.
- Q. You didn't think acting on behalf of the finance company that you should draft a collateral agreement which would give effect to that understanding?
- A. Mr. Wong is an experienced financier. He would know exactly what to do. 40
- Q. An experienced financier, but you left it to him to devise how he should write out that agreement?
- A. Yes, but our relationship at that time was such if – I am just guessing – if he got into difficulty in drafting that letter he would consult me.
- Q. You didn't think it was part of your duty in this transaction to give effect in writing to what was contemplated would be the course of dealing between these parties in the transaction?
- A. No.

- Q. Now would you agree with the statements that had been made in this case that it is much more convenient to send cheques to other solicitors on their undertaking to have certain documents executed and mortgage reassignment made?
- A. Yes.
- Q. Would you agree it is time saving?
- A. Yes.
- Q. Trouble savings?
- A. Yes.
- Q. Would allow you to devote your time to more productive work rather than to cross from Hongkong to Kowloon to arrange a physical completion? 10
- A. Yes.
- Q. And up to that time of this Danny Yiu transaction you say you had never done any physical completions, formal completions?
- A. No.
- Q. Was there any rule against formal completions?
- A. No.
- Q. Now in this transaction you forwarded \$1,655,000 to Danny Yiu, is that not correct?
- A. Yes -- sorry? 20
- Q. 1.655.
- A. 665 or 655?
- Q. 1.665, and it was on his undertaking not to release it until the documents had been executed?
- A. Yes.
- Q. Is that correct?
- A. Yes.
- Q. And you gave him ten days in which to do it, is that correct?
- A. Yes.
- Q. Meantime where did you expect him to put that money? 30
- A. In his client's account.
- Q. And in that client's account it would earn interest?
- A. That is something between him and his bank.
- Q. And in your firm when you receive money on behalf of a vendor you put it in client's account, do you not?
- A. Yes, current client's account.
- Q. And your firm earns interest on the day to day balance in that client's account, does it not?
- A. That is something for the partners, between the partners and the bank.
- Q. Are you not aware that Johnson Stokes -- 40
- A. I think I hear rumours about it, but no partner has ever confirmed to me. I have never felt it my business to inquire.
- Q. So you don't know whether Johnson Stokes earn money on interests in the client's account?
- A. Not for sure, but there are rumours about it.
- Q. There are rumours about it, I see. That's all you are prepared to admit?
- A. Yes.
- Q. I suggest you know for a fact that this money earns interest in the client's account.
- A. No partner has ever told me.

- Q. I suggest you have knowledge that this is the general practice in Hongkong for solicitors to earn interests on their client's accounts. Do you not know that?
- A. No.
- Q. Now let me ask you a question and perhaps you can tell us about it if you are frank. Roughly what is the average daily balance in the client's account in the Kowloon office of Johnson Stokes?
- A. I have no idea.
- Q. You are in charge of all the conveyancing, are you not?
- A. Sort of, yes. 10
- Q. I understood you to say yesterday, you were in charge of the Conveyancing Department although not formally, or if I misunderstood you again.
- A. It's not formal. There are one partner and three assistants in the Conveyancing Department. I am the most senior of the assistant solicitors and matters tend to be referred to me by the partner in the first instant.
- Q. So you would have a rough idea, would you not, about how much would be on balance from day to day in that client's account?
- A. No.
- Q. No idea at all?
- A. No idea at all. 20
- Q. It would be more than \$100,000 at any given time?
- A. It would be more than \$100,000.
- Q. More than a million, I would suggest.
- A. That I don't know because money comes in and goes out so quickly normally on the same day. It is difficult to tell.
- Q. Sometimes it stays ten days, doesn't it.
- A. If I knew it stays there for ten days as of a recent case, I would put it on a deposit to earn interest.
- Q. In that case it would be client's deposit account?
- A. Yes. 30
- Q. Do you often have large sums in that account?
- A. When I deal with transactions and I know that there might be some delay before I would part with that money to whoever is entitled to it, then I would put it on.
- Q. You put it on call deposit?
- A. Yes, on 24 hours.
- Q. And sometimes transactions may involve a hundred million dollars in your experience?
- A. Yes.
- Q. Even five hundred million?
- A. Well, our major clients are banks and we do have mortgages and debentures and so on for a very large amount, but in most cases where we deal with banks no money passes through our account because all we do is we would call the completion off the mortgage or the debenture and then the mortgagor or the borrower would directly issue cheques from the bank account without having the money go through Johnson Stokes at all. 40
- Q. I am talking of the occasions when, for one reason or another, a sum of money isn't required immediately and you put it on 24 hours deposit account.
- A. Yes.
- Q. Sometimes in those transactions a few hundred million dollars can be involved?

- A. I don't think I have dealt with more than eight figures.
Q. Not in excess of a hundred million?
A. No.
Q. And the rates of interest paid would vary from time to time?
A. Yes.
Q. And you know that in law the interest earned belongs to the solicitor, not to the client, unless it is placed on the client's deposit account.
A. I suppose if the firm has an arrangement with the bank, of which I don't have any information, I suppose it is possible that the firm could earn interest on the client's account. 10
Q. But you put it in the name of Johnson Stokes in a call deposit account?
A. In 24 hours –
Q. Yes.
A. – the case I was quoting, the interest would go to the client.
Q. The interest goes to the client or goes to Johnson Stokes?
A. Goes to the Client.
Q. By express agreement?
A. Not necessarily because my client would expect me to credit them with the interest earned on 24 hours call deposit. 20
Q. You don't put it – you put it in Johnson Stokes's name?
A. Yes, but the interest would be on the statement of account. At the end of the day after everything has been finished then the interest would be accounted for as one item to the credit of the client:
Q. Is that by express agreement with all clients or is it just occasionally?
A. I normally credit – I don't know what other solicitors do, but in the cases that I deal with I always credit my clients.

XXN. BY MR. TANG:

- Q. Miss Leung, you have said that after the Danny Yiu affair you would have one or two formal transactions in a year – formal completions in a year? 30
A. Yes.
Q. And you say that you have personally not kept a list of solicitors with whom you would insist on formal completion?
A. No.
Q. Nor are you aware of any such list in Johnson Stokes?
A. It may be that the accountant's list – other solicitors could have obtained the accountant's list.
Q. Have you got a copy of the accountant's list?
A. Yes.
Q. How many solicitors would be on it? 40
A. Lots.
Q. Hundred?
A. No, I haven't counted.
Q. Fifty?
A. I can't tell you.
Q. But there are lots of them?
A. Yes.

- Q. Do you know how many of them commenced practice before Mr. Yiu absconded?
A. I haven't made a scientific classification.
Q. But you would be able to do so if you were to go back to the office, take out the list, count the number and then find out how long they have been in practice?
A. Well, that would entail a lot of work because from the list I wouldn't be able to tell when they came into practice.
Q. But your, as secretary as it were, would be able to count the number of persons on the list for you?
A. Yes, but it wouldn't be possible to find out whether they came into practice before or after the Danny Yiu incident from the list itself. 10
Q. But you would be able to count the number of persons on the list?
A. Yes.
Q. Would you mind doing that over lunch?
A. She is away. She is having her wisdom tooth taken out.
Q. Can somebody else do it? Can you telephone the Accounts Department and ask them to count it?
A. Yes, I could.
Q. And do you think you can also ask somebody to check how many of them commenced their practice before Danny Yiu absconded? 20
A. I don't think it would be possible within today.
Q. To-morrow?

COURT: Is it of any significance?

MR. TANG: Yes, my Lord. If on the list there are names of persons who commenced practice before Danny Yiu then it would be very pertinent to know how their, as it were, honesty first came into question.

COURT: As of each one?

MR. TANG: Well, depending on how many on the list. If there are more – if there are a lot of them –

A. There are quite a lot, I mean – 30

COURT: It would be a major undertaking?

- A. Yes.
Q. Anyway, in that case I would confine myself with the lesser of the two evils and ask you simply to get somebody to count how many there are on the list.
A. The names or the firms?
Q. If there are firm names let them be firm names.
A. Our list is categorised under firms.
Q. I see. Well, the number of firms would be sufficient.
A. Yes.
Q. And is it your practice that whenever you would have a completion with a firm whose name appears on the list then you would insist on formal completion? 40
A. No, I have received no direction from the partners that I should do it. That's the

- accountant's list and I haven't been told by the authorities that I should have formal completion.
- Q. But is it your understanding that their names are on the list because there are some doubt as to their credit?
- A. Yes.
- Q. But notwithstanding that you have not insisted on formal completion with them?
- A. No.
- Q. You were content to send your clients' cheques over against their undertakings?
- A. Yes. 10
- Q. And when you do that do you think that you were risking your own money, your firm's money or your client's money?
- A. I didn't think about it.
- Q. If you thought that you were risking your firm's money would you have done it?
- A. If I were allowed by the firm to deal with the money, I think even if it were the firm's risk I think I would be acting within my authority.
- Q. What about if you should think that you were doing it at your client's risk?
- A. In that case I think I would be more careful if it was the client's money that I was risking.
- Q. You would be more careful. In what way would you be more careful? 20
- A. I don't know. It is difficult to say.
- Q. Would you have insisted on formal completion, for instance, on behalf of the client?
- A. Not as a rule.
- Q. Or maybe you would insist on having the cashier order made out in the name of the client?
- A. In the name of the recipient.
- Q. Yes, in the name of the recipient, to send over against the undertaking not to part with it until all the formalities have been completed?
- A. Yes, I sometimes do that. 30
- Q. In which case, unless there is a complicity between the solicitor and the recipient, it would be much more difficult for one to perpetrate a fraud, for the solicitor to perpetrate a fraud?
- A. Yes.
- Q. But would it be correct to say that when you sent money over you simply had not considered at whose risk you were doing it?
- A. No, because I didn't think there was a risk.
- Q. But after Danny Yiu you envisage situations where there might be some risk?
- A. Yes, say, for instance, there could be a competition of claims and I want the title deeds straight away to get it registered. 40
- Q. Leaving aside the question of competition of claims but concentrating only on dishonesty of solicitors, after Danny Yiu you realise that there may be some risks?
- A. Yes.
- Q. Because in the case of Danny Yiu, if I understood your evidence correctly, what you were saying is that you had no reason to mistrust Danny Yiu?
- A. Yes.
- Q. You had previous dealings with Danny Yiu and he was found to be trustworthy?
- A. (No audible reply.)
- Q. However, he let you down. It came as a surprise to you that he was dishonest?

- A. Yes.
- Q. And it would follow, would it not, that there may be lurking amongst the numbers of solicitors in Hongkong one or two other potential Danny Yius?
- A. Yes, that is possible.
- Q. So a person whom you have no reason to mistrust may turn out to be an untrustworthy person?
- A. Yes.
- Q. So after Danny Yiu you don't, as it were, accept a solicitor on his face value?
- A. That is true. 10
- Q. And therefore when you deal with him you have to ask yourself, "Is this man credit-worthy, trustworthy?"?
- A. Yes.
- Q. A firm like Deacons, no problem, trustworthy, but with some firms you may have some doubt?
- A. Yes.
- Q. In the case of doubt then do you ask yourself the question, further question, "At whose risk am I doing this?"
- A. I am not so logical as that. I only know that is the solicitor that we are dealing with is not trustworthy then somebody's money is to be at risk. 20
- Q. After today I suppose you would be more logical and you would ask yourself every time you send the money over, "At whose risk I am doing this?" would you not?
- A. I don't think it should make any difference whose money it is that I am sending across. If money is lost money is lost.
- Q. Now if it were at your client's risk do you feel that it would be your duty, before assuming that risk on his behalf, to tell him that there is this inherent risk?
- A. If I knew there would be a risk, yes, I would tell him.
- Q. Now you know of course there is a possibility of the risk every time you have a transaction with another solicitor? 30
- A. Yes.
- Q. Do you now tell your clients that "When I send your money over I may be doing it at your risk"?
- A. No.
- Q. Why not?
- A. I think it is common knowledge that we do send money across to other firms of solicitors to complete – is universal in Hongkong.
- Q. So if a man first purchased a property you would assume that he would be aware of this common practice or would you discriminate between a person who is well versed in conveyancing and a person who is new to it? 40
- A. I would have no means of finding out whether he is first purchasing or second purchasing.
- Q. Would you try to find out?
- A. No.
- Q. Would it not bother you that there is a possibility that he might not be aware of this common practice?
- A. I have never thought about it.
- Q. Now do you think it is also common knowledge in Hongkong to people who purchase or mortgage properties that there is an alternative open to them?

- A. Yes.
- Q. Do you think it is also common knowledge?
- A. I think the attitude of clients in Hongkong is that they leave everything to their solicitors and you do what you like. You arrange things in the way solicitors think best and even if you try to explain to some of them they are not interested.
- Q. And for some of them the intricacy of conveyancing is beyond their comprehension?
- A. Conveyancing I don't think is a very complicated matter. It shouldn't be beyond anybody's comprehension. 10
- Q. Do you think the system of land tenure in Hongkong, for instance, is common knowledge to a man in the street?
- A. Yes, I think so.
- Q. But it would take a law student some time for him to understand what conveyancing is about?
- A. Not the details of it, but I think everybody knows that the New Territories have 17 years to run, that kind of thing.
- Q. Yes, everybody would know that in Hongkong. But apart from that, do you think that a man in the street would know much more?
- A. I don't know what a man in the street would know because I am too specialised to think of other people. 20
- Q. Take this case, for instance, Mr. Shum paid over \$185,000 on the strength of two flimsy documents. Would you not say that suggests a lack of sophistication on his part?
- A. Yes, I would agree. I would never advise my own client to pay over any money until there is a proper agreement.
- Q. But that is done everyday in Hongkong?
- A. On the other hand, he took precautions, got a receipt which sets out the details of the property, the price and the parties which should form a sufficient memorandum. 30
- Q. But you are not suggesting that he realised that he needs a memorandum in writing and that in preparing the receipt it was with that in mind?
- A. He was sufficiently careful to include those details.
- Q. But the receipt was not written by him?
- A. No, but it would have been written at his request.
- Q. Would you not agree with me it is elementary for a person who pays over a large sum of money to ask for a receipt?
- A. Yes.
- Q. One doesn't have to be a particularly prudent person to ask for a receipt?
- A. Yes, but the receipt can just be like the second receipt. I mean It can be just – it can be without the details, without the payee's name and so on. 40
- Q. But it is not something which you would – nevertheless it wasn't something which you would have advised your client to do?
- A. No, I wouldn't advise my client to do it.
- Q. But one which is done everyday in Hongkong, people pay over money against a receipt by the proposed vendor who may or may not have any interest in the property at all.
- A. Yes, that is quite usual.
- Q. But that is not what you would say a sophisticated person would do?

A. I have seen, I have experienced with a client who is very sophisticated, who had a large group of companies managed by him and he would pay that sort of money across only against the receipt.

Q. Of course, solicitors and counsel would pay money even though there was no sufficient memorandum in writing?

A. (No audible reply.)

Q. Now Miss Leung, if a client were to come to you and say, "I want to have this transaction completed as they do it in England." you would comply with his request, would you not?

10

A. Yes, if he made that request.

Q. You would not refuse him, you would not say, "In that case I decline to act for you"?

A. No.

Q. So the choice is really your client's he could insist on the English type formal completion or the Hongkong type informal completion?

A. It could be his choice, yes, but normally the solicitor made the choice for him.

Q. But let's have it clear. If he were to insist on the formal completion you would not refuse to act for him?

A. No.

20

Q. Now if you act for a person who is about to part with his money and allow you to deal with the money in whatever you see fit in a completion, would you conceive it to be part of your duty to explain to him that he has a choice in the matter, that is, he could insist on formal completion or the informal completion as is commonly practised in Hongkong?

A. This may be something that I should do, but I don't think I have -- unless the client has specifically instructed me to have a formal completion I normally made the choice myself.

Q. But assuming that the client was unaware of this possibility of choice you agree that it would be -- that you ought to have informed him that he has this choice?

30

A. I suppose if I were a client I would like to be informed, yes.

Q. And you, as a solicitor, would want to inform him too?

A. I just don't inform clients.

Q. You don't do it as a rule, but you would agree that it is a good practice if you were to do it?

A. It is a good practice, yes, to give him the choice.

Q. Now assuming that the money were to be sent at his risk, do you think that it would be fairer to him too if you had beforehand explained to him that "There is this choice open to you, but in Hongkong we all do it the informal way and it has not been known to have gone wrong before, but what do you think?" Do you think that would not have been fairer?

40

A. Yes.

Q. Now after this, today, would you want to do it to all your clients?

A. I don't think so.

MR. TANG: Maybe this would be a convenient time.

12.50 p.m. Court adjourns.

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling cross-
examination

29th July, 1980.
2.35 p.m. Court resumes.

Appearances as before.

D.W. 3 -- LEUNG Wai-ling

O.f.o.

XXN. BY MR. TANG (Continues)

Q. Miss Leung, I'm afraid I have to ask you to go through the grounds which you have already covered. I would want to ask you what happened at the first meeting, the meeting which you think took place on the 21st July.

COURT: Hadn't we have that before?

10

MR. TANG: Yes, but I am going to go into it in greater detail.

COURT: Could you particularise as to what?

Q. What I want you to do, Miss Leung, is to tell his Lordship what was said to you at that meeting by Mr. Shum?

A. The definite thing I remember that he said to me was considering what I commented on his shelf company, North American Meat; he would purchase a shelf company from J.S.M.

Q. That is a distinct recollection on your part?

A. That is a distinct recollection.

Q. Now so far as that is concerned, the purchase of a shelf company from Johnson Stokes was that actually agreed to at that meeting? 20

A. Yes, but I think the particulars of the directors were going to follow and I think that's why I said perhaps Mr. Ma's suggestion was put in a little bit later.

Q. So far as your recollection goes when Mr. Shum and Mr. Wong left you you were sure that Mr. Shum was going to purchase a new shelf company from you?

A. Yes, in fact I telephoned our Hongkong office in Mr. Shum's presence to make sure that there was a shelf company available for him.

Q. So he had made up his mind to purchase a shelf company. What was to follow was just the particulars relating to the directors?

A. That I was concerned about.

30

Q. You are quite sure about that?

A. Yes.

Q. So when he left you you had no doubt in your mind that the purchaser was not going to be North American Meat?

A. Yes.

Q. It would follow from the meeting?

A. Yes.

Q. So so far as you were concerned when he left you you had nothing to do with North American Meat?

A. No.

40

Q. It was history?

- A. Yes.
- Q. But if you would look at your papers it would seem that that might not have been the case because a search was made of the North American Meat Company on the 27th January, was it not? If you look at volume 5, page 1.
- A. That might be the date on which the search was made, but I don't know when the requisition was made.
- Q. No, I'll come to that later. Do you remember when Mr. Shum gave evidence he said when he left you after that first meeting he had not yet made up his mind whether or not he was going to purchase a new shelf company from you, but he was to check with his colleagues and he would tell you later after they had made up their minds. Do you remember his evidence to that effect? 10
- A. No.
- Q. That is what he said, but do you say that he was wrong and you are right?
- A. My recollection is that he definitely decided to purchase the company when he left my office.
- Q. But do you agree that your recollection might be mistaken on that?
- A. I think my recollection is clear enough to say that I think I am right in my recollection.
- Q. Because if you were to look at the requisition you will find that in volume 2 at page 26 it is dated 21st January, 1976, from you in the Kowloon office to the Company Department, the Hongkong office, and it asks for a search to be done on the North American Meat Packing Company Limited. Now do you remember preparing this requisition? 20
- A. No, I think my secretary would automatically make company searches of whatever names she has seen. I don't think I gave instructions for that search.
- Q. Where would she have seen this name?
- A. Well, it would be from the file.
- Q. From what file?
- A. The file that – well, my purchase file. 30
- Q. But why would this name appear on the purchase file?
- A. Because I think Mr. Shum had deposited his Memorandum and Articles with me.
- Q. But why if it was already a matter of history when he left your meeting?
- A. I am a very curious person.
- Q. Do you think it is possible that when he left you after the first meeting the question as to whether or not he was going to purchase a shelf company from you was left open, he might or he might not?
- A. My recollection was quite clear in fact that he definitely decided to purchase the company from J.S.M.
- Q. You said one of the reasons why you didn't want to use – you thought using "North American Meat Company" was inconvenient is because you would have to study his Articles, right, to see whether or not table A was made applicable for Mr. Shum? 40
- A. Yes.
- Q. If you were too busy to do that why would your curiosity prompt anybody to make a search of this company?
- A. I don't remember having given instructions to search against this company myself.
- Q. Searching the company record costs money, does it not?
- A. Only a dollar.
- Q. But still costs money, and time, if anything? 50

In the
Supreme
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ling cross-
examination

- A. Yes.
- Q. And how much would you charge your clients?
- A. I don't know if we charge that one dollar.
- Q. Well, there was in item 4, "Search . . ." –
- A. \$8.
- Q. Yes, \$8. You charged \$8?
- A. I don't . . . (inaudible)
- Q. But that would have been the search fee for searching the North American Meat?
- A. It should be. 10
- Q. Or it might have been charges for more than one search, you don't know?
- A. Yes, I think there are quite a number of company searches floating around in the file against a number of companies.
- Q. But is the position that you cannot explain why a search was made on North American Meat Packing Company Limited on 21st January --
- A. No.
- Q. – when the use of it as the vehicle for the purchase of the property had already become history by the time Mr. Shum left you?
- A. Yes.
- Q. But you would not even now admit to the possibility that when Mr. Shum left 20 you he had not made up his mind to purchase a shelf company from you?

COURT: The following letter on the next page I suppose –

MR. TANG: Yes, this is dated the 22nd. Your Lordship will remember Mr. Shum's evidence – the same afternoon he rang Miss Leung and said, "Yes, we will buy a new company."

- Q. So would you accept it is a possibility that Mr. Shum is right here and you are wrong?
- A. Well, until you asked me I was very clear with my recollection but who am I to say that my recollection for four years is absolutely accurate.
- Q. Right. Now did Mr. Shum tell you that this – you said Mr. Shum told you that 30 he purchased this company from an accountant?
- A. Yes.
- Q. And he wanted to use this as the vehicle for the purchase?
- A. Yes.
- Q. And I suppose you inferred from what he had told you that he must have paid the accountant something for the purchase of the shelf company?
- A. That is a logical assumption although I don't think that thought had entered into my mind.
- Q. But you would not be surprised at all if he had paid for it, you would be very surprised if he hadn't? 40
- A. Yes.
- Q. And would you say that in 1976 the going rate for the purchase of a shelf company would be 3 to 5 thousand dollars?
- A. Yes, to purchase from J.S.M. would be about that price.
- Q. And to purchase from an accountant may be the same or slightly more or slightly less?

- A. It is normally slightly less.
- Q. I think the evidence of Mr. Ma was they paid between 4 to 5 thousand dollars for this company?
- A. That is possible.
- Q. Now if they paid 4 or 5 thousand dollars to buy the company then unless there was a good reason, would you not agree with me that they would not agree to purchasing another company and leaving this unused?
- A. Yes.
- Q. On the 21st January when Mr. Wong and Mr. Shum came to see you you said Mr. Wong told you that Mr. Shum was going to purchase a property which he wanted to mortgage to the plaintiff? 10
- A. Yes.
- Q. What did Mr. Shum say to that? Did he say anything about that?
- A. Yes, he confirmed what Mr. Wong said and it came out in the course of the conversation that he intended to have this North American Meat Packing Company to be a property holding company.
- Q. Did he say that to you first or had he already by then told you the description of the property, what property he was going to buy – which came first?
- A. I think the description of the property came first. 20
- Q. Did he tell you the name of the vendor?
- A. I don't remember.
- Q. Would it have been natural for you to ask him the name of the vendor?
- A. He would have to produce the receipt to me.
- Q. And you would have inferred from looking at the receipt that the name appearing in the receipt would be the name of the vendor?
- A. That would be an assumption, yes.
- Q. So could it be that when he gave the receipt to you you simply assume that the name appearing in the receipt would be the name of the vendor and therefore it was unnecessary for you to ask any further? 30
- A. I think by that time I was experienced enough not to jump to conclusions looking at the receipt.
- Q. So did you ask him who was the vendor?
- A. No, I asked him who the solicitor was that was dealing with the transaction.
- Q. Did you ask him who was the solicitor for the vendor?
- A. I don't know if I was as explicit as that.
- Q. Did you use the expressions which I think Mr. Wong and Mr. Shum both repeated: "Who were the solicitors for the other side"?
- A. I think I probably would be – why should I say the other side, assuming that I am this side acting for the mortgagees? I think I probably would ask, "who is dealing with the sale and purchase?" 40
- Q. But why not say who was acting for the vendor? I mean what is your objection to that?
- A. In my letter I did say, "I understand you act for the vendor." but I don't think it came out in the meeting quite that distinctly and I was just throwing that letter to him as a sort of testing, to see what Danny Yiu would reply. I don't think I had clear instructions.
- Q. No, but wouldn't it have been a natural thing to do, saying to those in front of you who were the solicitors for the vendor? I mean you must have done it day in

- out asking the same type of questions?
- A. I think I would more likely ask, "Who has got the title deeds? From whom should I get the title deeds?" and from that it would mean of course "who is the vendor", because it would be the vendor's solicitors who ought to have the title deeds.
- Q. Yes, for a solicitor you would know that the title deeds would be with the vendors, but to a layman do you not think it would be clearer if you were to ask who was acting for the vendor?
- A. I think it would be just equally clear if I had asked where the title deeds are. 10
- Q. Do you say that as a matter of practice when you have this kind of situation confronting you you would ask. "Who has the title deeds"?
- A. Yes, I think it is more my way of questioning than "Who is acting for the vendor".
- Q. To what particular reason would you ascribe the fact that both Mr. Wong and Mr. Shum seem to have different recollection? They seem both to have recollected that what you said was who were the solicitors for the other side.
- A. I don't know why.
- Q. But you would agree, would you not, if one had been asked who had the title deeds, that would have stuck in one's mind much clearer than if one had been asked who had the title deeds? (sig.) 20
- A. There might be other reasons that they would prefer to use that version.
- Q. So you asked a question and who answered you?
- A. I think it was Mr. Shum.
- Q. And what did he say?
- A. I think he produced the piece of paper with Mr. Yiu's name on in Chinese and English. So from that I assumed that he has got the title deeds.
- Q. Now both of them have recollected that what you said was solicitors on the other side -- who were the solicitors for the other side, and you said a moment ago you might not have said it because it implied there was our side and their side, do you remember that? 30
- A. Yes.
- Q. But that would be so standing there in the witness-box now. But on the 21st January, 1976, you had no idea that it would come to this, did you?
- A. No.
- Q. Then would it not have been a natural thing for one to say who were the solicitors on the other side?
- A. I don't think so because sometimes clients have no idea who is acting for whom and it would be easier and simpler to ask where the title deeds are, because it might be with the bank. 40
- Q. Now if he had said it was with the Hang Seng Bank that would not have, as it were, answered your query because you wouldn't then have been told who were the vendors?
- A. I am not concerned to know who the vendors were at that particular stage because sometimes by getting the deeds I could get the vendor to be my client, everything would be transacted in my office.
- Q. Do you mean to say that when you asked who had the title deeds it was deliberate?
- A. It's more likely that I would have said where the title deeds are than who is acting for the vendor. It's more likely because after four years I couldn't remember what

I had said exactly.

Q. But acting for a mortgagee in the position of Mr. Wong I thought you have told my Lord that you were not really concerned with prior encumbrancers like a mortgagee, a bank, who might have the documents, but with who the vendor was and, in particular, who his solicitors were?

A. I asked him where the title deeds were, I did not mean to say that I was concerned with the mortgagees.

Q. But would you not agree with me that this is a less direct question to the answer that you wanted to get?

A. All I was concerned at that particular stage was to get hold of the deeds to see if the title was all right for security. It may come from any source. I don't care where it came from. It could have come from Mr. Shum himself.

Q. And you also thought to yourself that if you have got the deeds from the mortgagee, a bank, you might have the possibility of acting also for the vendor in the transaction?

A. I am trying to think whether that has happened before.

COURT: Well, we are really concerned with this particular transaction. Did that occur to you in relation to this particular transaction?

A. No, it didn't.

Q. So what you have said indirectly is insofar as Mr. Wong and Mr. Shum have told my Lord that what you asked – the question you asked was who were the solicitors on the other side, their recollection is faulty?

A. I am not saying one way or the other. This is my recollection. They are entitled to their recollection. I am not saying who is right –

Q. But are you so firm about your own recollection that you don't admit to the possibility that they may be right and you may be wrong?

COURT: Well, I think she has said, "This is my recollection. Theirs might be correct."

Q. I see, you agree with my Lord.

A. I am not saying whose recollection is correct. I am not in a position to say.

Q. So I take it you agree with my Lord and that is, your recollection may be faulty and their recollection correct?

A. Yes, and the other way round as well.

Q. So Mr. Shum produced a piece of paper with Danny Yiu's name in both Chinese and English?

A. Yes.

Q. And that was handed to you?

A. Yes.

Q. And you got it?

A. Yes.

Q. Now apart from asking him who had the title deeds did you ask him any other question?

A. I think I was doing a lot of talking, but I couldn't exactly remember what I asked.

Q. Did you ask him whether or not he had a solicitor acting from him in the purchase?

A. No.

Q. Was it a deliberate silence on your part or what?

- A. It just did not occur to me to enquire because I was just concerned with Edward Wong.
- Q. You were just concerned with the mortgage?
- A. Yes.
- Q. But did it occur to you that if he had no solicitor acting for him in the purchase you might offer yourself to act for him?
- A. If they asked me to, I might, yes.
- Q. Would it not have been a natural thing in that kind of circumstances for you to have asked them, "Have you any solicitor acting for you in the purchase"?
- A. I don't normally tout for business. 10
- Q. I don't suggest that you tout for business, but would it not have been a natural thing to have asked him, "Do you have a solicitor acting for you in the purchase"?
- A. I don't think it is a normal thing for me to ask.
- Q. You mean you normally don't ask?
- A. I normally don't ask.
- Q. And what is the reason for not asking?
- A. Because if I am just acting for – I only act for people who ask me to act for them and Edward Wong asked me to act for him on the mortgage.
- Q. But that doesn't seem quite to be in character in view of a previous answer of yours in which you said you asked who might have the title deeds and if the answer was the mortgagee you would then – might have a chance of acting for the vendor? 20
- A. Yes.
- Q. So you always had your – you sometimes had your view on more business?
- A. Yes.
- Q. So on this rather innocent occasion, why not ask?
- A. I don't know why, but I didn't think it was my practice to ask.
- Q. Now if he had a solicitor acting for him in the purchase would it not have been more convenient so far as you are concerned?
- A. On the 21st January if I knew he had a solicitor acting for him it would be more convenient, yes. 30
- Q. Now did you ask him whether or not he had anybody acting for him in the mortgage?
- A. No.
- Q. Why not?
- A. That is not my practice.
- Q. But would it not have been more convenient to you if he was represented by a solicitor?
- A. It would not have been more convenient for me if he was represented on the mortgage. 40
- Q. But why not?
- A. Because then that would mean my sending the draft to his solicitors for approval. Having mortgagors separately represented by another firm of solicitors is so rare that I don't think I can – we have established any sort of practice. But I can imagine having it approved and having it executed in somebody else's office and then sending it to mine before I can do anything would be time consuming.
- Q. Have you ever heard of – but in Hongkong it is extremely rare, rare to the degree of being unknown, for laymen to prepare conveyancing for themselves?
- A. Yes, I don't think I have heard of it.

Q. You have never heard of it. And that is probably because from the point of view of laymen, ordinary men-in-the-street, they believe that it is better if that can be done by solicitors, if they are done by solicitors?

A. Yes.

Q. And in fact a lot of them may think that it is necessary for them to go to a solicitor, otherwise the matter would not be valid?

A. Yes.

Q. So for a person who is purchasing a property, more likely than not, he would believe that he needs a solicitor, or that he should have a solicitor?

10

A. That is a logical assumption, yes.

Q. Now in this case if Mr. Shum had his own solicitor acting for him on the mortgage, you have told my learned friend Mr. Cheung that you would have considered it improper for you to take instructions from him?

A. Yes.

Q. You would then have dealt with his solicitors direct?

A. Yes.

Q. You realise that of course because you are a solicitor?

A. Yes, I would not expect other solicitors to deal directly with my clients.

Q. And Mr. Shum's solicitors would know that too?

20

A. Yes.

Q. But there was a possibility, was there not, that Mr. Shum might not have realised the etiquette of solicitors and might not have thought it necessary to inform you that he had his own solicitors acting for him in the mortgage?

A. I don't think of that thought.

Q. Do you not think it would have been safer or wiser for you to have asked him this very simple question, 'Are you represented in the mortgage at all'?

A. No.

Q. But why not, because he might have been represented by a solicitor and simply didn't occur to him that he ought to tell you?

30

A. No, it didn't occur to me to ask. I don't think I have ever asked any mortgagors. All the mortgagors, who are very far and few in between, who are represented by solicitors are very big and established companies and they have either their own in-house lawyers or their retained lawyers and they would expressly instruct me to forward the mortgage deeds to their solicitors for approval.

Q. But normally in mortgages the mortgagee would be the big man and the mortgagor the small man?

A. Yes.

Q. For instance, the mortgagee may be the Hongkong Bank and the mortgagor a man-in-the-street?

40

A. Yes.

Q. Such people would be sent to you by the bank?

A. Yes.

Q. And would you ask them, "Are you separately represented"?

A. No, I have never asked them.

Q. Do you think it is possible that a person in that kind of situation, sent to your office, might somehow get the wrong impression that you were also acting for him?

A. I don't think they ever got the impression that I was acting for them.

- Q. Why not?
- A. Because it was just abundantly clear they were told by Hong Kong Bank to come to their solicitor and when they come we would say Hong Kong Bank is our client and the bill would say bracket payable by so-and-so the mortgagor.
- Q. And you think that is sufficient to dispel any – well, that would be sufficient information for such a person not to get the impression that you might also be acting for him?
- A. Yes.
- Q. But a lot of those persons would be the small man who may be making their first and only purchase in their life? 10
- A. Yes.
- Q. Some of them may be a hawker in the street?
- A. Yes.
- Q. Do you think that a hawker in the street would be sophisticated enough to realise the significance of the words in brackets in your bill?
- A. I think my clerks would normally interpret everything to the mortgagor including the bill.
- Q. Yes. What I don't understand is are you suggesting that your clerk would on presentation of the bill interpret the bill to the purchaser or the mortgagor? 20
- A. Yes, because very often we would be asked to explain item by item from beginning to end.
- Q. And is it also your understanding that a clerk on that occasion would tell the mortgagee, "We are not your solicitors; we never acted for you." . . . I'm sorry, the mortgagor, that we never acted for you; we are only acting for the mortgagee"?
- A. Yes, in fact I told David LEUNG specifically to tell the mortgagor that.
- Q. I see, but why did you not say so yourself?
- A. I think I have abundantly manifested by my behaviour that I wasn't their solicitor . . .
- Q. . . . Describe your behaviour. 30
- A. . . . in the mortgage; that I did not take instructions from them as to the amount of the loan, the interest rate . . .
- Q. . . . Now, pausing there for a moment . . .
- A. . . . or the personal guarantees.
- Q. . . . what do you mean by that you did not take instructions from them as to the amount of the loan?
- A. I did not consult them at all.
- Q. Did you ask them?
- A. No.
- Q. Do you mean they were sitting in front of you and you directed your question to Mr. WONG? 40
- A. No, that figure was consulted on the telephone with Edward WONG himself.
- Q. Subsequently?
- A. Subsequently, yes, and that was never confirmed with Mr. SHUM on the telephone until he came to my office.
- Q. I see, and when would that be?
- A. 27th of January.
- Q. One thing, interest rate, you've mentioned.
- A. Yes.

- Q. In what way had you failed to take instructions from him on the question of the interest rate?
- A. The interest rate was relayed to me by Mr. WONG at the first meeting.
- Q. Now, when you say related to you, do you mean Mr. WONG and Mr. SHUM were there and you asked "What's the interest rate?" and Mr. WONG said "one per cent"?
- A. One per cent, yes, per month.
- Q. And so that is a manifestation of your not acting for Mr. SHUM anything else?
- A. The personal guarantees.
- Q. And what about the personal guarantees? 10
- A. I did not ask the directors whether or not they were prepared to give the guarantees. I just, I don't know whether I personally consulted Edward WONG on that one but eventually it was confirmed from Edward WONG that he requires the personal guarantees.
- Q. Anything else?
- A. I think I have the interest of Edward WONG in mind.
- Q. Yes, but that would not have been a manifestation, would it?
- A. No.
- Q. We are dealing with manifestations of your behaviour.
- A. And I did not consult them on the date on which the advance was made. 20
- Q. Now, what do you mean by that?
- A. The advance was going to be made on the 27th of January. That date was conferred and confirmed with Edward WONG but Mr. SHUM was not consulted. He was informed when I think I either telephoned him or he telephoned me.
- Q. On the 26th?
- A. Not on the 26th; it must be a few days before, either the 24th or –
- Q. Any other reason – any other manifestation of your behaviour?
- A. I cannot remember exactly.
- Q. Do you say that they in combination or are you saying that they singularly are capable of conveying to Mr. SHUM? 30
- A. In combination.
- Q. In combination?
- A. Yes.
- Q. Now, how many of those manifestations are omissions and how many of them are ex commissions would you say – as opposed to ex commissions?
- A. I think they are all commissions.
- Q. Do you mean you failed to ask them what the interest rate was?
- A. No, they are not omissions, they are commissions.
- Q. Yes, commissions.
- A. Yes. 40
- Q. Do you mean to say that it was an act on your part in that you failed to ask them what the interest rate was?
- A. No, no, I didn't feel it my duty to ask them because I wasn't acting for them.
- Q. I see, but what I am asking you to tell my Lord: why did you think that you had made it abundantly clear by your behaviour to Mr. SHUM that you were not acting for him?
- A. Well, a combination of those factors that I have just mentioned.
- Q. Now, you said you did not have the question of the amount of the loan confirmed with Mr. SHUM. I may be wrong about this but if I remember correctly it was

put to Mr. SHUM by my learned friend that somebody had done that – I made a note of that; do you think that it is possible that you might also have confirmed that figure with Mr. SHUM?

A. I mean I am just guessing because I cannot remember but it is possible that I could have informed him what the loan was in order that he could ascertain what the balance of the purchase price was to pay Danny YIU.

Q. But anyway it would have been something which you would have expected him to know about because that figure must have been agreed ...

A. ... Either from him ...

Q. ... between him and Mr. SHUM?

A. Yes, yes.

Q. No, between him and Mr. WONG?

A. Either the information would come either from me or Mr. WONG. I may not be his only source of information.

Q. Quite; so even if you were acting for him, it was possible, was it not, for you to have omitted to do that on the assumption that he must also have known about it because that was what Mr. WONG told you had been agreed between Mr. WONG and Mr. SHUM?

A. But I think if I were acting for him I would ask him Is 1.355 million sufficient? 20

Q. I find it now, it is in the afternoon of the 10th of June and the question was:

Following first meeting Miss LEUNG wrote to plaintiff and copied to you and MA
this letter which thanks Edward Wong & Co. for instructions to prepare a debenture.

Yes, and then I have got this I have paraphrased it:

Leung says that figure of 1.355 was communicated to her by WONG after meeting on previous day.
Had you communicated the figure to her ...

(Mr. TANG confers with Mr. Price)

It was in the afternoon of the 10th June at 2 o'clock or something. We started off by referring – my learned friend started off by referring Mr. SHUM to Volume 2, page 27. Has your lordship got a note of it? 30

COURT: No, I haven't.

(Mr. TANG confers with Mr. CHEUNG)

Q. (Cont.) I have got a note of my learned friend Mr. CHEUNG and it says:

Miss Leung says that figure was communicated to her after the meeting of the previous day.

Had you communicated figure to her as well?

Answer: I can't remember. Nor can I remember the figure was given to her at our meeting. If she got it only from Wong that would show she was acting 40

for WONG, not me.

MR. PRICE: That is what it says here yes, that would be

If Miss Leung received that figure from WONG alone that would be because acting for this company and not you?

Answer: Don't agree.

But he had previously said.

You told the Court you can't remember whether or not it was mentioned at the meeting

and he had previously said he couldn't remember whether he communicated the figure to Miss LEUNG or not and it went on: 10

You were prepared to accept whatever figure WONG would lend?

and the answer to that:

We agreed in principle 70 per cent.

- Q. (Cont.) So there is some doubt as to whether or not it had been put to Mr. SHUM but it is unimportant, Miss LEUNG, because the point that I am trying to make now is to see what were the things which were said would have manifested abundantly to Mr. SHUM that you were not acting for him; and one of the things that you said was your failure to confirm the figure of the loan with him is a matter which ought to have manifested abundantly clear to him that you were not acting for him? 20
- A. I think I would put it like that – to say that I did not consult him on the amount of the loan that he was going to get from Edward WONG and not that the amount of the loan was not communicated to him because by the copy letters the amount of loan would have been communicated to him.
- Q. Now, since you have already made it abundantly clear to him, why did you instruct your clerk to tell him?
- A. Because I sold him the shelf company. I don't want him to be under the wrong impression that I acted for him on everything else as well.
- Q. Did he give you the impression that he might have got that impression? 30
- A. It is safer no matter what my impression was.
- Q. I see, but you did not think it necessary for you yourself to communicate it to him?
- A. I don't remember whether I myself said in so many words that I did not act for him but I definitely remember telling my clerk to make it very clear to Mr. SHUM that we were not acting for him on anything else other than the purchase of the shelf company.
- Q. Now, do you do it in every case or is this the only case which you – ?
- A. Since this is a border line case I made it – a special mention of it.
- Q. Why do you say this is a border line case?
- A. Because I sold him the shelf company. 40

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling cross-
examination

- Q. I see, but for that it would not have been a border-line case?
A. No.
Q. And but for that you would not have instructed your clerk to tell him?
A. No.
Q. I see. So notwithstanding that you have made it abundantly clear to him by your behaviour, you thought that it would be safer to have somebody tell him?
A. Yes.
Q. And that was done on the 27th?
A. That was done on – that was done before Mr. SHUM came . . . 10
Q. What do you mean?
A. . . on the 27th so it could be the 26th; it could be the 25th.
Q. I see, you mean your clerk told him before the 27th?
A. No, no, I told my clerk to tell Mr. SHUM.
Q. Yes.
A. I don't know when my clerk told him.
Q. Did you tell your clerk on what occasion he should tell Mr. SHUM that?
A. I don't think I specified the occasion but I would imagine since the – my clerk would only see Mr. SHUM and his friend and his associates on the 27th of January he would not have any other opportunity of communicating that to him other than on the 27th. 20
Q. And you realised, did you not, at that time that the only contact which your clerk was likely to have with Mr. SHUM would be on the occasion of the presentation of the bill?
A. And the interpretation of the debenture.
Q. I see do you say . . .
A. . . . But I don't know if my clerk had interpreted the debenture to him; that has to come from him personally.
Q. You mean his job was to interpret the debenture?
A. Yes. 30
Q. And to present the bill?
A. To present the bills, collect payment and specifically to tell Mr. SHUM that we were not acting for him on any capacity other than the purchase of the shelf company.
Q. I see and you told Mr. LEUNG to do that one or two days before the 27th?
A. Yes.
Q. Now, if your fear was justified and Mr. SHUM had actually thought that you were acting for him, do you not think that you might have left it too late; Mr. SHUM might then have said. "Look, I didn't realise that. I want my own lawyers now." then what would you have done? 40
A. But sometime after the receipt of title deeds and before the 27th of January I had a telephone conversation with there were several telephone conversations – I had a telephone conversation with Danny YIU.
Q. Yes, now, leaving that for the time being, because we know Danny YIU is dishonest, so what he might have told you on the phone might have been untrue.
A. Yes, you can leave that out but I tell in between 23rd . . . Oh, when did I receive the title deeds? Either the 23rd or the 24th of January and the 27th January Mr. SHUM was told that he should go to Danny YIU to sign the purchase papers.
Q. Now, pausing there for a moment, although we accept that Danny Yiu might have

been dishonest, what was it that Danny YIU tell you?

A. I think he was anxious that he would still be able to collect the full cost on the transaction.

Q. Yes.

A. And that would only be possible if I don't act in any capacity for Mr. SHUM.

Q. I see! did he say that to you in so many words or was that only an impression that you gained?

A. That was an impression that I gained.

Q. That he was anxious to make sure that he should have the full fee for the transaction? 10

A. Yes.

Q. I see and did he -- and the anxiety let it known -- and the impression that you gained was he was anxious that he should act in the transaction in such a way that he would get the full fee?

A. That he would get the full fee, yes.

Q. And was it a clear impression that he made?

A. It was clear enough that it was an impression that he had communicated over the telephone and then coupled with that was my reasoning at the time without any hindsight that that Mr. Shum, even if he were left unrepresented or if he was represented by Danny YIU, I would still have control over the validity of the title deeds that he was going to get as well as making sure that the stamp duty was paid, the registration was done and everything properly done because I would be doing that on behalf of the mortgagee anyway. 20

Q. Right: so would it be correct to say that was the impression that you gained and from your own point of view so long as the mortgagee should get a good title for the mortgage ...

A. Yes.

Q. ... you were not going to battle with Danny YIU over who was to get the full fee over the purchase? 30

A. Yes, and also if I were acting on the purchase, that would mean if I were that would mean SHUM having to pay JSM's costs in full and one half cost on the other side -- for the other side's I don't know what the other side's were for the vendor's costs.

Q. So you were saying it would be cheaper for SHUM to be represented by Danny YIU?

A. Yes.

Q. And you were not going to, as it were, to battle over it?

A. No.

Q. Now, when did that conversation take place?

A. It would be the time after I received the title deeds and before the 27th. 40

Q. Now, would that have been before or after you had spoken to Mr. YIU about re-arranging the structure of the transaction?

A. I can't remember the sequence.

Q. So it might have been before or it might have been after?

A. Yes.

Q. So you have, as it were, settled -- did you say to Mr. YIU, "All right, you would get the full fee."?

A. No, I didn't say so in so many words. After that conversation I just told Mr. SHUM to go to Danny YIU to sign the papers.

- Q. And so far as you were concerned that would entail Mr. YIU getting full costs?
A. Yes.
Q. Because the documents would then be signed, as it were, physically by SHUM in his office?
A. Yes.
Q. So on this point the accident as to who would get the full costs would depend on where the documents were executed?
A. Yes.
Q. Signed? 10
A. In this case, yes, but sometimes – in this case, yes.
Q. Yes, in this case, because if you were not ladylike enough to have given in to Mr. YIU it might have been completed at your office or he might have – Mr. SHUM might have signed the documents in your office?
A. Well, Mr. SHUM had so many other papers to do – to deal with that I could have no control over it would be very difficult for me to have asked for all the papers to be sent across to me by the 27th.
Q. Troublesome – it would have been troublesome?
A. It may not be possible because I wasn't expecting Danny YIU to have been able to finalise all the purchase papers by the 27th of January. 20
Q. But if he had been and if Mr. YIU was of the generous sort he might have said to you, "I don't care, I will contend with the half costs from the vendors." then you might well have been prepared to act in the purchase yourself?
A. But that still depends on Mr. Shum's explicit instructions.
Q. Quite, then in that case I suppose somebody would have to ask Mr. SHUM in which event, either you or Mr. YIU or somebody would have to ask Mr. SHUM "Who do you want to act for you in the purchase?"
A. It's a lot of hindsight in this because . . .
Q. . . . Oh, quite, yes, quite . . .
A. . . . on the 27th of January, I mean in that period I don't think I was worried 30 whether or not Mr. SHUM was represented because I was acting for the mortgagee and I would be perusing the title making sure that the new title deeds would be all right, making sure that everything was registered and stamped and so on. He would come under the mortgagee's umbrella. If it is good enough for the mortgagee it is good enough for the purchaser.
Q. Oh, yes, naturally, because the mortgagee was going to get exactly what the purchaser was going to get?
A. Yes.
Q. So the answer to my question is – still remains and that is it would depend on Mr. SHUM's explicit instructions, and in that event it would mean somebody would 40 have to say to Mr. SHUM, who is going to represent you?
A. Yes, that is one course of events.
Q. Yes, but having settled it with Mr. YIU, then you told Mr. SHUM that he should go to Mr. YIU's office to complete?
A. Yes.
Q. And you told him that he should go on the 27th?
A. Yes, not so much to sign the papers because I didn't think they would be completely ready although some of them might be, there would be the cancellation, the new agreement and the engrossment of the assignment, it would probably be a bit

too much to expect a sole proprietor firm to get all that lined up within that short time. What I was worried was the payment of the balance of the purchase price and the costs.

Q. So what you in effect said to Mr. SHUM was "You go to Danny YIU's office on the 27th. Pay the balance of the purchase price."?

A. Not on the 27th...

Q. ... I'm sorry ...

A. ... I said before the 27th.

Q. Before the 27th?

A. Yes.

Q. Or on the 27th so long as it is before ...

A. ... Yes.

Q. ... he came to your office?

A. Before he came to my office.

Q. Yes, to pay the balance of the purchase price and to pay costs and disbursements?

A. Yes.

Q. And Mr. SHUM said "Yes"?

A. Yes.

Q. Now, on the I think – could it be – I see, so your recollection is that you 20
telephoned Mr. SHUM and told him to do that?

A. It is either him – I think I telephoned him once and then he telephoned me a couple of times in between the 21st and the 27th.

Q. Could it be that it was SHUM who telephoned you ...

A. ... Yes, I think it is more likely that he ...

Q. ... and asked you what he had to do to complete the matter?

A. Yes, that is very likely.

Q. I see, and then you told him 'Pay the balance of the purchase price to Danny YIU & Co. as well as the costs?

A. Yes.

Q. Because that is how you have pleaded or how the 5th defendant has pleaded their case ... 30

MR. TANG: ... I do not know if this is a convenient time. It would certainly be convenient to me if your lordship wants an adjournment.

COURT: Will you be some time, the rest of today?

MR. TANG: Oh, yes, I will be some time, I will be for the rest of the day.

3.30 p.m. Court adjourns.

3.50 p.m. Court resumes

Appearances as before.

D.W. 3 LEUNG Wai-ling

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XXN. BY MR. TANG (Cont.)

- Q. Miss LEUNG, you were telling my Lord that before the 24th and the 27th of January Mr. SHUM telephoned you and asked what he had to do about the completion.
- A. Yes.
- Q. According to your pleadings it was on the 26th of January. Would it be probable that that date is right?
- A. Yes.
- Q. Now, can you try to recall what it was that Mr. SHUM said to you on the completion. 10
- A. I don't think I recall exactly.
- Q. But you can remember the gist of it though, he asked you what he had to do about the completion?
- A. Yes.
- Q. Is it possible that before he telephoned you somebody from your office had already telephoned him or Mr. MA or Mr. TSIANG telling him that on the 27th they were to come – to go up to your office for the mortgage?
- A. That is probable.
- Q. It is probable. Did you tell him on that occasion how much he had to pay by way of balance of the purchase price or did you assume that he knew? 20
- A. Now, I can't remember but the more logical assumption would be that I didn't because I am very bad with figures.
- Q. I see, you were – you anyway assumed that he would know about it?
- A. Yes.
- Q. Did you tell him how much he would have to pay by way of costs and disbursements?
- A. No.
- Q. Not on that occasion?
- A. Not on that occasion.
- Q. Do you think you might have told him that on a previous occasion? 30
- A. I think I would leave that to – I would have left that to Danny YIU himself.
- Q. I see. Now, speaking for yourself acting for the mortgagee you were not concerned with the balance of the purchase price?
- A. I should be concerned with the balance of the purchase price. If the balance of the purchase price was not paid . . .
- Q. . . . Quite no . . .
- A. . . . I wouldn't be able to get the title deeds . . .
- Q. . . . I put the question very badly; you were not concerned with the quantum of the balance of the purchase price; you were concerned that it should be paid? 40
- A. I was concerned that it should be paid, yes.
- Q. And the same with disbursements and costs, you were not concerned as to the quantum?
- A. Yes.
- Q. You were concerned that it should be paid?
- A. Yes.
- Q. So you just leave it to Mr. SHUM to find out in whatever way he can, what he had to pay?
- A. Yes.
- Q. Now, you said you told him that he should go to Danny YIU's office first, pay the

- balance of the purchase price and disbursements and costs before coming to your office to execute the mortgage?
- A. Yes.
- Q. That was a message that you gave him personally over the telephone?
- A. Yes.
- Q. And you say now you cannot recollect whether he came to your office in the morning or the afternoon of the 27th?
- A. No, I can't remember.
- Q. His recollection was that it was in the afternoon and he was confirmed by Mr. MA who gave evidence. 10
- A. Yes.
- Q. Is there any way of checking out – checking from your diary whether or not it was in the afternoon or in the morning?
- A. I don't think so because everything happened so quickly in that case I didn't have any time to mark it down in my diary.
- Q. No, it was quite hectic that afternoon, wasn't it?
- A. Yes.
- Q. Because there was a lot of things to do; hectic I shouldn't say that afternoon; assuming that it was in the afternoon. 20
- A. It is possible that it was in the afternoon.
- Q. I see, but you cannot remember; you didn't even have time to mark it down in your diary?
- A. No.
- Q. Because you were very busy?
- A. Yes.
- Q. And you were racing against time as it were to try and get everything completed on the 27th before the Chinese New Year?
- A. Yes.
- Q. Were you also going to go away for the Chinese New Year? 30
- A. No.
- Q. And you told my Lord that as Danny YIU was the sole proprietor you had not really expected him to get to have all the documents ready on the 27th?
- A. No.
- Q. But you were not unduly worried about . . .
- A. . . . No.
- Q. . . . so long as they were ready within a reasonable time?
- A. Yes.
- Q. In fact you also said, did you not, that when you wrote and asked for Danny YIU's undertaking you did not really believe that he could have done it within ten days? 40
- A. He! It is possible to have done it within ten days but I don't think he would.
- Q. You would have been pleasantly surprised if he had been able to do it within ten days?
- A. Yes.
- Q. But you would not be unduly worried if it wasn't?
- A. No.
- Q. And you also said something rather cryptic in answer to my learned friend Mr. Price you said: the mortgage and the assignment to Mr. SHUM ought to be executed first and then the superior assignments, namely the assignment from Mr. Ho to

- Lucky Time, and then . . .
- A. . . . No not the execution but the completion of the subsequent agreements should be – should take place a little bit earlier than the superior agreement in that the parties in between would have to get the money from the lower – the people lower down in order to pay the people further up.
- Q. I see, so on the 27th completion were to take place only so far as the mortgage was concerned?
- A. Yes.
- Q. And so far as the payment of the purchase price was concerned? 10
- A. By . . .
- Q. . . . By Bovill?
- A. Yes, by Bovill.
- Q. But that the actual assignment would await the date of completion stipulated . . .
- A. . . . Yes . . .
- Q. . . . in the agreement?
- A. . . . on the 29th.
- Q. That is the 29th?
- A. Yes.
- Q. That was your understanding on the 27th? 20
- A. Yes.
- Q. Did you explain that to Mr. SHUM?
- A. No.
- Q. I see, but so far as you were concerned and using the language loosely, you told Mr. SHUM completion 27th?
- A. Yes, one day later than he expected.
- Q. One day later than he had hoped for?
- A. Yes.
- Q. Although completion in the real sense of the word could not in any event take place until the 29th . . . 30
- A. . . . Yes.
- Q. . . . because it was so nominated in the superior agreements.
Now you said you told Mr. SHUM to go to Danny YIU first before coming to your office and execute the mortgage. The documents which he signed at your office and at Danny YIU's office would be signed as it were in escrow?
- A. Yes.
- Q. They would be dated when the superior documents have been completed?
- A. The date has always been something which is very unsatisfactory because . . .
- Q. . . . Unsatisfactory . . .
- A. . . . No, because sometimes if I get all the assignment and agreement I could not date them or stamp them until I have the re-assignment and sometimes the re-assignment takes so long in coming that the one month period for stamping has gone by so the date is irrelevant to the completion date. 40
- Q. So the practice in Hong Kong is not to date such documents?
- A. Until I get all the documents necessary for registration.
- Q. Quite, because you have to first have the re-assignment, that should take place theoretically in time first?'
- A. Yes.
- Q. And then the other documents would follow thereafter?

- A. Yes.
- Q. So none of the documents would be dated on that day?
- A. No.
- Q. And if the bank mortgagee was slow they might not be dated until some considerable time afterwards?
- A. No, but my own personal practice was to pencil mark the date on which it was actually signed and then, if possible, to adhere to that date.
- Q. Yes, but it may not be possible...
- A. ... It may not be possible. 10
- Q. ... If more than one month had expired...
- A. ... Yes.
- Q. ... Because one would then have to pay a huge penalty.
- I see, so in that case, It would not have been a matter of great concern to you whether the purchase documents were signed first or the mortgage was signed first?
- A. It would not be a matter of great concern to me.
- Q. In fact would it not be correct to say that it was a matter of indifference to you whether or not they were signed on the same day – whether or not they were signed one – one was signed before the other? 20
- A. But I think I would prefer the assignment to be executed prior to the mortgage because then when they come to execute the mortgage, in some sense although not in the full sense, they have become the title holder.
- Q. Yes. Now, that would be so in a case where all the necessary documents were to be signed in escrow on the same day?
- A. You mean the cancellation?
- Q. The cancellation, the assignments, all to be signed on the same day because after signing their own purchase documents they would have become the equitable owner when they signed the mortgage?
- A. Yes. 30
- Q. But in this case since it was not anticipated that the superior documents were to be signed on the 27th of January, would it not have been a matter of indifference in what order the documents were executed?
- A. Yes, because really at the back of my mind I didn't expect – I didn't expect these papers to be ready.
- Q. Right; so if you did not expect the papers to be ready would it not have been more convenient to sign those which were ready first?
- A. Yes, but my concern, apart from the signing of the documents, was also the balance of the purchase price.
- Q. Quite, but then why should you be concerned about that because you were going 40 to obtain an undertaking from Danny YIU...
- A. ... Yes.
- Q. ... not to part with the mortgage money ...
- A. ... Yes.
- Q. ... before all the documents have been satisfactorily executed?
- A. Yes, but it is always better to have it paid and not to argue about it after I have paid over the mortgage money.
- Q. I mean what sort of arguments would you anticipate?
- A. Well, if there are a lot of arguments in other cases where the mortgagor didn't

turn up at the developer's office to pay the costs and the developer would hold the assignment without releasing it to us and without returning the mortgage money to us.

Q. Notwithstanding the undertaking?

A. Yes, and sometimes you sort of overlooked it and you sort of sat there for a few months.

Q. I see, so it would be a matter of concern to you to see that the balance of the purchase price was paid first?

A. Yes.

Q. To know that it was safely sitting in the office or in the safe of Danny Yiu & Co.?

A. Yes.

Q. Now, assuming that Mr. SHUM and Mr. MA were correct and that they came to your office on the afternoon of the 27th and assuming that you had found out the same afternoon that Mr. SHUM and Mr. MA had not been to Danny YIU's office, you would have been annoyed, would you not?

A. I don't know if there is another further misunderstanding because – I don't know if there was another misunderstanding, the first misunderstanding being the tenancy . . .

Q. . . . The tenancy . . .

A. . . . There is another further misunderstanding because I did ask Mr. SHUM when he came to sign the mortgage, Have you been to Danny YIU?, and I thought the answer was "Yes".

Q. Yes.

A. But I think hearing to his evidence and looking and watching him giving the evidence it may be that he misunderstood me because he is – I think he is a very agreeable person so he probably would say "Yes" to anything.

Q. I think one has a lot of experiences should that kind of people who say "Yes" to everything and then contradict themselves later.

Yes, now, but my question was assuming that you discovered either Mr. SHUM or independently of Mr. SHUM on the afternoon of the 27th that they had not been to Danny YIU's office, would you have been annoyed?

A. I don't know what my reaction would be, I couldn't remember what my reaction was because I discovered. I had an inkling that they hadn't been to Danny YIU's when the three bankers drafts arrived.

Q. Quite, yes, because they were to go and pay?

A. Yes.

Q. They obviously had gone and paid?

A. Yes.

Q. Because the money had come from Edward WONG?

A. Yes.

Q. So would you say that it was more than an inkling your natural inference from that they had not been to Danny YIU's office?

A. They could have been to Danny YIU's office for other things – to pay the costs.

Q. All right. Now, would it not have been very easy for you to find out because there the three of them were still sitting in your office?

A. Because well, I did try to find out. I said, "Have you been to Danny YIU?", and the answer was "Yes".

Q. I see.

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- A. That was my previous – I think I said that about five minutes ago.
Q. I see, I had not realised that . . .
A. . . . That was a misunderstanding.
Q. You asked that question after the three cashier orders arrived?
A. No, no, before the three cashier orders arrived.
Q. Quite.
A. When they came to execute the mortgage.
Q. But after three orders arrived, that gave you, as you said, an inkling . . .
A. . . . Yes. 10
Q. . . . that he might not have been to Danny YIU's office?
A. Yes.
Q. But you still had the three of them in your office.
Did you then ask any one of them. Have you been to Danny YIU's office?
A. No.
Q. Why note?
A. No, because it was very late in the afternoon, I think, thinking about it now, when Edward WONG came with the three cashier orders; and by that time I was more concerned that the three cashiers orders should get to Danny YIU than I was concerned with what SHUM was doing. 20
Q. I see, so naturally you did not tell them to go to Danny YIU that afternoon?
A. Well, my recollection was – I didn't mention – I didn't tell them to go that day but previously.
Q. Yes, now apart from payment of the balance of the purchase price, costs and stamp duty, was it a matter of some relevance to you whether or not they signed any documents on the 27th?
A. So long as they signed the documents within the ten days' limit and that Danny YIU produced to me all the documents duly signed, I don't think I was worried on the 27th of January . . .
Q. . . . I see. 30
A. . . . That the papers were not signed.
Q. So again it was a matter of indifference to you on the 27th whether or not they should go to Danny YIU's office to sign any documents?
A. I was not concerned, yes.
Q. You were only concerned that they should pay the balance of the purchase price, costs and disbursements?
A. Yes, particularly the balance of the purchase price.
Q. Now, the balance of the purchase price we know had somehow or other been paid to Mr. Edward WONG instead?
A. Yes. 40
Q. Now, I know that there is a difference in recollection between you and Mr. SHUM on the question of the stamp duty.
A. Yes.
Q. Is it possible that for a person like Mr. SHUM who had paid the balance of the purchase price not to Danny YIU but to Edward WONG that he might also have not paid the stamp duty before he came to your office that afternoon?
A. I don't know what his assumption would be.
Q. Did it occur to you that he might also not have paid the stamp duty and the costs?
A. I was not concerned with the costs and the stamp duty because even if that was

- not paid I could always get Edward WONG to pay.
- Q. So it did not occur to you that afternoon to find out whether or not they had paid costs and disbursements?
- A. No, my concern was the balance of the purchase price.
- Q. Again it was a matter of indifference to you whether or not they had paid before they came to your office?
- A. I was concerned that they should pay the balance of the purchase price on or before the 27th of January.
- Q. I see, but so far as the stamp duty etc. is concerned, it is a matter of indifference to you. 10
- A. I was not concerned.
- Q. Now, you said the reason why you were not concerned is because if they should fail to pay you can always get Edward WONG to pay?
- A. Yes, we have had that in other cases.
- Q. Yes, Edward WONG, I suppose, would not like it?
- A. No, Edward WONG would not like it.
- Q. And do you not think that as solicitor for Edward WONG you ought to have made sure that they are paying so that there would be no possibility in the future of your having to seek recourse against Mr. WONG? 20
- A. Well, they were told by me previously to go and pay Danny YIU's costs and I would expect them to go there because they did say that – SHUM did say that he would go.
- Q. But he had been proved wrong by that time because the three cashier orders arrived in your office.
- A. I don't think I had time to worry on that day about the costs.
- Q. Because then everything was done very hecticly?
- A. Yes.
- Q. Now, again a matter of recollection, do you think it is possible that Mr. SHUM might have said to you "What about stamp duty and costs, shall we pay you? do you think it was possible that he might have asked you that? 30
- A. I certainly have no recollection of that.
- Q. Well, I think so far the impression that you have given of Mr. SHUM is a type of – rather bumbling type of person; if so, would you not agree with me – of course it is a matter of your own recollection – it is possible that your recollection might have been wrong and his is correct?
- A. Well, I think so, yes.
- Q. It is a possibility?
- A. It is a possibility although I really have no recollection in this regard.
- Q. But assuming that he had asked you, "Shall I pay you the stamp duty?", what would your reaction have been? 40
- A. I would have said, "Didn't I tell you to pay Danny YIU?"
- Q. Yes, assuming that his answer was, "Yes, you told me but I haven't paid. Can I pay you now?"
- A. Yes.
- Q. That what would you have said?
- A. Then I would have said, "No, don't pay me, pay Danny YIU."
- Q. Now, I'm talking about the stamp duty, not about costs and other disbursements.
- A. Yes.

- Q. So far as stamp duty is concerned, would it not have been just as convenient for him to have paid you?
- A. Yes, he could have paid me as solicitors for the mortgagees.
- Q. Quite. Now, could it have been possible when you heard him ask you "Shall I pay you the stamp duty?" for you then to ring Danny YIU up and say "Shall I accept the payment of the stamp duty on your behalf?"?
- A. That is a possibility but I have no recollection of that ever happening.
- Q. Yes. You see, your arrangement with Danny YIU was, after stamp duty had been paid to Danny YIU, he would then send you the money, would he not so that you can attend to the stamping yourself? 10
- A. Yes.
- Q. So it would have been less troublesome if the stamp duty had been paid to you direct?
- A. It would have been less troublesome, yes.
- Q. So would you not accept that when Mr. SHUM said he had asked you whether or not he should pay you the stamp duty that was possible and also it was possible that on hearing that you telephoned Danny YIU and asked him "How about it; shall I accept the stamp duty from Mr. SHUM?".
- A. Yes, but that story does not ring a bell to me. 20
- Q. No, but it is possible?
- A. It is possible but I have no recollection of that.
- Q. In fact if he had raised that, would it not have been the most natural thing to do?
- A. It is one way of handling the situation, yes.
- Q. And if Mr. YIU was not thinking of going away with the money, would he not have been expected to say. Yes, it would save me writing you a cheque?
- A. Yes.
- Q. Now, assuming that Mr. SHUM was not -- you say that it is a possibility that this question of stamp duty might have been mentioned to you; is it also possible that they also mentioned the question of costs? 30
- A. I don't think so. Those are possibilities. It may or may not have happened. I don't think my recollection is clear enough to say even the first possibility did happen.
- Q. You would not exclude it as a possibility but you would not go further than that?
- A. Yes.
- Q. What about the question of costs; would you exclude it as completely not possible?
- A. I would exclude it completely, yes.
- Q. Now, why would that be so?
- A. Because they have just paid a lot of cost and I don't think anyone, layman or otherwise would enquire as to paying further cost.
- Q. Not if they knew that they had further cost to pay. 40
- A. I am clear. I am quite clear on this one though that no cost was mentioned that no further cost was mentioned when they came to sign the debenture.
- Q. If that had been mentioned to you, you would not have taken it amiss, would you because it's just one of those questions that laymen are prone to ask I mean was there reason why, if that question had been asked of you, it should have stuck in your mind so that you can now say four years later that it was impossible that you had been asked the question?
- A. I do not think laymen as a rule are -- mention costs.
- Q. Of course I can't give evidence but I think one has -- I see, but in Hong Kong have

you not seen lay clients, for instance, asking counsel after the conference that you had attended with him and counsel, "Shall I pay counsel now?" have you heard people say that?

A.

No.

Q.

Or you don't do any litigation?

A.

No, I don't do any litigation.

Q.

I have been asked that question many times.

Now, if you had found out one way or the other on the 27th . . . I'm sorry, you said you telephoned Mr. YIU on the 27th to ascertain that 1.665 was the balance payable?

10

A.

Yes.

Q.

But why ask him; could you not have asked Mr. SHUM who was in your office?

A.

Well, he is in control of the sale and purchase so he ought to know. It would be better to confirm with the solicitor rather than a layman. What happens if he says, 'Oh, the balance of the purchase price was just 1.2 million.'?"

Q.

Now, Mr. YIU knew on the 27th that money was coming?

A.

Yes.

Q.

And he knew, did he not, on that day that Mr. SHUM was going to go to his office to pay?

20

A.

I don't know if he knew.

Q.

And . . .

A.

. . . I mean if I were him I would contact SHUM to get him to come.

Q.

Yes, if you were him, but assuming – but you can't say whether or not?

A.

I do not know whether he was aware that they were going.

Q.

Now, you said that you were not expecting all the documents to be ready but you were expecting some of the documents to be ready and you were expecting them to be signed on the 27th?

A.

Yes, I think it would be very easy to do a cancellation agreement.

Q.

It is easier to do a cancellation than a new agreement; so was it your understanding that on the 27th some documents would be ready for signature by SHUM?

30

A.

Yes.

Q.

And so when you said to SHUM on the 27th, 'Go to Danny YIU, completion, payment' . . .

A.

. . . I don't think I said to Mr. SHUM on the 27th to ask him to go; it was a previous occasion on the telephone.

Q.

Yes, I know, I'm sorry, when I said I don't mean told him on the 27th to go "I told him on the 27th to go".

A.

No, I didn't say "Go on the 27th"; "Go to Danny YIU before you come here," I said.

40

Q.

And "Go there and pay"?

A.

Yes.

Q.

Now, did you ask Mr. YIU "Have you been paid your stamp duty and costs?"?

A.

No.

Q.

Why not?

A.

It just didn't enter into my head to ask sorry.

Q.

I see, but wouldn't that have been the most natural thing to do because you had been careful enough to tell Mr. SHUM that he should go before coming to your office to pay the balance plus costs plus disbursements; why be so much less

- careful on the 27th?
- A. Possibly because I was very busy and I didn't and I thought I had left the matter with Danny YIU and Danny YIU would be collecting the balance of the purchase price and his cost if he is doing his job.
- Q. I am afraid I suggest to you that your recollection is incorrect and Mr. SHUM's is correct and on the 27th he asked you whether or not he should pay the stamp duty and costs to you and you said you then had a telephone conversation with Mr. YIU and then you told him that he should go to Mr. YIU's office and pay?
- A. That is not my recollection. 10
- Q. Now, you were expecting some documents to be paid on that day – to be signed on that day; so had you realised on the 27th that they had not already been to Danny YIU's office would it not have been the most natural thing for you then to say "You ought to have gone before coming here but since you haven't done so you had better go now"?
- A. No, that would sound a little bit schoolish. By that time I think I was already relying on Danny YIU's undertaking to put everything in order and I sort of completely -- as soon as the debenture is executed, the personal guarantee signed, I considered myself having fulfilled my duty.
- Q. I suggest to you that it would not have been schoolish; it would have been just the most natural thing to do? 20
- A. Well, whether it was natural or not, I didn't do it. My recollection was that I didn't do it.
- Q. Now, I suggest to you that you did and they went all the way over that same afternoon?
- A. That is not my recollection.
- Q. Now, the purchase of the North American Meat Company, you told my learned friend Mr. CHEUNG that it was more – you said that –
Now, I think you said to my learned friend Mr. CHEUNG that you flipped through the memorandum? 30
- A. Yes.
- Q. And you found that the principal object was a meat company.
- A. Yes.
- Q. And you thought that is wasn't very appropriate?
- A. Yes.
- Q. And did you also say that it didn't sound nice?
- A. Yes, I think I admitted that when I replied to Mr. CHEUNG.
- Q. So there you have Mr. SHUM and Mr. WONG sitting in front of you.

COURT: What relevance has it got I must admit that so far I cannot Mr. SHUM went along: he had this company which he had bought from his accountant. Miss LEUNG said it didn't seem appropriate and he agreed that he should buy another shelf company. 40

MR. TANG: But I think there is some dispute over this, first, as to whether or not she was keen in selling the shelf company or that she was reluctant to do so. I'm afraid your lordship at the end of the day would have to say whose recollection is more accurate; and if I could persuade your lordship that on this particular matter more likely than not my client's recollection is more accurate, and your lordship may

feel that he may also be more accurate in some other matters, because this is a very important meeting, the 21st...

COURT: This evidence relating to the North American Meat Packing Company is relevant purely to prove memories?

MR. TANG: Yes, because on a very important point their recollection differs and that is whether or not Mr. SHUM said to her that he wanted her to represent him as well. On that bare point it would be impossible – it would be difficult with respect for your lordship to decide whose recollection is more correct.

What I would seek to do is to examine the reasons given by the witness and to see how far they are valid. 10

COURT: Have you been over this...?

MR. TANG: Not by me. My learned friend Mr. CHEUNG has gone over it for his own purpose but not for mine. I will try and keep it as brief as possible.

COURT: Yes, I don't want to have to hear this all over again.

Q. You also mentioned that it would be – you were not very keen to supply a shelf company?

A. No.

Q. But you thought that it would be more convenient for you to supply one than for him to get another one from his accountant? 20

A. Yes.

Q. And you also mentioned that it would be more convenient because then you don't have to see whether or not Table A was applicable?

A. Yes, but that is the last reason and the last consideration in the matter because my convenience would not – should not be a deciding factor.

Q. So so far as you were concerned, how would you rate their rank of importance. What was the most important reason?

A. That the first object of the company was of the North American Meat was in dealing with cattle sheep and pigs.

Q. Right, the second reason is it did not sound nice? 30

A. That my – I don't think that comes in; that can be easily changed.

Q. But it was proffered as a reason to Mr. CHEUNG?

A. Yes, proffered as a reason possible because that might go with Mr. WONG and Mr. SHUM.

Q. What was the...

A. ... Because knowing ...

Q. ... Yes, and other reasons?

A. I suppose my prejudice against the accountants' memorandum and articles.

Q. Yes, and you thought it would be more convenient if you didn't have to check through them. 40

A. Yes.

Q. But as you say that would have been an improper consideration so far as you were

- concerned because you were paid to work?
- A. Yes.
- Q. Any other considerations?
- A. I don't think so.
- Q. So did you mention all three of them or just the two, the first two?
- A. Just the two because the last one is just personal. I shouldn't state that as a reason.
- Q. But could that third reason have been a reason why you offered those two reasons to them?
- A. No, I think they are all independent. 10
- Q. Now, so far as the first reason is concerned, you agree with my learned friend that even at that juncture you were aware that the company had the power to purchase for investment?
- A. Yes.
- Q. The company had the power to mortgage?
- A. Yes.
- Q. Whatever the two positions might have been, that was your understanding at the time?
- A. Yes.
- Q. So far as the second reason was concerned, you could easily change the name? 20
- A. Yes.
- Q. So it would also be correct to say that if one wanted to do so one could also delete the first object if one wants to?
- A. That is a bit unusual.
- Q. Yes, but it can be done?
- A. Yes.
- Q. If you muster enough majority to pass the necessary resolution?
- A. I do not know if I am sufficiently up on company law to answer that question.
- Q. So when you offered those two reasons to them, were you doing that as solicitor for Mr WONG or as what? 30
- A. I think I was just – I think I was advising Mr. SHUM then.
- Q. Because it would have been a matter of indifference to Mr. WONG whether the name sounds nice or not; it would have been a matter of indifference to him whether or not the first object was a meat, sheep and whatever?
- A. Yes.
- Q. So you were . . .
- A. . . . If the objects are all independent.
- Q. Yes, quite, as you thought they were?
- A. Yes.
- Q. So you were at that time advising Mr. SHUM? 40
- A. Yes.
- Q. And then he conferred with Mr. WONG?
- A. MA I think it was.
- Q. No, in your presence he conferred with Mr. WONG . . .
- A. . . . Oh, Mr. WONG.
- Q. You said, in Cantonese, and he turned back and said "Yes, I will buy the shelf company from you"?
- A. Yes, I did not suggest that Mr. SHUM should buy the shelf company from JSM.
- Q. But did you suggest that he should buy a new shelf company?

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- A. Yes.
- Q. And so you gave him the two reasons, the meat object, name wasn't nice, you should get another shelf company?
- A. Yes.
- Q. And then he conferred?
- A. Yes, in Shanghainese.
- Q. And then he came back and said, yes, in Shanghainese, and then he said 'Yes, I want a shelf company' from you?
- A. From JSM. 10
- Q. And then you said you were not keen?
- A. I think it was whilst they were discussing in Shanghainese that I was not butting in to influence them one way or the other but once they have indicated their desire to purchase a shelf company from JSM I was willing to have more business, I was – now that I know it would be my responsibility or the responsibility of the firm to provide a shelf company then I ought to make sure as quickly as possible that a shelf company was available and that it was set up.
- Q. So are you in effect saying that far from being not keen you were keen?
- A. After they have decided to purchase, yes.
- Q. But, of course, as a solicitor you should not tout for business and you did not? 20
- A. No, I did not tout.
- Q. So you were keen; but in answer to my learned friend you gave as a reason or you agreed with him when he suggested to you as a reason that you thought it would be quicker for you to supply the shelf company than for SHUM to go to his accountant to get one?
- A. Yes.
- Q. So that was also operating in your mind at that time?
- A. I was keeping that in my mind but I don't think I indicated that to him.
- Q. No, no, but since he was going to get a new shelf company he might as well get it from you rather than from his accountant? 30
- A. Yes, yes.
- Q. Because if he were to get from his accountant it would take more time and you would have to check?
- A. Yes.
- Q. Now, had it occurred to you for you to say to yourself "I wonder if he had a solicitor and if he had would it not have been easy for him to get a new shelf company from his own solicitor?"
- A. Why turn away business when it is at your own door?
- Q. But if he was represented by another solicitor, wouldn't that have upset his solicitor? 40
- A. No.
- Q. Here was his client who was not as stupid enough to tell him that he was represented by a solicitor coming to see you, you utilising the opportunity in selling him a shelf company which the other solicitor could just as easily have done?
- A. Yes, the other solicitor could have easily sold him a shelf company.
- Q. But you were not keen to turn away business as it were?
- A. No.
- Q. Now, you said yesterday to my learned friend Mr. CHEUNG that you were not aware whether or not you would be entitled to the same fees or more fees if you were acting not only for the mortgagee but also for the mortgagor; do you remember

- that?
- A. Yes, I wasn't aware – I did not know that I was entitled to charge only one set of costs even if I were acting for both the mortgagor and mortgagee.
- Q. So at that time it was possible so far as you were concerned that if you had acted for the mortgagor you might have got more fees?
- A. No, the thought never entered into my mind.
- Q. No, maybe not, but so far as you were concerned you did not know then that if you acted for both of them you would only get the same costs?
- A. I didn't know at that time. 10
- Q. At that time it was a possibility that if you acted for the mortgagor as well as the mortgagee you could have got more?
- A. No, I have never acted for mortgagors ever since 1973 June up to now.
- Q. But that is not quite my question.
- A. It has never entered into my head to act for Mr. SHUM in his capacity or to act for his company in his capacity as mortgagor.
- Q. But if – but why would it not – never occurred to you because you were keen to have more business?
- A. Because it was not my practice. It just never entered into my head at all.
- Q. Now, let's examine this practice further: why was it not your practice; I mean 20 did you make it a practice for yourself?
- A. I came into the practice.

COURT: Can we take it . . . she said it was not her practice.

MR. TANG: I am just interested to know that her recollection on this point is also faulty.

- A. It can't be faulty; it never entered into my head.
- Q. Of course not.

MR. TANG: But your lordship may not accept her evidence on this point and what I want to do is to explore her evidence in such a way as to hopefully suggest to your lordship at the end of the day that you should not accept her evidence on this point. 30

COURT: She has said . . .

MR. TANG: And in this case I say that she was acting for my client . . .

COURT: Yes, she has now said about ten times that she has never acted for the mortgagor and that it was not her practice to do so.

MR. TANG: My Lord, I do not know if your lordship thinks this is a convenient time. I have got a few more questions of this witness and it is now after half past four.

COURT: I am getting very concerned with the time again.

MR. TANG: I think the other witnesses will be quite brief. I don't see the remainder of the witnesses taking up even one day.

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MR. PRICE: My Lord, I have two witnesses who will be very short . . . I have one witness. I do not know whether he will be long or short.. His evidence in chief will be magnificently short his cross-examination I can't guess yet.

MR. TANG: Would your lordship – ?

COURT: Yes, very well, we will adjourn now, but I really think that this point has been gone over so many times . . .

MR. TANG: . . . With respect I shall certainly consider it overnight.

COURT: We will adjourn to tomorrow.

4:35 p.m. Court adjourns

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30th July, 1980.
 10:05 a.m. Court resumes.
 Appearances as before.
 D.W. 3 – LEUNG Wai-ling

XXN. BY MR. TANG:

- Q. I have gone through my notes of your evidence in chief last night and I would want to refresh your memory on a matter which you have said in chief, but you have seemed to have said something quite different when I asked you questions on it in cross-examination. Now to begin with, you told my learned friend Mr. Price that the date for completion was arranged between you and Mr. Yiu? 10
- A. Yes.
- Q. And it was decided that completion should take place on the 27th?
- A. Yes, because I don't think I could make it by the 26th.
- Q. So was the postponement to the 27th at your suggestion?
- A. Yes, after I have consulted Mr. Edward Wong.
- Q. And completion as used by you and Mr. Yiu meant Hongkong completion?
- A. Yes.
- Q. And by that it's meant the purchaser would sign the necessary documents, the assignor may sign the necessary documents, but the whole thing – completion in the full sense would have to await the execution of a re-assignment, for instance, by the bank mortgagee? 20
- A. Yes.
- Q. You said that you had several telephone conversations with Mr. Shum before the 27th?
- A. Yes.
- Q. And you said on the last occasion he was told that completion would take place on the 27th?
- A. Yes.
- Q. And you also said, "I told him to go to Danny Yiu's office to sign the purchase papers and to pay his costs, the balance of price not covered by the plaintiff's loan"? 30
- A. Yes.
- Q. You again said that later on in your evidence when my learned friend repeated the same question to you?
- A. Yes.
- Q. So on the 27th it was in your mind that Mr. Shum should go to Danny Yiu's office to sign the necessary purchase papers?
- A. If they were ready, yes.
- Q. But you have told him to go and sign those papers? 40
- A. Yes, before he came to me.
- Q. And your understanding was that completion should not take place on the 26th because you needed an extra day and therefore you requested a postponement to the 27th?

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- A. Yes.
- Q. So it wasn't Mr. Yiu who would not be ready on the 26th but rather you that you wanted an extra day?
- A. Yes.
- Q. And you also said to my learned friend that if Mr. Shum had been to Mr. Yiu's office on the 27th and signed the documents then at the end of the day on the 27th, in your mind anyway, completion in the Hongkong sense would have taken place?
- A. I think completion from my point of view would have taken place if I had sent across to Danny Yiu the mortgage proceeds against the undertaking. 10
- Q. But my learned friend's question to you was not only that, but on the assumption that the three directions had attended Danny Yiu's office and signed – and provided the balance of the purchase price, then in your mind transaction, according to Hongkong idea, would have been complete, I think that was the gist of his question to you and you agreed to that?
- A. Yes, but I thought also at the back of my mind it was also that Danny Yiu may not have all the papers ready because he was the sole proprietor, he may not have the necessary staff to do it, but as soon as Mr. Shum had made contact – whether or not he had previously made contact with Danny Yiu I don't know – but as soon as he had made contact to say that he was ready to sign the purchase papers, pay the excess of the purchase price which was not covered by the loan and to pay his costs, then it's up to Danny Yiu to make his own arrangement as to when that's actually done. 20
- Q. The doubt that you had as to whether or not Mr. Danny Yiu as a sole proprietor could have generated sufficient – all the necessary paper work by the 27th was a personal doubt?
- A. It's a personal doubt and not expressed to anyone.
- Q. Not expressed to anyone, and it was a doubt – and the basis of the doubt was simply your knowledge that Mr. Yiu was a sole proprietor? 30
- A. Yes, and it seems to be a very small firm. Every time I rang he answered the phone himself.
- Q. So it was only for those reasons that you had this doubt which you never expressed to anybody?
- A. Yes.
- Q. But in your conversation with Mr. Yiu he gave you the impression that he could have completed the matter on the 26th but you wanted it to be done on the 27th?
- A. He did not say whether or not he could have completed the matter on the 26th.
- Q. But when a solicitor in Hongkong speaks to another solicitor in Hongkong and says. "Let's complete on certain date", would it not be implicit in that statement that the documents would be ready for signature? 40
- A. That is not vital to a Hongkong completion.
- Q. What is not vital or critical is that the re-assignment should have been completed, but is it not vital that the purchaser should sign the purchase documents?
- A. Yes.
- Q. So what is vital?
- A. The vital thing was the money on that date.
- Q. But why is that vital?
- A. Because that is the purchase – well, in this case there is no contract, there is no

written contract between Tsiang and Bovill, or whatever, or Shum. In a standard form of agreement that J.S.M. has anyway it would say on completion the purchaser will pay the purchase price and then another clause would say on payment of the purchase price the vendor would execute and all necessary parties would execute the assignment. Now there in the agreement would it say the purchaser has to execute the assignment.

- Q. But then did you not say to Mr. Shum and he should go to Mr. Yiu's office to sign the purchase papers? What documents did you have in mind at that time; what documents were you referring to? 10
- A. All the purchase documents, the assignment and the new agreement.
- Q. So you told him to go and sign the new agreement and the assignment?
- A. Yes, and it is up to him and Mr. Yiu to make their own further arrangement between them as to when that actually was to happen.
- Q. But did you say that you told him to go there on the 27th?
- A. I did not tell him to go on the 27th. I told him to go before he came to me.
- Q. And he was to go to you on the 27th?
- A. Yes.
- Q. Did you not tell him that completion would take place on the 27th? 20
- A. Yes.
- Q. And what – completion would take place on the 27th and you told him in the same conversation to go to Danny Yiu's office to sign the purchase papers, what would that suggest to you?
- A. Exactly what I said, that completion would take place.
- Q. On the 27th?
- A. Yes.
- Q. Not on the 26th?
- A. No.
- Q. Not on the 25th? 30
- A. No.
- Q. So was he not to go to Danny Yiu's office to sign the purchase papers in order to complete the transaction on the 27th?
- A. I have sufficiently answered the question.

COURT: She said over and over again she told Shum to go to Danny Yiu's office before the 27th to sign the papers.

MR. TANG: Not before the 27th, before, as she said, going to the office.

COURT: Before the 27th.

MR. PRIZE: My Lord, I think as I understand it, Miss Leung's insistence is before the 27th, she thinks it was the 26th, she told Mr. Shum that he must go to Danny Yiu's office for the purposes indicated and he must do that before he came to her office on the 27th. I think that's really what she had been saying so insistently and frequently. 40

Q. So in your mind he was to go before the 27th to sign the papers?

COURT: Yes, she's said that many times.

MR. TANG: I don't know if she has agreed to that.

- A. Not necessarily before the 27th, but before they came to my office.
- Q. So so far as you were concerned what you were telling them to do was not to go on the 26th, not to go on the 27th, but to go at a time before they come to your office, and they were to go and sign the documents?
- A. Yes, by arrangement with Danny Yiu and if Danny Yiu could make it ready.
- Q. Did you say that to Mr. Shum?
- A. Did I say what to Mr. Shum? 10
- Q. By arrangement with Danny Yiu.
- A. No, I just said "go", and then he said if they went and they were not ready they would be told when they would come, and if they had any sense they would make an appointment before they go to see any solicitor.
- Q. So on the 27th that Mr. Shum came to your office it was a matter of importance to you that they should have been to Mr. Yiu's office and sign the documents?
- A. Not necessarily sign the documents but to pay the excess of the purchase price which I asked Mr. Shum and Mr. Shum, as I understood it, confirmed it. That's why I was so surprised to get those three banker's drafts.
- Q. And the importance of their paying the balance of the purchase price, according to you, was that if they should fail to do so Danny Yiu might not honour his undertaking and return – and hold the mortgage proceeds to your order? 20
- A. I don't want any complication to arise because of the excess of the purchase price.
- Q. What complication could arise?
- A. That it was paid later than the 27th.
- Q. And how would that concern you?
- A. Because then completion would not be able to take place.
- Q. When?
- A. On the 27th.
- Q. So in your mind they should pay the balance of the purchase price on the 27th so that completion could take place on the 27th. Now when you used the word "completion" did you mean Hongkong completion in the sense that the purchaser should sign the necessary documents on that day? 30
- A. I think, from my understanding, a Hongkong completion is not necessarily even ever for the purchaser to sign.
- Q. But do they not always sign?
- A. Not always on the same day. It may be days afterwards. So long as when it's registered, when it's stamped, it was signed.
- Q. But you were saying that you were concerned that the balance of the purchase price should be paid on the 27th or before? 40
- A. Yes.
- Q. And that when I asked you why you were so concerned, your answer was because so that completion could take place on the 27th?
- A. Yes.
- Q. And what did you mean by completion could take place on the 27th, or are you in effect saying so that the money could be paid on the 27th.
- A. I think by Hongkong conveyancing completion really just means the money going

- across to some other firms of solicitors against an undertaking that all its other papers would come back in due course or within a time limit specified in the undertaking.
- Q. So your understanding is completion should take place on the 27th and by completion you meant money should be paid over to him against an undertaking?
- A. Yes.
- Q. I suggest to you that it was a matter of importance to you that on the 27th Mr. Shum should execute documents which were for him to sign.
- A. I don't agree to your suggestion. 10
- Q. From your point of view Mr. Shum could execute the documents after the 27th, for all you can?
- A. Yes.
- Q. Now the reason why you said you were reluctant, you didn't release the seal of the company was because your fees had not been paid?
- A. Yes.
- Q. You were paid on the 27th, were you not?
- A. Yes.
- Q. Did you have to wait for the cheque to clear before releasing the seal?
- A. No. 20
- Q. So could you not therefore on the 27th release the seal to Mr. Shum so that he could take the seal over to Danny Yiu's office and apply properly?
- A. Yes, he could have.
- Q. Why didn't you do that if you weren't under the impression that completion should take place on the 27th in the sense that he should execute all the necessary documents on that day?
- A. I think by that time I had orally said to Cecilia TSU, the chief clerk in the conveyancing department, that she was to take instructions from Mr. Shum regarding further details of the company, like registered office, shareholders and so on, and by that time I think I had already put the matter of the Company out of my mind and it just didn't occur to me to ask Mr. Shum to take the seal with him to Danny Yiu's office or to take it away for that matter to anywhere because it would belong to him by that time. 30
- Q. So it wasn't because you were waiting to be paid your fees that the seal was not given either to him or to Danny Yiu?
- A. I think by the time I wrote the first letter on the 27th to Danny Yiu our cost was not paid.
- Q. But did you think that there was a possibility that your fees – cost might not be paid?
- A. I had no reason to think one way or the other. 40
- Q. You simply did not release it because you had not been paid?
- A. It just – after the costs were paid, I just didn't apply my mind to it.
- Q. And what you suggest to Mr. Yiu was, "Let Bovill execute the assignment leaving out the seal, send it back to me and I will apply the seal for you"?
- A. Yes. I did not say that to Mr. Shum. I said that to Mr. Yiu.
- Q. Would that be a proper thing to do?
- A. Why not?
- Q. Now if you look at the draft assignment which you had sent to you by Danny Yiu you will see that at page 71 in volume 3 – no, page 70, you will see that was the

- page for signature and sealing?
- A. Yes.
- Q. And the first deals with confirmor, we can ignore it. The second one says: "Sealed with the common seal of the purchaser and signed by (blank) in the presence of (blank) solicitor, Hong Kong"?
- A. Yes.
- Q. So your suggestion to Mr. Yiu was, it not, that Mr. Shum should sign in the presence of Mr. Yiu?
- A. Yes. 10
- Q. The common seal was not to be applied then?
- A. Yes.
- Q. The document with the signature of Mr. Shum were then to be returned to you?
- A. Yes.
- Q. You would then apply the seal to it?
- A. Yes.
- Q. Was Mr. Yiu supposed also to witness, to sign in the presence of Danny Yiu?
- A. Yes.
- Q. And you are quite content that that should be done?
- A. Yes. 20
- Q. But are you not aware --

COURT: This is bundle -- ?

MR. TANG: Bundle 3.

COURT: Page -- ?

MR. TANG: Page 70. Your Lordship will see "Sealed with the common seal of the purchaser and signed by (blank)."

- Q. The arrangement was Mr. Shum should sign, Mr. Yiu should then sign as a witness, the document would then be sent back to you?
- A. Yes.
- Q. You would then apply the seal to it? 30
- A. Yes.
- Q. Would this sealing be invalid; wouldn't this be invalid?
- A. No, in fact it doesn't need the signature of the solicitor there to validate the sealing and the signature by the directors.
- Q. But according to the articles of the company Bovill, the seal was to be applied in the presence of a director?
- A. Yes.
- Q. And the director was to sign?
- A. Can I have a look at Bovill please?
- Q. Certainly. It's in file No. 4, starting with page 1 and it's article 30 which is at page 40
15 of volume 4. It says: "The seal shall not be affixed to any instrument except by the general or special authority of a resolution of the directors -- and in the presence of at least one director, or some other person authorised by the directors . . . as aforesaid, as the case may be," and who "shall sign autographically every

instrument to which the seal shall be so affixed in his presence." So wouldn't this suggestion that you made to Mr. Yiu render the execution of this document by the invalid?

A. Yes, but that is quite usual practice that sealing is not done because sometimes the seal would be left permanently in a firm of solicitors or permanently with a firm of accountants.

Q. Now when you applied the seal to this document you would be doing it as a solicitor for whom?

A. It would not be in any capacity except a person authorised by the directors to affix it. 10

Q. Who would you consider yourself as acting for?

A. In connection with the secretarial work of the company.

Q. You would be acting, as it were, for Bovill when you applied the seal on this document?

A. On the secretarial work of the company.

Q. You would not consider yourself as a solicitor for the mortgagee?

A. No.

Q. So when you wrote the letter – maybe you should now look at the letter, volume 2, it's at page 32, paragraph 1(a), it says: "You will within 10 days . . . etc. The assignment of these premises from HO Sau-ki and Lucky Time to Bovill together with the requisite memorial duly executed and attested (with the exception of the common seal of Bovill Investments Limited)." When you wrote that passage were you writing in your capacity as a person who was to attend to the secretarial work for Bovill? 20

A. I was writing on behalf of the mortgagee, as solicitors for the mortgagee.

Q. But when you suggested "with the exception of the common seal of Bovill Investments Ltd." were you making this suggestion on behalf of the mortgagee?

A. No, that is just recording. I didn't scientifically analyse that paragraph before it goes out. That was recording the arrangement that I had with Danny Yiu. 30

Q. No doubt, but when you wrote that were you writing the letter –

A. I think it's a matter of interpretation now. I don't think I scientifically had anything in my mind when I wrote that letter other than that I was acting for the mortgagee.

Q. But you would agree with me, would you not, acting for the mortgagee you ought not to have made that suggestion?

A. Why not?

Q. Because it might render the execution of the document invalid?

A. As I said previously, it is my understanding of the conveyancing law in Hongkong that it is not necessary even for the purchaser ever to execute the assignment because their covenants are minimal in there so long as the assignment of the legal title is valid, that is O.K. 40

COURT: I don't think the question is directed as such. I think the question directed is the legality of the affixing of the seal.

A. Yes, if the legality is in doubt then the validity, that is what he said, the validity of the assignment would be in doubt, and I am saying that it would not render the whole assignment invalid. Even if the purchaser never executed the assignment the assignment would still be valid because it has been signed by the vendor.

Q. So what you are saying is the execution of the assignment by the purchaser is

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Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling cross-
examination

- really superfluous?
- A. Not superfluous, it is something desirable.
- Q. But unnecessary?
- A. But not necessary to make it valid, no.
- Q. So when you wrote this letter do you mean, looking at it now, you are saying to yourself as a solicitor for the mortgagee it doesn't matter because it does not -- can't possibly affect the title which the mortgagee was going to get from this assignment?
- A. Well, this is an afterthought. I didn't think at all along that line at the time.
- Q. When you wrote that letter dealing with the question of the common seal it had nothing whatsoever to do with the mortgagee, had it? 10
- A. No, but I am asking Danny Yiu to give an undertaking. If I just left it here without mentioning the exception of the common seal he wouldn't be able to fulfil . . .
- Q. Why not?
- A. Because the common seal -- he would not have the common seal.
- Q. He wouldn't have it on the 27th?
- A. No.
- Q. You mean you didn't expect Danny Yiu after the 27th to ask you for the common seal?
- A. No, it would be simpler not to have the common seal floating around everywhere, sent round to other firms of solicitors. 20
- Q. You mean you were content to send the cashier orders but not the common seal?
- A. I am sending the cashier orders against his undertaking.
- Q. Could you not have sent the seal on the same undertaking?
- A. I could have.
- Q. You see, another point which may be indicative of your attitude is you say that in dating documents you would pencil in the dates first of the execution?
- A. Yes.
- Q. But if by the time you were ready to have the documents stamped, more than a month had expired, you would then not fill in the pencilled date? 30
- A. No.
- Q. Because if you were to fill in the pencilled date then your client may incur a penalty?
- A. Yes.
- Q. But do you think that it was right for you to then have put in a fictitious date?
- A. I am not in a position to say whether that's right or wrong. I don't like it myself, but there are circumstances beyond my control and it is a practice throughout the whole of Hong Kong to do that in solicitors firms.
- Q. So your excuse for doing that is "Although if I had put in the right date the Government might have been able to exact a penalty. I don't do it because it's the common practice in Hongkong for solicitors to do otherwise." Is that what you are saying? 40
- A. Yes, but in a way all the documents were signed in escrow on that date fixed for completion, but everything -- we in most cases depend on the return of the re-assignment and until we are executing, even if the vendor were to execute the assignment on the 27th January he wouldn't have any title to pass, he would have to depend on the re-assignment, and if the re-assignment was executed -- so he must have on the 27th, taking it hypothetically, executed in escrow pending the time he got the legal title, and if he got the legal title later than the 27th January,

- then I think it's perfectly proper to date it later than the 27th January.
- Q. I think you are perfectly right, Miss Leung. But why did you say, in answer to my learned friend Mr. Cheung and earlier to me, the reason why the pencilled date was not put in was because if that had been put in he might have entailed a penalty?
- A. He might have entailed a penalty for other reasons, but in this case these other reasons had not arisen.
- Q. So if there had been a justifiable reason for the extraction of a penalty from a client you would be quite content to put in a different date so that he could avoid it?
- A. I would consider the matter very carefully and I would consult a partner before I'd ever do that. 10
- Q. If you look at volume 4 and at page 77 – do you remember you prepared this? It starts at page 76 which is a minute – minutes of a meeting of the board of Bovill?
- A. Yes.
- Q. And turning over to 77, the last resolution was Mr. Shum be authorised to sign and affix his common seal?
- A. Yes.
- Q. But you say that that was not so, he was authorised to sign, you would, as secretary for the company, affix the common seal? 20
- A. Yes.
- Q. Proving secretarial work for the company?
- A. Yes.
- Q. Miss Leung, I'm afraid I have to go back to explore your evidence when you said that it was your practice not to act for the mortgagor because I don't think you have given a reason for that. Now what is your reason for not acting for a mortgagor – to act only for the mortgagee and not for the mortgagor as well?
- A. I think the main reason behind it would be the practice of the firm.
- Q. First reason: practice of the firm, main reason, and –?
- A. And the other reason that I always have at the back of my mind, not sort of clarify with anyone, is the realisation that there is inevitably a conflict of interest between the mortgagee and the mortgagor. The mortgagor would like to give as little as possible for the money and the mortgagee would like to get as much as possible for the money – as much security as possible, and I really don't see how a person acting – a solicitor acting for the mortgagee could very well protect the interest of a mortgagor. 30
- Q. Any other reason?
- A. No.
- Q. The practice of the firm, how was the practice of the firm communicated to you?
- A. Not by any director, but it is just a practice that you just sit in a firm and you just become aware of. 40
- Q. Were you told you are not to act for mortgagor?
- A. No.
- Q. How did you become aware of it? I mean what are the indications?
- A. You are asking me to remember something more than six years ago.
- Q. That may be so, but you must have a reason for believing that is a practice of the firm?
- A. Which is happening even today. I don't think I can remember how I learned it, just as I don't remember how I learned to use chopsticks.

- Q. Because it was, do you mean, a case of second nature to you?
- A. Yes.
- Q. But you can't remember how you were first made aware of this practice?
- A. No.
- Q. But what you can say is that it was not communicated to you orally or in writing?
- A. No.
- Q. You just learned by following the example of your colleagues?
- A. Yes.
- Q. And let us examine your second reason. Your second reason is this conflict of interest, inevitable conflict of interest. 10
- A. Yes.
- Q. You feel that you can't serve both, you can serve one?
- A. Yes.
- Q. Do you make clear to mortgagors coming up to see you with the mortgagee that "there is a conflict of interest between you and him"?
- A. No, but it would be very apparent.
- Q. It would be apparent to the mortgagor?
- A. Yes.
- Q. Do you give the same reason as to why you said it must have been abundantly clear to him that you were not acting for him? 20
- A. I think in this case it is more clearer than a lot of other cases..
- Q. But let us talk about an ordinary case. You say that it would be clear to the mortgagor?
- A. Yes.
- Q. How would that be clear? Do you tell him?
- A. No.
- Q. Then how would it be clear to him?
- A. I can only -- I mean I have very few clients lenders, who are not banks. I can only say that with banks the mortgagors would be told to go to "our solicitors, J.S.M.", and in some cases the mortgagor would say, "We don't like J.S.M. because they are so slow." Then the bank would say, "No, you must go to J.S.M. because they are our solicitors; we wouldn't go to anybody else." That's happened very often. 30
- Q. You also mentioned that when the man comes you would tell him that we are the bank's solicitors or would you leave it unsaid thinking that the bank must have said it for you?
- A. I must say I seldom see mortgagors in the first instance because normally it would be the interpreters who had contacted them, made arrangement with them for their attendance of the execution of the mortgage.
- Q. But it would not be so far as you are aware, the practice of the firm for the interpreters to be instructed to tell them, 'We don't act for you'? 40
- A. It is unusual, yes. It is unusual for an interpreter to be instructed.
- Q. Now in this case you did not see fit to tell the mortgagor as you have said?
- A. I didn't say that. I said I couldn't remember whether I told Mr. Shum before the relevant date, the 17th February -- I mean before --
- Q. The 27th.
- A. -- before the 27th that I didn't act for him. Personally I could not remember.
- Q. You mean you might have?
- A. I might have, yes.

- Q. When would that be?
A. That would be during the course of my conversation when I told him to go to Danny Yiu's office, but since this is such an important matter, my mind just went blank, I refused to think about it because as soon as I said that the case would be settled, and knowing the importance of that answer I could not say yes or no that I actually said to Mr. Shum . . . I can just say I could not remember because I could not remember clearly.
- Q. At the first meeting you can clearly recollect that you did not tell him?
A. Yes. 10
- Q. Do you remember telling my Lord that you didn't want him to go to another solicitor because it would mean inconvenience if he were represented?
A. I don't think I said that – oh, you mean that he had another firm acting for him on the mortgage?
- Q. On the mortgage, yes.
A. Yes, it would be inconvenient.
- Q. And you didn't want to do anything which may lead him into instructing somebody to represent him in the mortgage?
A. I don't think I said that. I just said it would be inconvenient if he had another solicitor acting for him. I don't think I made the suggestion to him that he shouldn't have another solicitor. 20
- Q. No, that was not my suggestion. But was it your intention that you should not say anything to him which may lead him into instructing somebody to act for him in the mortgage?
A. I don't think I applied my mind to that. I don't think I even thought that it was inconvenient. It was just an answer to your question that I said it would be inconvenient. I don't think that thought entered into my mind at that time.
- Q. But you did not ask him if he was represented?
A. No, that was sure. 30
- Q. Why not?
A. I never do. If he was represented he would tell me.
- Q. Now apart from mortgages do you deal with sale and purchase, conveyancing from a vendor to a purchaser yourself?
A. Yes.
- Q. Do you act for one party or two parties?
A. Two parties, most times.
- Q. I see, you act for the vendor and the purchaser?
A. Sometimes I just act for the vendor sometimes I just act for the purchaser, but sometimes I act for both. 40
- Q. Would you say most times?
A. Most times what?
- Q. You act for both the vendor and the purchaser.
A. I don't think I have a scientific categorisation of my cases to say that.
- Q. Would you say more likely than not you act for both?
A. I think the transactions that I deal with are so large normally that both parties would be separately represented, but it is becoming increasingly common now that two solicitors in a firm act for – one solicitor in the firm in one office would act for one party and another solicitor in another office would act for another party.

- Q. But before you graduate into larger and more important work would you say that vendors and purchasers were normally represented by the same solicitor?
- A. I don't think I am in a position to say that because I didn't make an analysis of my cases.
- Q. What about other people in your firm?
- A. I can't say for other people.
- Q. But I think you were supposed to be in some sort of charge overall?
- A. Not to the extent that I count their cases.
- Q. No. Now you, see you learned from observing your colleagues this practice of not acting for mortgagors. Did you learn from your observation of your colleagues whether or not they act for both vendors and purchasers? 10
- A. I know it sounds very cocky, but I think I am better than my colleagues now and I don't have to observe.
- Q. You mean you no longer observe now?
- A. No.
- Q. But would you agree that it is a common thing for your firm to act for both the purchaser and the vendor?
- A. It is a common thing, but it is also a common thing that we just act for one party.
- Q. And you yourself have acted for both the vendor and the purchaser? 20
- A. Yes, I think I have experience of doing that.
- Q. And I think a subject which is skin to conveyancing is leases, landlord and tenant?
- A. Yes.
- Q. You do them too, do you not?
- A. Yes.
- Q. Do you sometimes act for both the landlord and the tenant?
- A. Yes.
- Q. Would you say that more likely than not – or in a lot of cases you act for both the landlord and the tenant?
- A. I am not in a position to answer that question without detailed study of the cases. 30
- Q. Now in the case of a vendor and purchaser are there not also inevitably a conflict of interest between them?
- A. Yes.
- Q. In the case of a landlord and tenant would not the same be true?
- A. Yes.
- Q. But why these touchiness about – in the case of mortgage?
- A. I don't know how the practice developed.
- Q. I know, but leaving aside the practice because you gave two reasons: the first was the practice which you learned insensibly from the colleagues, the second was this squeamishness about acting for both parties? 40
- A. Yes, I think in the case of tenancies, in the case of domestic tenancies, needless to say we normally, more often have landlord clients than tenant clients. In the case of domestic tenancies the tenant is already protected by the legislation and no matter what nasty clauses are put in and they are still protected.
- Q. The legislations were introduced quite recently?
- A. No, as I could remember there were legislations in favour of the tenants.
- Q. But they were not comprehensive, were they? They did not cover every type of tenancy or every type of tenants?
- A. They covered wide enough. I don't think I deal with a lot of pre-war tenancies . . .

- Q. Now what about vendors and purchasers?
- A. I haven't finished with tenancies. With tenancies it is for fixed periods, say, two years, three years. It is not an ever-lasting thing, it is a short-term commitment so that, as it were, if there is a conflict of interest and one party suffers injustice, say, for instance, it is a short-term arrangement.
- Q. I see. So the harm, the potential harm is much smaller?
- A. Lesser, yes.
- Q. What about in the case of vendor and purchaser?
- A. I think in the case of vendor and purchaser I personally anyway seem to have a feeling that there is very little conflict of interest. 10
- Q. But would it not be the interest of the vendor to get as much as possible from the purchaser?
- A. No, by the time they came to us the purchase price would have been agreed.
- Q. So you think no conflict?
- A. I think in the case of sales and purchases it's always quite amicable. That's why I like doing conveyancing.
- Q. In the case of mortgages, take the case of the Hongkong Bank, for instance, they would have standard forms, would they not? 20
- A. What forms?
- Q. For mortgages.
- A. No.
- Q. Or when they come to you would you not use standard forms --
- A. Oh, oh, yes.
- Q. Wouldn't mortgages with a bank quite the same as mortgages with B bank?
- A. They are not all the same. They have slight variations. Sometimes they would say, We want to use form BBB and you may have the foggiest idea what form BBB was and then you would have to ring up and find out.
- Q. Let's talk about small people because big people can look after themselves, as you said, they would probably have even house-lawyers. Small people who go to a bank and raise a mortgage, they would be taking a mortgage on the bank's terms, would they not? 30
- A. Yes.
- Q. And they are quite content with 1% interest -- let's say 1% interest, they agree with it?
- A. I think I never have anything to do with interest rates.
- Q. No, because before they came to you that had been agreed?
- A. That should have been agreed before they came to us.
- Q. So in the average mortgage a person buying a flat, what sort of conflict would he find himself in with the mortgagee? 40
- A. The interest rate with most banks would be variable to be fluctuated without notice.
- Q. Yes, but you can't get a fixed term interest in Hongkong easily, can you?
- A. No.
- Q. So what do they lose by that because every bank does the same thing?
- A. They would not be allowed to rent their premises out to other people without the written consent of the bank.
- Q. But that is so in every case?

- A. They would not be allowed to – yes, that's why there is a conflict in each cases, yes.
- Q. But surely a mortgagor realised that?
- A. Most mortgagors don't realise that they couldn't further charge or rent out their premises.
- Q. If they were separately represented would the terms be different?
- A. No.
- Q. I mean what benefit do they gain by being separately represented?
- A. And that's why most of them are unrepresented. 10
- Q. So they don't gain anything by being separately represented. You don't represent them not because – then there could not have been anything to do with conflict of interest?
- A. That's my own feeling which hasn't been expressed before I came to this court.
- Q. Now, Miss Leung, you professed not to realise that if you act for both the mortgagee and the mortgagor you get one set of fee, just the full-scale fee?
- A. Yes, I thought about that last night. I think I have to amend it by saying that although I didn't realise I could charge one set of fees, one set of full costs, when I act for both the mortgagor and the mortgagee, I do realise, as a general rule, that I can only charge once, or the firm as a whole can only charge once on the same transaction, so that same transaction could include a mortgage. 20
- Q. So in the case of a mortgage, if you act for the mortgagee alone you get the full scale cost?
- A. Yes.
- Q. If you act for the mortgagor alone you get half of the scale costs?
- A. I don't think I have ever acted for a mortgagor alone.
- Q. But if you act for both the mortgagee and the mortgagor you get full-scale costs?
- A. Yes.
- Q. So whether you act for only the mortgagee or you act for the mortgagee and the mortgagor you get the same costs. 30
- A. Yes.
- Q. You don't earn a cent more by acting for the mortgagor?
- A. No, that is the general rule.
- Q. But if your client is a vendor and he comes to you because they are your general clients, if you act for the vendor alone you would get half costs, would you not?
- A. If I act for the vendor alone?
- Q. Yes.
- A. Well, that is a generalisation because if I act for the vendor alone and the purchaser is not represented I still get full costs.
- Q. Well, assuming if you act for the vendor alone and the purchaser is represented, you would get half costs? 40
- A. Yes, then I get half costs.
- Q. So in that kind of situation would it not be in your interest – in the firm's interest, if possible, to act for the purchaser alone although the purchaser might not have been your general client?
- A. I don't think it is my practice anyway to take cost factor into – make cost the main consideration of whether acting for one person –
- Q. Yes, but observing your colleagues you did not insensibly obtain this practice of not acting for both the vendor and purchaser. What I am seeking to do is to

- explore the reason why not. Why there is a different practice?
- A. Between who and whom?
- Q. Vendor and purchaser, mortgagee and mortgagor. So if you have a general client who is a vendor -- as you say, most of your clients are the vendors.
- A. No, landlords, I said.
- Q. I see. Would it not also be a case that most of your clients would be vendors too?
- A. No.
- Q. Would your firm act for large developers, would your firm not?
- A. Yes, but they have to purchase before they can sell. 10
- Q. I see, but they would sell, and when they sell piecemeal, flat by flat, that's where the money is in conveyancing, isn't it?
- A. Yes.
- Q. When they do that you would not be content, as it were, with just acting for the vendor because you would only get half costs?
- A. As I said, your statement needs modification, that if I only act for the vendor and the purchaser is not represented I am still entitled to charge full scale which is most of the cases in developments.
- Q. Have you ever heard of a case where the purchaser --
- COURT: Just a moment. I couldn't get this: if you act for the vendor and the purchaser is unrepresented you get half scale? 20
- A. No, you get full scale.
- Q. But as you said yesterday, people almost invariably in Hongkong want to be represented, want the matters to be dealt with by a solicitor?
- COURT: One more point: you get full scale from the vendor?
- A. No, in a large development which Mr. Tang is talking about, the agreement would say that the purchaser is liable for the vendor's costs and the vendor's costs would be full scale if the purchaser is not represented but half scale if the purchaser is represented.
- COURT: That is approved by the Law society? 30
- A. You mean the purchaser not represented?
- COURT: Yes.
- A. I think it is quite common in large development because there is no point in having your own solicitor where you must pay --
- COURT: If the purchaser is unrepresented you charge the full scale?
- A. Yes.
- COURT: On behalf of the vendor?
- A. Yes, but then that is payable by the purchaser.
- COURT: And if he is represented you charge half scale, also payable by the purchaser?
- A. Yes, because the agreement says so. 40
- Q. You said it was rare for mortgagors to be separately represented and to be represented?
- A. Yes.
- Q. What about the purchasers, have you ever heard of a case where a purchaser of a large development being unrepresented?

- A. Yes, that is very usual.
- Q. In what way?
- A. That they are unrepresented. That is a common occurrence.
- Q. You mean because they come to Johnson Stokes and don't say that they want representation?
- A. They come to anyone. As far as I know, in large developments it is very unusual for purchasers to be represented because that would mean him paying more money out when the time – he has to pay a lot of money.
- Q. You mean purchasers in Hongkong who purchase from a large developer, who would be told that they would have to pay the solicitor's costs go to the solicitors and end up being unrepresented? 10
- A. No, that's not what I said. It is usual that they are unrepresented.
- Q. That means they are unrepresented?
- A. They just go to the vendor's solicitors and sign the papers.
- Q. And you would not consider yourself as also acting for him?
- A. No.
- Q. And would you tell him that you are not acting for him?
- A. I don't know if I do because, as I said, in such cases the clerk would be the first person to see him and all I see him for would be the signing of the documents, more or less. 20
- Q. You know, Miss Leung, do you not that in the last two years there had been – there was an extraordinary general meeting of the Law Society dealing with the question of whether or not purchasers and vendors ought to be separately represented?
- A. Yes.
- Q. Can you tell my Lord a bit more about it?
- A. I don't think I am familiar enough with this proposal.
- Q. Did you attend the meeting?
- A. No. 30
- Q. Do you remember it was suggested by people representing, I think, the Consumer Council that in Hongkong it was unfair that vendors and purchasers should be represented by the same solicitors because in nine cases out of ten that would be represented by the vendors' solicitors and it was suggested that in future there should be compulsory separate representation?
- A. I think that is the gist of that resolution.
- Q. And I believe the resolution was defeated?
- A. Yes.
- Q. Solicitors in Hongkong voted against compulsory separate representation?
- A. Yes. 40
- Q. Now at that meeting did anybody say when a purchaser –
- A. I was not at the meeting.
- Q. No. Do you know if it was said –
- A. I don't know.
- Q. – by anybody – let me finish the question first.

COURT: I think she said . . . (inaudible)

- Q. I suggest to you, Miss Leung, that cannot be the policy of your firm to treat

- purchasers in that kind of situation as being unrepresented.
- A. From my evidence I have said what I have said. I don't think I can add anything.
- Q. Do you not consider that to be unconscionable?
- A. Not necessarily if the purchaser wants to save costs, and especially if there is no point of his being separately represented in a purchase.
- Q. But what if the purchaser were to say to you, "I want you also to represent me." and what?
- A. Are you talking about a large development or just one individual?
- Q. Let's say large development. 10
- A. That's unusual.
- Q. But if he should say that what would you say?
- A. I don't really know. It has never happened.
- Q. Could it be it never happened because – well, never mind that. But you don't tell them they are unrepresented?
- A. No.
- Q. They never asked you to represent them?
- A. No.
- Q. But if they ask you you would not know the answer?
- A. If they ask me to represent them – I mean taking it hypothetically – I would say, "O.K., yes." 20
- Q. And you have told my Lord you were not going to do battle over – let Mr. Shum – you were quite content . . .
- A. I think that's what he said at the time.
- Q. Yes, and you agreed to that?
- A. Well, that's your statement.
- Q. But you agreed to that?
- A. I don't think so. I couldn't remember what I said, how could I agree to your statement?
- MR. PRICE: My Lord, I don't think the witness has ever agreed that that was her attitude at the time. She was assenting to the proposition "So you were not going to do battle." 30
- Q. So at the time he gave you the impression that he wanted very much to act for Mr. Yiu (sic.)?
- A. That he wanted to collect the full costs.
- Q. And he would only collect the full costs if he was acting for Mr. Shum or if Mr. Shum was unrepresented?
- A. Yes.
- Q. So the position was he was acting for the vendor, Mr. Yiu was acting for the vendor? There is no doubt about it? 40
- A. Yes, from the documents available, yes.
- Q. He would get the full costs if he either also act for Mr. Shum or if Mr. Shum was unrepresented?
- A. Yes.
- Q. And he was anxious that he should have the full cost?
- A. That's the impression I got.
- Q. So he was anxious that either Mr. Shum should be represented by him or be

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unrepresented?

A. That would be the logical implications.

Q. How did he give you that impression?

A. I don't remember.

Q. But did you have the impression that he intended to give you that impression?

A. I don't know that was in his mind.

Q. But it was a distinct impression of yours?

A. Yes.

Q. If he hadn't given you that impression you might have acted for Mr. Shum in the purchase, would you not? 10

A. If I were asked, yes.

Q. If you were asked you would have been happy?

A. I would – yes, because it wouldn't entail any more work apart from typing the assignment.

Q. As you said, you don't want to turn costs away?

A. No.

Q. Do you agree with that?

A. Yes.

Q. Now assuming that he had not given you that impression, and assuming that Mr. Shum had asked you to represent him in the purchase, then how would you have considered yourself vis-a-vis Mr. Shum in the mortgage? 20

A. I would still not be representing him on the mortgage.

Q. You would then say to yourself, "I act for Mr. Wong exclusively in the mortgage, I act for him in the purchase"?

A. Yes, that happened quite – well, not in all cases, but often enough.

Q. Would you explain that to Mr. Shum?

A. I don't know. That would be – I don't know what sort of contact I would have with him. This had not happened. I don't know what I would say.

Q. You mentioned, I think, to my learned friend that you have acted for mortgagors when they were also purchasers? 30

A. What did I say?

Q. He asked you if you have ever acted for mortgagors. You said, "Yes, but only in cases where they are also the purchasers."

A. No, Did I say that? I don't think so. No, what I said was I never act for mortgagors, but in some cases I do act for the mortgagors as purchasers.

COURT: That means somebody purchase the property and you act for them and they are also the mortgagors. You act for them as purchasers but not as mortgagors?

A. Yes, sometimes what happens is like this. Instead of coming in like that with the mortgagee the mortgagor would come first, the purchaser would come first to say, "I am purchasing this property from this gentleman . . ." and then in the course of taking instructions and so on I would say, "Where would your money be coming from?" He would say, "Oh, I would think about the bank or something." Then in that case he would tell his bank that J.S.M. is also acting on the assignment and he would require his bank to send the bank's instructions to us as well so that we act for the bank on the mortgage and we act for the vendor and purchaser, or just the purchaser in the assignment. But in this case the situation is reversed where the mortgagee comes in first. 40

- Q. Now just so that what is correct: A purchaser comes into your office and says, "I want to purchase certain premises and I want you to act for me in the purchaser."
A. Yes.
Q. You ask him, "Where would your money be coming from?" He says, "Oh, I would have to raise a loan from the bank."
A. Yes.
Q. And let us assume that he should say Hongkong Bank. Then you say, "All right, we are the solicitors for the Hongkong Bank too."
A. I don't think that is a statement that needs to be made. 10
Q. No, because it is general knowledge that you act for the Hongkong Bank. Then he would go to the Hongkong Bank, would he not, to arrange for the mortgage?
A. Yes.
Q. And then the papers would be sent and then you would deal with the matter, the mortgage and the purchase?
A. Yes.
Q. But in that kind of situation you would consider yourself as acting for this client who came to see you qua purchaser?
A. On the purchase, yes.
Q. You would consider him as unrepresented qua mortgagor? 20
A. Yes.
Q. But you would not tell him that?
A. No.
Q. Because you just assume that he must have gathered that somehow or other?
A. Well, I don't know. It is not a matter of concern to me. It is very important in this case, but normally it is not a concern to me whether he understands exactly whether I was representing him just on the purchase.
Q. Yes. As you say, people in Hongkong would be quite happy to leave everything to their solicitors?
A. To their own solicitors, yes. 30
Q. So in that kind of situation you act for him qua purchaser but not mortgagor?
A. Yes.
Q. And you won't tell him that?
A. I don't mean to say that I won't tell him deliberately, but I wouldn't think it is necessary to tell him and I don't think I normally do.
Q. But if he should say to you in that event, "But Miss Leung, I want you to act for me too in the mortgage," what would you have said?
A. I don't think I would say yes.
Q. You would say "Go away"?
A. Yes. That's never happened, mind you. 40
Q. But if it should happen you would say "Go away".
A. Yes.
Q. Because of this practice?
A. Yes.
Q. Dealing with the practice again I thought you said it is the practice of your colleagues when they act for a bank not to also act for the mortgagor?
A. Yes.
Q. It is your personal practice not to act for the mortgagor when the mortgagee is not a bank?

A. Yes.

Q. Are you in fact saying that the latter practice is not the practice of your colleagues?

A. I cannot have knowledge –

COURT: What is the latter practice?

MR. TANG: That is when the mortgagee is not a bank they would also act for the mortgagor as well.

A. No, I didn't say that.

COURT: She said she never acted for a mortgagor.

MR. TANG: Yes, I know, but your Lordship will member her evidence is this: she and her colleagues would never act for the mortgagor if the mortgagee was a bank; she herself would not act for the mortgagor even though the mortgagee was not a bank. She never said that her colleagues wouldn't either. 10

A. What I said was I would have no knowledge whether or not they do.

Q. You mean in observing the practice you have not gained the knowledge as to whether or not they would act for the mortgagor when the mortgagee was not a bank?

A. We are sufficiently independent of each that there are some cases that I deal with that they don't know about and there are some cases they deal with that I don't know about. 20

Q. Now Mr. Wong said in evidence when he came to see you with Mr. Shum he said he wanted you to represent both of them, both Mr. Shum and Mr. Wong?

A. Sorry, can you repeat that?

Q. When Mr. Wong gave evidence he said when he first came to see you he said he wanted you to act for both him and Mr. Shum.

MR. PRICE: My Lord, I am sorry, that is not my recollection nor my reading of my notes.

MR. CHEUNG: That is in my note. It is in cross-examination.

COURT: I got it in chief: "I told her about mortgaging the property and asked her to go through the formalities for us."

MR. TANG: In fact I got exactly the same thing. I put "us" in brackets in my notes. 30

COURT: You say in cross-examination she said . . .

MR. CHEUNG: In cross-examination on the 4th June, my Lord, in answer to Mr. Tang, about, I would say, a page and a half after his cross-examination has started Mr. Tang asked the question: "Why did you go with Shum to see Miss Leung?" Does your Lordship see the question? About a page, or just over a page after the beginning of Mr. Tang's cross-examination. . . . Does your Lordship see the question: "The appointment was for 9.30."? . . . About the 29th question. "Was the meeting between you and Miss Leung and Shum and you pre-arranged?"

COURT: Yes, that's right. "Told Leung to complete the formalities." "Yes, she said she was prepared to do it for Shum and myself."

MR. CHEUNG: That's right.

MR. PRICE: My Lord, at 3.45 on the same day in cross-examination by me, taking up this point, Mr. Wong was asked, "Was she to do this as your solicitor and not as Shum's solicitor?" and his answer was, "It's positive Miss Leung was my solicitor. I don't know whether or not she was acting for Shum." This is at about 3.45 on the same day in cross-examination.

MR. TANG: With respect, it was a most commendable answer because that issue is for your Lordship, not for us. 10

MR. PRICE: That came just before a reference in the afternoon to North American Meat.

COURT: Yes. "She was certainly my solicitor. I don't know if she was acting for Shum."

Q. Miss Leung, you have heard the various passages referred to. Would you say that it is possible that using that kind of language – that Mr. Wong might have used that kind of language in his conversation – Mr. Wong and Mr. Shum might have used that kind of language during the first meeting with you?

A. I cannot say exactly that I remember the exact words of either Mr. Wong or Mr. Shum, but at the end of the meeting it was clear absolutely in my mind that I was acting for Mr. Wong in the mortgage and acting for Mr. Shum in the matter of the company. 20

Q. That was clear in your mind because of your usual practice?

A. Probably, yes.

Q. Do you know some people are very polite in Hongkong. Mr. Shum might have been to see you and before they leave they would say, "Thank you very much, Miss Leung. We have given you so much trouble. Thank you very much for helping us." Would it not be the most natural thing for a client to say to his solicitor – for a person to say to a person who – to you in that kind of situation?

A. It is possible, yes. I don't think they thanked me because I had not done any work yet. 30

Q. No, but would they thank you in anticipation of the work that you were going to do?

A. That's unusual. I mean I am paid for it. Why thank you for it.

Q. But people are very polite. Sometimes they would say, "Thank you very much for helping us."

A. I don't remember being thanked. I remember being thumped.

Q. Yes, but at the first meeting?

A. I don't think I remember being thanked. That's a distinct impression.

Q. Would they be courteous and say "Sorry, we wanted you to do all this in a rush, but our thanks anyway," something like that? 40

A. I don't remember being thanked.

Q. Now you said you were clear in your mind. I would now want to refer you to several letters that you wrote.

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COURT: Would this be a convenient point?

MR. TANG: Yes.

11:35 a.m. Court adjourns.

11:50 a.m. Court resumes.

Appearances as before.

D.W. 3 – LEUNG Wai-ling

O.f.o.

XXN. BY MR. TANG (Continues):

- Q. There are two short forms that I would want you to deal with first. Now let's first deal with the -- relates to the question of instalment payments? 10
- A. Yes.
- Q. Now you said that the debenture as drafted was disadvantageous to Mr. Shum in that it was repayable on demand rather than by instalments?
- A. Yes, but there would be a side letter between Edward Wong and Shum regarding the instalment payments.
- Q. What I would suggest to you is that people have been unfair to you. The arrangement which you proposed was this, was it not, because it was anticipated that there would be continued financial transactions between Mr. Shum and Mr. Wong it would be inappropriate to have an ordinary mortgage with repayment over 7 years and therefore you suggested that the matter can be better dealt with by means of general banking facilities, or general credit facilities? Was that what you were trying to do at the first meeting? 20
- A. Yes, when suggesting the credit facilities form rather than the instalment form I had more in mind as to the future loans than the present loan.
- Q. The question of the instalment payments would be dealt with by a side letter?
- A. Yes.
- Q. It is as if there were going to be a collateral agreement between them relating to the instalment payments?
- A. Yes.
- Q. So far as the general credit facilities is concerned then it doesn't matter that some of the instalments might have been paid off, Mr. Wong would be protected so long as his advances do not exceed the maximum provided for under that document? 30
- A. Yes.
- Q. If you had not suggested that the result would have been this, would it not: there would have been a fixed-term instalment payment scheme; if and when in the future Mr. Shum wanted to borrow further money from Mr. Wong he would then have to make a further charge so that the advance would be covered by the security of the mortgage?
- A. Yes, or by some other security?
- Q. And if he were to do it by means of further charge or by means of further securities it would involve Mr. Shum in further costs? 40
- A. That would be a logical conclusion if I think it through logically, but I didn't think

- through that.
- Q. So your suggestion, once it is analysed, would seem to safeguard the interest of both Mr. Wong and Mr. Shum. It safeguards the interest of Mr. Shum because he could be protected by a collateral agreement relating to the instalment payments?
- A. I don't think I logically think through to that about the saving of cost.
- Q. No, but if you were to analyse it now it would have that effect, wouldn't it?
- A. It would have that effect thinking about it now, yes.
- Q. And Mr. Wong would feel free to lend him further money without the need of requiring further security or further charge? 10
- A. Yes, that I thought about the time.
- Q. And Mr. Shum would not have to incur further costs in the preparation of further charge in the giving of further condition?
- A. That would be so, but I didn't think about that aspect of the matter at the time.
- Q. But that would be a result of it?
- A. That would be a logical consequence, yes.
- Q. So what I am suggesting to you is that your suggestion is not an unfair one from the point of view of Mr. Shum because on analysis it would be – it seems to serve the purpose of Mr. Shum as well as the purpose of Mr. Wong?
- A. Yes. 20
- Q. Now on the question of fees, was it discussed at that first meeting?
- A. Whose fees?
- Q. Who was to pay the solicitors' cost relating to the mortgage?
- A. No, that was not mentioned.
- Q. What was your understanding?
- A. That Mr. Shum would pay our costs on behalf – as the mortgagor for our costs chargeable to the mortgagee.
- Q. Your understanding was the most would be paid by Mr. Shum?
- A. But the acquisition of the company and the setting up of the company would be paid by Mr. Shum as we were acting for him on that matter and I think I did give an estimate of the costs of the company's acquisition and the setting up of the company. 30
- Q. Did you give him an estimate of the mortgage cost?
- A. I don't think so.
- Q. But you had no doubt in your mind that they were to be paid for by Mr. Shum?
- A. Yes.
- Q. As mortgagor?
- A. Yes.
- Q. Subsequently of course on the 27th Mr. Shum came up to your office – on the 27th January? 40
- A. Yes, that's right.
- Q. And before he came you said you had told him that he should go to Danny Yiu, pay costs, etc. . . But what I want to find out from you is did you tell him that on the 27th he would have to come up to your office and pay your costs – and pay costs too?
- A. I don't know if I remember telling him that.
- Q. But it would not be surprising if you had because you don't want him to turn up without his cheque book?
- A. That is possible, yes.

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- Q. So would you agree more likely than not you would have told him that on the 27th he was to bring with him his cheque book too because he would have to pay Johnson Stokes's fees?
- A. Yes, but I don't remember whether I actually said it or not, but that is possible.
- Q. Would you say that it is probable?
- A. Possible.
- Q. Would you go further to say it is probable?
- A. I think my memory in that is so faint I couldn't say whether it's probable or not.
- Q. Would it also be possible you might have mentioned the quantum to him?
- A. The – ?
- Q. The quantum, the amount of costs payable.
- A. No, I never mentioned the amount of costs to anyone because I am hopeless with figures and no matter what I do, one and one together, I'll get it wrong.

10

- Q. Now, I would now want you to take out Volume 2 to look at page 23 first. It's a letter dated the 21st of January to Danny Yiu & Company by you. Now, you said in the first sentence: "We understand that you are acting for the Vendor . . ."
- A. Yes.
- Q. Now, do you remember telling my learned friend Mr. Cheung yesterday that when you wrote the letter to Danny Yiu, you were testing the water, to see whether or not he would respond and say, "Yes, we are solicitors for the Vendor."
- A. Yes.
- Q. Are you quite serious about that? 10
- A. Because at that time I had really had very vague ideas about what's happening as latter proved because there was so much behind this matter, because there are superior agreements and so on and I don't think I was given a very clear idea by Mr. Shum as to whom Danny Yiu was acting at that particular point on the 21st of January and if I could be explicit, if I knew for certain I think I would have said, "You are acting for CHAN Sun-ming." because that's the only name I know.
- Q. And then in the second paragraph you said, "Please let us have the title deeds subject to the usual undertaking . . ." that's irrelevant, ". . . and a note of the amount required for completion together with a note of your charges." You remember telling my Lord yesterday that the amount of the charges payable by Mr. Shum was a matter of indifference to you? 20
- A. Yes, I must – further clarification is required and that is it's quite common for a mortgagee to collect the costs and the balance of the purchase price for mortgagee because the mortgagee is concerned that the balance of the purchase price and . . .
- Q. I see, you are saying that it is quite common for the mortgagee to collect from the mortgagor the balance of the purchase price and costs and disbursements.
- A. Yes.
- Q. And when you wrote this letter, was that what you had in mind?
- A. I did have that in mind but when his letter came and when it became apparent, everything was so complicated and also because time was getting very short and I don't want to have to get Mr. Shum's cheque for the excess and the charges for it to be cleared before sending it across to Danny Yiu so I asked instead of doing it this way – this is one way of doing it – so the other way of doing it would be for Shum to pay directly to Danny Yiu. That would save time. 30
- Q. Would it be correct to say that when you wrote this letter on the 21st, your intention was that the mortgagee – you acting for the mortgagee – should correct the balance of the purchase price from the mortgagor together with the necessary disbursements and costs.
- A. That's one way of doing it and I think this is what this letter . . .
- Q. But that wasn't what you intended to do at the time. 40
- A. Yes.
- Q. But subsequently because of the shortness of time, that was changed.
- A. Yes.
- Q. So were you gratified when Mr. Wong came on the 27th of January with the three cashier orders for the entire balance of the purchase price?
- A. I was surprised.
- Q. But were you not also pleased because then you can follow . . .
- A. No, I wasn't pleased at all.
- Q. Then you can follow the procedure that you had intended on the 21st.

- A. No, because, as I said, when they came to execute the Mortgage, I did ask Mr. Shum, "Did you go to Danny Yiu?" and I think his answer – unless he understood me wrongly, he did say, "Yes." so until the cashier orders came, I was under the firm impression that he had been to Danny Yiu.
- Q. That may be so.
- A. So that's why I was surprised when the cashier orders came and I had to telephone Danny Yiu and I was so rushed, I didn't have time to check with Danny Yiu whether or not Shum had been there. I just said, "What was the balance of the purchase price that you required?" and after a few seconds of checking, he replied, "Yes, your figure was right." 10
- Q. I think you said yesterday when Mr. Wong came with the three cashier orders, it was late in the afternoon.
- A. Yes.
- Q. And everything was done in a rush.
- A. Yes.
- Q. And you weren't also gratified that you could revert back to your original intention.
- A. No, I was so rushed, I don't think I remembered what the original arrangement was.
- Q. So if I were to suggest to you when you wrote and asked about the balance required for completion with a note of his charges, you were making the enquiry on behalf of the mortgagor, you would say no. 20
- A. I would say – yes, I would say no.
- Q. Now, 26 you've already looked at. You remember the requisition, page 26.
- A. Yes.
- Q. On checking through my notes, I remember your telling my learned friend Mr. Price not when he was dealing with this document but with the actual search which is in Volume 5, first page, you told my learned friend Mr. Price that you requested a search to be made, you caused it to be made. Do you remember that?
- A. I think normally when I received instructions on a transaction, it would be usual for me to give all the papers to my secretary and tell her to open a file and make all the necessary searches. Now, by that time I don't know if I had already written on North American Meat a stroke and say "Not the purchaser" so my secretary quite understandably would make searches against the property. Because she didn't have the lot number, she made a wrong search and because perhaps I did not delete it at that time – "Not the purchaser" – I don't know if I deleted it – I couldn't remember when I deleted it – drew that stroke on the North American Meat Memorandum and Articles, so quite understandably she could have conscientiously made searches against North American Meat . . . 30
- Q. But it would not be correct to say that you required a search to be made.
- A. I think my secretary – I couldn't remember, it may be out of curiosity, I could have caused a search to be made just to see whether in fact it was a shelf company but other than that, I don't think I should have caused a search to be made against it. 40
- Q. You were a very busy person, were you not?
- A. Yes.
- Q. Even on the 21st of January I suppose you had other business and clients to attend to.
- A. Yes.
- Q. And I suppose you must interview scores of people a day.

- A. Yes.
- Q. Would you turn to page 28? It's a letter from Danny Yiu to you of the 23rd. Do you remember Mr. Price taking you through those documents?
- A. Yes.
- Q. And the 8th document is a copy Assignment from Mr. Ho Sau-ki.
- A. Yes.
- Q. And you remember when one looked at the Assignment, it was shown that Lucky Time was to be a confirmor.
- A. Yes. 10
- Q. And it was drafted in such a way as to be a direct Assignment from Mr. Ho presumably to Bovill.
- A. Yes.
- Q. And you said after this conversation – after this letter was received, you spoke to Mr. Yiu on the phone about . . .
- A. My recollection was that I spoke to him after I received the letter from him.
- Q. . . . on the subject of Mr. Chan Sun-ming's profit.
- A. Being a confirmor, yes.
- Q. And you said that you eventually arranged with Mr. Yiu that the structure of the deal should be changed. 20
- A. Yes.
- Q. He should drop out of the picture as a confirmor but should become a broker.
- A. Yes.
- Q. And therefore, he would not have to be featured in any of the title documents.
- A. Yes.
- Q. And you said Mr. Yiu would then do the necessary drafting.
- A. Yes.
- Q. Now, the necessary drafting would entail two documents, would it not?
- A. The Cancellation Agreement.
- Q. And the new agreement. 30
- A. The new agreement between Lucky Time and Bovill.
- Q. And you had this conversation with Mr. Yiu soon after you received this letter.
- A. I could not remember when I rang him.
- Q. It must have been between the 23rd and the 26th.
- A. Yes, it must have been.
- Q. The other documents could still be used, could they not?
- A. Which other documents?
- Q. The other documents – Document No.8, for instance, and No.7, the Mutual Covenant and the Assignment.
- A. Yes, I would still keep it and then I would still use that as a basis for drafting the Mortgage. 40
- Q. And these were to be the two documents to be executed on completion, 7 and 8.
- A. 7 and 8 plus the two to be drafted, yes.
- Q. Right, so all that Mr. Yiu, as a sole proprietor, had to do was to draft a Cancellation Agreement and a pro-forma Sale and Purchase Agreement.
- A. Yes.
- Q. You would agree, would you not, any solicitor who's practised for any time as a sole proprietor would have ready forms for this kind of thing?
- A. Yes.

- Q. So at one time you expressed some doubts as to whether or not the documents would be ready on the 27th, would you not agree on analysis the doubt is really a bit far fetched?
- A. Whether it was far fetched or not, I did have that doubt.
- Q. But it was not a serious doubt. All that he had to do was to draft some simple documents.
- A. I was not really worried by that doubt.
- Q. And you would not be surprised at all if all the documents were ready for signature on the 27th. 10
- A. I did not expect all the documents to be ready. I had doubts.
- Q. There were only two to be prepared, the rest . . .
- A. Well, if we take it hypothetically, it may be that all he's sending me here were copy Deed of Mutual Covenant, copy Assignment, they might have been typed on paper which is not engrossment paper. I don't know because I only have a copy.
- Q. But normally would they not send you copy of the engrossed . . .
- A. Not necessarily.
- Q. . . . Deed and Assignment?
- A. Not necessarily.
- Q. And then they told you what was payable and the cost – what was the balance and the costs and disbursements? I'm afraid although this matter had been gone through but it's a matter of great importance. In your conversation with Mr. Yiu about changing the structure of the transaction converting Mr. Chan into a broker you suggested to Mr. Yiu that he should be a second confirmor and Mr. Yiu was reluctant. 20
- A. Yes.
- Q. Can you remember anything more about this conversation?
- A. In fact, the only reason why I remember that conversation was that it was confirmed later on in my letter of the 27th and I think I had a discussion with my clerk over the Assignment and our reluctance to accept it. It was after that discussion that I telephoned Danny Yiu so I think the conversation was primarily on the Assignment and then . . . 30
- Q. Yes, but at the end of the conversation you and Mr. Yiu had arranged that the Assignment in that form could be used, the structure of the transaction had been changed, Mr. Chan dropped out, Cancellation Agreement signed.
- A. Yes.
- Q. Who came up with that suggestion? You or Mr. Yiu or did it emerge in your discussion with him?
- A. It did not emerge; it's possible that it was my suggestion.
- Q. So, in fact, you had a problem because of his reluctance so you had to solve it. 40
- A. And I had to solve it.
- Q. This is one way.
- A. Yes.
- Q. So it might have been your suggestion.
- A. Yes.
- Q. Now, would you turn to page 32 which is a letter of the 27th of January. You remember telling my Lord that if Mr. Shum had asked you to act for him in the purchase, you would have been prepared to do so.
- A. Yes.

- Q. Assuming that he had asked you and you had agreed to act for him in the purchase, would this letter have been written in the same way or would it have been written differently?
- A. It would have been written differently in the second paragraph.
- Q. Yes, now in the second paragraph what would you have said?
- A. We would have said, "We shall release to you the balance of the purchase price in the sum of . . . in payment of . . . "; "in payment of" instead of "towards payment".
- Q. Can you do so slowly so that I can jot it down? 10
- A. "We shall release the balance of the purchase price . . . "
- Q. ". . . balance of the purchase price . . . "
- A. ". . . to you in payment . . . "
- Q. ". . . in payment . . . "
- A. ". . . of the . . . "
- Q. ". . . money . . . "
- A. ". . . money required to complete . . . "
- Q. So instead of ". . . ask our clients to put us in funds with the mortgage proceeds . . ." you would have: ". . . release the balance of the purchase price to you in payment . . ." 20
- A. Yes . . .
- Q. Then anything else?
- A. I don't think so. I mean I would still require the same documents— require the same undertaking, same number of days.
- Q. Or you may say, for instance, in (1) (a): "The Assignment of these premises from Ho Sau-ki and Lucky Time Finance . . . "
- A. Yes, of course, ". . . duly executed by the Vendor."
- Q. ". . . by the vendor . . . "
- A. Yes.
- Q. ". . . and attested." So "(with the exception of the Common Seal of Bovill Investments Limited)" would go out because that would be done at your office. 30
- A. Yes.
- Q. ". . . and also your cheque in payment of the stamp duty and registration fee payable on such Assignment;" that would come out too.
- A. And also I suppose the cancellation – Are we talking that we are acting for the purchaser?
- Q. Purchaser, yes.
- A. I suppose also the original Agreement for Sale and Purchase between Lucky Time and Bovill would be just signed by Lucky Time.
- Q. So it would be duly executed and attested by Lucky Time and Ho Sau Ki only, 40 as it were . . .
- A. Yes.
- Q. . . . leaving the last bit to be done by you. (b) would still be done by Danny Yiu.
- A. Yes.
- Q. (c) duly signed by Lucky Time only.
- A. Yes.
- Q. (d), you would still require it.
- A. Yes.
- Q. (2) you definitely require.

- A. Yes.
- Q. And (3) you would also require.
- A. Yes.
- Q. And I suppose the last paragraph would be retained.
- A. Yes.
- Q. So if you were acting for the purchaser, that's the sort of letter you would have written.
- A. Yes.
- Q. And you would also act at the same time for the Mortgagee, remember, in this hypothetical situation? 10
- A. Yes.
- Q. And then over the page to 38. Would you look at page 38? If you were acting for the Bovill in the purchase, again in this letter?
- A. Yes.
- Q. Exactly in the same way.
- A. Yes.
- Q. Would you look at page 36, your letter to Edward Wong? If you were again acting for Bovill in the purchase, would you have written this letter to Edward Wong?
- A. Yes, yes. 20
- Q. Any amendment at all?
- A. No.
- Q. So instead of asking – so if you were acting for the purchaser, the type of documents you would ask for would be different.
- A. Yes, it won't be signed by Bovill.
- Q. Now, looking at the letter at page 32 again, according to you, is there any difference between “towards payment” and “in payment of”?
- A. Yes.
- Q. What, according to you, is the difference?
- A. “In payment” would be in total payment whereas “towards payment” is towards partial payment. 30
- Q. I see, but if you were only sending 1.335 million.
- A. That would be just in partial payment.
- Q. You would still retain the words “towards payment”.
- A. Sorry?
- Q. If you were only sending over 1.355 million, you would still say “towards payment” even though you were acting for the purchaser.
- A. If I were acting for the purchaser, I wouldn't be sending 1.335 million.
- Q. You would be sending the whole sum.
- A. Yes. 40
- Q. But assuming that you were only sending 1.335, you would still use “towards payment”.
- A. But I would not be if I were acting for the purchaser.
- Q. So the difference between “towards payment” and “in payment of” is really this: “towards payment” suggests partial payment and “in payment of” suggests full payment.
- A. Yes, total payment, yes.
- Q. So, according to you then, is it your evidence, Miss Leung, that by virtue of page 38 which is a letter dated the 27th of January, Bovill was directing Edward Wong as

- to what to do with the mortgage proceeds?
- A. Yes.
- Q. So the wording is deliberate; it was a direction to Edward Wong.
- A. Yes.
- Q. And if you were to read page 38 with 36, the point is again emphasized because there Edward Wong was being directed to have the money paid over to Danny Yiu & Company.
- A. Yes.
- Q. Through you? 10
- A. Yes, because of the authorization enclosed.
- Q. Yes, so assuming that you were acting for the purchaser at that time, then looking at page 32 again, when you sent the money over to Danny Yiu & Company and exacted an undertaking from him and say in the last paragraph, paragraph (3), at page 33, that you will hold the said sum . . . to our order . . ." you meant "to our order as solicitors for the purchaser".
- A. If I were acting for the purchaser?
- Q. Yes.
- A. Yes.
- Q. Would it be correct from your evidence to say that so far as you were concerned, 20 on the 27th of January the Mortgage had been completed in the Hong Kong sense?
- A. I suppose so, yes.
- Q. And it was because of this supposition that led you to write the letter at page 38 directing the Mortgagee to forward the money.
- A. I think that letter was written before this letter or . . .
- Q. At the same time.
- A. At the same time . . .
- Q. Yes, but it was because of this supposition that the completion in the Hong Kong style had been completed that led you to write the letter at page 38 directing the Mortgagee to part with the money. 30
- A. Yes, that is one of the reasons.
- MR. PRICE: Does my friend mean it had been completed before the letter was written? I am not clear about that.
- MR. TANG: Completion of the Mortgage in the Hong Kong sense was to take place at about the same time as all these documents were being given effect to.
- A. Yes, I should think so.
- Q. In effect, you had Mr. Shum and the Directors coming up to your office, sign the Mortgage, give the guarantees.
- A. Yes.
- Q. And then sign page 38 and then on -- After all that had been done, 38 would be sent 40 together with 36.
- A. Yes.
- Q. Because by then completion of the Mortgage in the Hong Kong sense would have been completed.
- A. It would have been completed by the time -- by two things further other than the

- things you have just mentioned. It would be the return of the undertaking duly signed by Danny Yiu and my parting with the cashier orders to him.
- Q. But if you were acting for Mr. Shum in the purchase, then the undertaking to be given by Mr. Danny Yiu would be an undertaking as solicitor for the Vendor given to you as solicitor for the purchaser.
- A. Yes, if I was acting for the purchaser.
- Q. Quite, yes. I want to refer you to a later letter which I think made this point very clear, page 72. You remember my learned friend has already, I think, referred you to this letter. It is your reference on the top left hand corner. Was this a letter written by you? 10
- A. No.
- Q. Who was it written by?
- A. It looks like Mr. Thornhill's signature but . . .
- Q. I see, but I suppose Mr. Thornhill had no personal knowledge of the matter so he would have written this on information supplied to him by you.
- A. By me, yes.
- Q. Before this was sent off, had you read it?
- A. I might have supplied information to him to write it.
- Q. Yes, but can you recall if it had been shown to you before he sent out this letter saying, "Check if it is right before I send it out."? 20
- A. I think it's very likely that I had seen it.
- Q. Because this was a rather important letter. It's by that time Mr. Wong had been advised to seek separate representation.
- A. Yes.
- Q. And litigation was already in the wind, as it were.
- A. Yes.
- Q. So you wanted to be careful that you had not got the facts wrong.
- A. Yes.
- Q. I think what you have told my Lord a moment ago is consistent certainly with this letter. If you look at page 73, second page of the letter, I think there the same point was made again. "The moneys being advanced by your client . . ." that is Edward Wong, ". . . were as you will note from the mortgage deed, to be treated as general credit facilities and accordingly, after the Common Seal of the Mortgagor Company had been affixed to the mortgage and it was signed by Mr. Shum Ka Ching and after the personal guarantees of Bovill Investments Limited were duly signed, . . ." Pausing there for a moment, in effect what you are saying is Hong Kong completion of the mortgage and going back to the letter saying: ". . . we treated the advance as having been made by your client to the mortgagor . . ." That's correct, isn't it? 30
- A. Yes.
- Q. ". . . and obtained the mortgagor's written authority to forward the whole of the \$1,665,000 – to Messrs. Danny Yiu & Co." 40
- A. Yes.
- Q. So that's again correct.
- A. Yes, I think the written authority only covers the smaller sum.
- Q. Quite, yes, because at the time when it was drafted, you hadn't realised that the full sum was coming but apart from that slight discrepancy, that's correct.
- A. Yes.

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling cross-
examination

- Q. "A copy of that written authority is enclosed." That you have already looked at. "We would mention that it was not "on our advice" that the moneys were forwarded to Messrs. Danny Yiu & Co., but on the written authority of the Mortgagor." That's correct, isn't it?
- A. Yes.
- Q. Yes, because what you were saying is after the Mortgagor had done all that should be expected of them, they were entitled to direct the mortgagee to have the money forwarded to Danny Yiu.
- A. Yes. 10
- Q. You are agreeing with that?
- A. Yes, yes.
- Q. Now, when Mr. Shum and his colleagues came up to your office on the 27th of January, you said you explained the gist of the documents to them before they signed them.
- A. Yes, but they were not very interested.
- Q. No, in fact they were impatient, were they?
- A. I could not remember that.
- Q. But a lot of laymen would be content to say, "Look, don't explain to me. I'll sign. Just tell me where to sign." 20
- A. On a whole, that's what they said but I definitely remember they were not particularly concerned about the details of the mortgage.
- Q. Nor the other documents, at it were, not the details.
- A. Not the details.
- Q. I think you mentioned that you might have instructed Mr. David Leung to explain the Debenture to Mr. Shum.
- A. Before they came to see me, yes, and that's why I assumed that David Leung would probably also interpret not word for word but interpret the gist of the documents so that they know sort of roughly what documents they were required to sign.
- Q. A lot of the terms would be very difficult to be translated into Chinese. One probably needs a glossary of legal terms in Chinese to do that. 30
- A. I think an interpreter would be used to what Chinese words are used.
- Q. Quite. I think you told my learned friend already that the letter at page 32 had already been prepared before Mr. Shum and his colleagues arrived or have I got it wrong?
- A. I really could not say whether it was before they arrived or after they arrived.
- Q. Yes, but it would be in the same afternoon, as it were.
- A. Yes.
- Q. And I suppose the same can be said about the other letter that's dated the 27th of January. 40
- A. Yes.
- Q. Was the completion on the 27th also a rushed job, as it were, because they were very eager to complete and you tried your best to accommodate them rushed in the sense that some of the documents might not have been prepared before they arrived and had to be prepared when they were there, as it were.
- A. I think the Debenture and the Guarantees and so on were prepared.
- Q. Quite, yes.
- A. But the letters – I am not sure about the letters.
- Q. If you had a lot of time, of course, they would all be prepared, typed, just ready

- for signature.
- A. Yes, you mean the letters?
- Q. Yes, the letters.
- A. Yes.
- Q. You said when the question of the floating charge was mentioned, then all three of them, I think you said, immediately said no, they were not happy with that.
- A. I am not sure it was all three of them but there was definitely some kind of objection.
- Q. Spontaneous? 10
- A. Spontaneous objection.
- Q. Yes. Would you look at page 27? It's an earlier letter, of course. This is a letter which was supposed to have been copied to Mr. Shum and Mr. Ma.
- A. Yes.
- Q. In the first paragraph of this letter there was a reference to a floating charge, was there not?
- A. Yes.
- Q. But you have heard no complaint or query from Mr. Shum until that date, the 27th.
- A. No.
- Q. About the floating charge. 20
- A. No, I have not heard any complaint.
- Q. And on the 27th as soon as you told them there was a floating charge, there was this spontaneous objection.
- A. Yes.
- Q. So it is possible, is it not, that either they had never received this letter, it had gone astray or that they had got this letter, they were not fully aware of its content?
- A. Yes, but I think, in addition, I can say that in our post book there is a record of those two letters being despatched by post.
- Q. So either they were despatched and had gone astray or they had not gone astray and received by them but they had not realised the true significance of this letter. 30
- A. Yes.
- Q. When you presented the guarantees for them to sign, what was their reaction?
- A. They were prepared to sign it.
- Q. Did they seem surprised that they had to sign the guarantees?
- A. I don't remember.
- Q. You don't remember. Now, although you said the question of the instalment payments were to be dealt with in a side letter – a collateral letter.
- A. Yes.
- Q. Do you think you might have, in explaining the gist of the guarantees to Mr. Shum and his colleagues, said that if the instalments are not paid, then they would have to be responsible for payment? 40
- A. No, I think I was very general. I just said, "If the Company does not pay, under this guarantee you would be jointly and severally liable." That's more or less – I think that was what I said.
- Q. And when you said that to them – I would like to show you now the Minutes of the Company that's in Volume 4 and the signed copy starts at page 76 – Volume 4, page 76. You would agree with me, would you not, that the minutes here recorded represent the gist of the documents which they were to sign on that day and the things they were to do on that day?

- A. Not necessarily, particularly (1), because the purchase documents were not being signed in my office.
- Q. No, quite so, maybe I was wrong then but you explained this document to Mr. Shum and his colleagues.
- A. Yes.
- Q. Now, when you dealt with (1), did you explain to them that this is all right, it only means changing the structure of the deal?
- A. I think I did mention to them that because of the difference in the figure. I had to explain to them why this is smaller than they had actually agreed to pay. 10
- Q. Did Mr. Shum ask you why was this 1.74?
- A. No, I think I took the matter up myself.
- Q. So instead of waiting for questions, you explained to them why it was that it was 1.74.
- A. Yes.
- Q. And you explained by saying you changed the structure of the deal.
- A. Yes.
- Q. Did you tell them, "The end result is the same."?
- A. I don't remember what I . . .
- Q. But it will be implicit in what you say. 20
- A. Yes.
- Q. They were satisfied with your explanation.
- A. They did not object.
- Q. So you explained that to them. Second thing: it's all right – requests making facilities. Third: execute a Debenture floating charge, they objected to it and that was deleted and, four, just formality.
- A. Yes.
- Q. No, when you were explaining this to them, you were doing part of the secretarial work provided by Johnson, Stokes to Bovill, were you not?
- A. That again is a practice which has developed in the Kowloon Office of the JSM 30 that we, as mortgagee's solicitors being anxious that they get a good title and a good mortgage, would prepare this sort of minutes even though we are not dealing with the secretarial work of the company.
- Q. But if you were also the company's secretary, as it were, doing the secretarial work of the company?
- A. That would be even more natural that we should do it, yes.
- Q. Did it take you some time to explain the first item to Mr. Shum?
- A. I couldn't remember whether it took a long or short time.
- Q. But I suppose of all the items there probably No. (1) took the most time.
- A. I couldn't remember. I think item No. (3) took me the most time because . . . 40
- Q. . . . because you had to contact Mr. Wong . . .
- A. . . . I had to telephone Mr. Wong, yes, and I couldn't find him.
- Q. Yes, but explanation-wise, No. (1) would be the one which took more time than the other items, wouldn't it?
- A. I couldn't remember.
- Q. You said that in Hong Kong people would leave whatever had to be done to their solicitors and are content that it should be so. Do you remember saying that?
- A. To their own solicitors, yes.
- Q. Yes, to their own solicitors.

- In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Leung Wai-
ling cross-
examination
- A. Yes.
- Q. When you were explaining the documents to them, did you say to anyone of them, "I am not your solicitor."?
- A. No, not on that occasion.
- Q. When you asked Mr. Shum to sign Volume 2, page 38, the letter directing Edward Wong to pay the money to Danny Yiu & Company, what did you say to Mr. Shum?
- A. I could not remember the exact words but I think I explained what was in English in Cantonese.
- Q. Did you explain to him the significance of this letter? 10
- A. It would be apparent from the Cantonese.
- Q. You mean you just gave him a literal translation of this.
- A. Yes.
- Q. And you asked him to sign.
- A. Yes.
- Q. And he did.
- A. Yes.
- Q. Did he raise any questions with you?
- A. No.
- Q. When you were doing that, for whom did you consider yourself to be acting? 20
- A. For Edward Wong.
- Q. Why did you consider yourself acting for Edward Wong?
- A. Because on a previous transaction Mr. Wong had complained to me that since he was not a bank, he does not issue cheques so he had no evidence that the money under the general credit facilities had been drawn so on this occasion I was giving him, amongst other reasons, an evidence that the money had actually been drawn.
- Q. That he had actually paid out the money to the mortgagor, as it were.
- A. Yes.
- Q. So this is to serve as evidence that he had paid the money over not to the mortgagor but as directed by the mortgagor. 30
- A. Yes.
- Q. Now, if you were acting for Bovill at the same time as the purchaser which you said you were quite content to do had you been asked, you said you would have drafted the same letter, in that event for whom would you have considered yourself acting?
- A. It would still – I would regard this as part and parcel of the work of the mortgage.
- Q. Yes but this would also form part and parcel of the purchase, wouldn't it?
- A. No.
- Q. Because the purchaser would have to get the money in order to pay.
- A. Yes but here he is just applying for the credit facilities and directing – I mean 40 Edward Wong doesn't want him to draw the 1.355 and then squander it on another property. Edward Wong wants to make sure that that money is applied in payment of the purchase price in order that he can get a mortgage.
- Q. But what you were saying was that if you were acting for him in the purchase, you would have written the same letter anyway.
- A. Yes, that's the mortgage side of it.
- Q. If you were acting for Bovill in the purchase and the money had been handed over by Edward Wong to your firm pursuant to that letter, you would then write to Danny Yiu & Company in terms of page 32 as amended.

- A. Yes.
- Q. And you would consider yourself holding that money for the purchaser.
- A. Yes.
- Q. And, in other words, you would be holding the money as solicitor for the purchaser.
- A. Yes, because if I were acting for the purchaser, any money paid by Edward Wong to me would, in the first instance, be mortgage advance and then it will go out under a purchase file – we have a different file for a different transaction – it would be paid into the mortgage file and then the transfer would be made from the mortgage file to the purchase file and then it would go out under the purchase file. 10
- Q. So the nature of the holding would be changed by means of switching it from one file to the other.
- A. Yes.
- Q. Now, what I want to ask you now is in what way is it really different in the present case that you say you were not acting for Mr. Shum in the purchase. Looking at the letter at page 32 again, this time on the facts of the present case and not on the hypothesis, you said, “We shall ask our clients . . .” You had not identified who your clients were.
- A. No. 20
- Q. Now, “. . . to put us in funds with the mortgage proceeds.” Do you see that?
- A. Yes.
- Q. Now, “mortgage proceeds” in the context must mean what came as a – out of the mortgage, what was paid over by the mortgagee to mortgagor.
- A. Well, I just – I mean that’s used loosely, meaning the money to come from the mortgagee.
- Q. Yes, forgetting about using it loosely, looking at the words now as they are, would they not suggest that this would be money obtained by the mortgagor pursuant to the mortgage because they are the mortgage proceeds?
- A. Well, I don’t know what it means. It’s a matter of English. I intended it to mean the advance from the mortgagee and also the client’s – the name was not identified because it’s confidential. Why should I disclose the mortgagee? 30
- Q. You can’t be very serious about that because if they are curious about it, they can make a search a month later.
- A. Yes.
- Q. And they will discover the name of the mortgagee.
- A. Yes, it’s their own search not my voluntary information.
- Q. I see. You didn’t say, “Our clients, the mortgagee” or “Our clients, the mortgagor.”
- A. No.
- Q. Although you were not acting for Mr. Shum in the purchase, according to your evidence, completion in the Hong Kong sense had taken place. 40
- A. Of the mortgage, yes.
- Q. Yes and with the result that he would be entitled to direct as to the disposal of the mortgage proceeds.
- A. Yes, subject to the undertaking – you mean Danny Yiu would be ?
- Q. No, Mr. Shum.
- A. Mr. Shum, yes.
- Q. So the letter at page 38 not only according to you serves as evidence that the mortgagee had paid the mortgagor, it also amounts, does it not, to an exercise by

- the mortgagor of his right to direct the mortgagee as to the disposal of the mortgage proceeds?
- A. Yes.
- Q. Now, throughout your relationship with Mr. Shum you were a solicitor to him. You knew that . . .
- A. Solicitor of the Supreme Court.
- Q. . . . he treated you as a solicitor not just as any person.
- A. He knew I was a solicitor.
- Q. And he always addressed you as Solicitor Leung? 10
- A. I couldn't remember the address now.
- Q. He's certain he used that expression when he was in the box.
- A. I'm generally known in the profession as Miss Leung so I think Mr. Wong called me Miss Leung.
- Q. But Mr. Shum would be addressing you in Chinese.
- A. He would not use English, yes, he would use Cantonese but I could not remember what he would address me as.
- Q. But more likely than not, he would address you as Solicitor Leung.
- A. I don't remember, I don't recall anything of that kind.
- Q. You have never told him, have you, that in the event of any doubt on his mind, he 20 should consult his own solicitors?
- A. I did not tell him that.
- Q. And, in particular, you never tell him to consult Mr. Danny Yiu or any other solicitor – Mr. Danny Yiu?
- A. I think I told him to go to Danny Yiu and it's up to Danny Yiu to, as it were, tout for business.
- Q. And when you told him to go to Mr. Danny Yiu and pay the proceeds you expected Mr. Shum to follow your suggestion, did you not?
- A. Yes, because he was keen that I should complete the mortgage.
- Q. So when you told him to go to Mr. Yiu's office to pay the money over, costs, 30 etc., you expected him to follow your suggestion.
- A. He did say he would go and . . .
- Q. You expected him, when you said it, to go?
- A. Yes.
- Q. When you asked him to sign papers, you expected him to sign them?
- A. Whose papers?
- Q. Whatever papers which he signed in your presence.
- A. The papers – the mortgage papers?
- Q. Yes.
- A. Yes, because he's the mortgagor – I mean his company is the mortgagor. 40
- Q. And so you expected him to sign.
- A. Yes.
- Q. So when you explained the gist of the documents to him, you expected him to rely on your explanation too.
- A. He relied on my interpretation, yes.
- Q. And when you gave him a literal translation of document 38 in Bundle 2, you expected him to accept your literal translation and to act on it.
- A. Yes.
- Q. Did you also tell him that it was a document which he ought to sign?

- A. I don't remember exactly what I said. I think what I could have said, looking at it now, is that , in order for me to get money from Edward Wong, that has to be signed.
- Q. When you presented the bills or when you instructed David Leung to present the bills to Mr. Shum for payment, you expected him to pay, didn't you?
- A. Yes.
- Q. Would it be correct to say that although it might not have been spent out but tacitly it was understood by all three of you that when the bills were presented, Mr. Shum would pay them? 10
- A. Yes.
- Q. I suggest to you, Miss Leung, that when you asked Mr. Shum to sign document 38 in Volume 2, you were in effect advising him that the mortgage proceeds should be paid to Danny Yiu & Company. Would that be a correct interpretation of your action?
- A. I would consider the mortgage completed on that day and, in order that I could actual complete the mortgage, I get a good title, I had to get the money across to Danny Yiu.
- Q. So what you were doing was to say to Mr. Shum, "This is a letter which you have to sign in order to get the mortgage money." 20
- A. Yes.
- Q. So in effect what you are saying is, "If you don't sign this letter, you may not get the mortgage money."
- A. That is one of the documents he had to sign in order to get the mortgage money.
- Q. Yes, the other documents are the Debenture and the . . .
- A. And the Guarantees.
- Q. So this document completes the picture.
- A. Yes.

MR. TANG: My Lord, would this be a convenient time? I have very few more questions. I'll be about 15 minutes after lunch. 30

COURT: Yes.

12:53 p.m. Court adjourns

2.32 p.m. Court resumes.

Appearances as before.

D.W. 3 – LEUNG Wai-ling o.f.o.

XXN BY MR. TANG (Continuing)

- Q. Now, Miss Leung, I have just got three very short points to deal with. Have you got Volume 2 in front of you?
- A. Yes.
- Q. Would you look at page 46, Volume 2? 40
- A. Yes.

- Q. You have already told my Lord that when Mr. Shum first telephoned you about the question of the tenancy, you told him, "I have nothing to do – I am not your solicitor in the purchase. Go and speak to Danny Yiu."
- A. Yes.
- Q. And then he came back and persisted.
- A. Yes.
- Q. Now, would you look at this letter 46?
- A. Yes.
- Q. Now, would you look at this letter 46? 10
- A. Yes.
- Q. Also on the question of the title deeds.
- A. Yes.
- Q. Mr. Shum was the person who was pressing you for them.
- A. It is possible, yes.
- Q. Because up to the 16th of February, there's no evidence that Mr. Edward Wong did anything about the title deeds.
- A. No, he generally left it to me.
- Q. But Mr. Shum was anxious. Now, the first letter dealt with the question of title deeds. We can pass it over. The second paragraph is: "We are informed by the Mortgagor (the Purchaser) that part of the premises is subject to tenancy. Please let us have details of the same and confirm that no construction or key money has been accepted from the tenancy." When you wrote this second paragraph, you wrote this as a result of information which you thought Mr. Shum had supplied to you. 20
- A. Yes.
- Q. Those information when he first supplied to you you thought had nothing to do with you and it was something which he ought to have dealt with.
- A. By Danny Yiu.
- Q. By Danny Yiu. When you wrote this letter, did you write it on behalf of Mr. Shum? 30
- A. I wrote it on behalf of – It took me a couple of days to think of how to word it to make sure that that's on behalf of the mortgagee actually because I felt a bit guilty that I did not look into this matter thoroughly before, but this letter was written on behalf of the mortgagee.
- Q. Buy why should that concern the mortgagee?
- A. Because that would affect the value of the property.
- Q. If that were the case, when Mr. Shum first telephoned you, why sent him off to Mr. Yiu, why did you not say to him, "Thank you very much. This is valuable information for the mortgagee."
- A. Yes, when he telephoned me, my understanding correctly or wrongly was that he told me the tenant refused to pay him rent and on that score the mortgagee is not concerned. 40
- Q. Yes but it wasn't question of payment of rent, wasn't it, it was a question of the existence of a tenancy?
- A. But my understanding at the time with outstanding to Mr. Shum in evidence was that somebody refused to pay him rent.
- Q. I suggest to you when you wrote this letter, you wrote on behalf of Mr. Shum.
- A. No.
- Q. That's one point. The second one is even shorter and it's a very general question.

- It is correct to say, is it not, that up to and including the 27th of January you had no reason to suspect that this particular transaction was going to be out of the ordinary?
- A. No, I had no reason to suspect.
- Q. So up to that time you had no reason to commit any particular thing to your memory more than as usual.
- A. No.
- Q. The third and final point. It's slightly longer but it seals with the matter that I have already dealt with but from a slightly different angle. Would you look at Volume 2, page 32, again? I have asked you already if you were acting for the purchaser what amendment you would have made to this letter. 10
- A. Yes.
- Q. Now, assuming for the present purpose that you were not acting for the mortgagee but you were acting for Mr. Shum as the mortgagor.
- A. Yes.
- Q. In the mortgage.
- A. Yes.
- Q. Would you have written a similar letter to Danny Yiu?
- A. If I were simply acting for the mortgagor and nobody else. 20
- Q. Quite.
- A. Not even the purchaser.
- Q. Not even the purchaser.
- A. I think it would be more or less the same.
- Q. I see. In fact, it's difficult to think of any alteration to make to it.
- A. Yes.
- Q. Now, assuming . . .
- A. Except that if I were acting for the mortgagor, would I be entitled to have these things? I probably would ask him to send these or these title deeds to whoever was acting for the mortgagee. I wouldn't be entitled to retain them at any moment. 30
- Q. You would not be retaining them but you would be sending the money over on behalf of the mortgagor, would you not?
- A. I would be sending the money across on behalf of the mortgagor, yes, if I were acting for him.
- Q. And you would ask Danny Yiu to undertake, when the documents are ready, to send them over to the mortgagee.
- A. Yes.
- Q. Alternatively, you may have asked him to undertake to send the documents to you, in which event you would then forward them over to the mortgagee.
- A. I don't know if I were – but assuming that somebody else, another solicitor was acting for the mortgagee. 40
- Q. Right.
- A. I don't know if that mortgagee's solicitor would allow the title deeds ever pass through me.
- Q. So maybe you would just send the money over against the undertaking to send the title deeds to the mortgagee's solicitor.
- A. Yes, to somebody else's office, yes.
- Q. Now, finally on this point. Assuming that you were acting for both the mortgagee and the mortgagor, I know you have told my Lord many times that you don't,

- assuming that you were, would you have written the letter in the same way?
- A. In that case, I think I would have written the letter on behalf of the mortgagor in the first part because the money that I was sending would be the mortgagor's money and I would be authorized as his solicitor to release the money. I think I'll probably say, "We shall send you the mortgagor's money." or something like that.
- Q. Because you would have already as solicitor for the mortgagor had the mortgage proceeds.
- A. Yes.
- Q. But part from that cosmetic difference, you would have sent substantially the same letter? 10
- A. Yes, the documents, if I were acting for both, then the documents that I got would be identical.
- Q. But assuming that you were acting for both but had not been – have not had your experience, as it were, enriched by this case, would you not, have written a letter quite like the one that one sees now at page 32 and 33 because then you would not have made the dichotomy between mortgagor and mortgagee so clearly in your mind?
- A. I really could not answer this question. I don't know what I would have thought.
- Q. Lastly, would it be correct to say that whatever the position you would not have allowed the mortgage proceeds to go into the hands of Mr. Shum, that is to say, you would only part with the mortgage proceeds against an undertaking from another solicitor? 20
- A. You mean we are specifically talking about this case?
- Q. Yes.
- A. In this case, yes.
- Q. You would not allow the mortgage proceeds to be paid to Mr. Shum and leave it to him to pay to Mr. Danny Yiu.
- A. No, because I have to be absolutely certain that that money is paid towards the purchase price of that property which is to be mortgaged. 30
- Q. It's the part of the achievement of this object that you got Mr. Shum to sign . . .
- A. 38.
- Q. And even at that time you had in mind that you would send 32 over to Danny Yiu . . .
- A. As I have said, I could not remember the sequence of 32 and 38.
- Q. But you would not have had one without the other.
- A. Not in this case, no.
- Q. I think the effect of your evidence was between you and Mr. Yiu it was arranged that Mr. Yiu should represent Mr. Shum.
- A. I did not say that. 40
- Q. Sorry, you did not say that. Between you and Mr. Yiu it was left hanging in the air but you said that when you sent Mr. Shum over to Mr. Yiu, Mr. Yiu may be able to get Mr. Shum to retain him as his solicitor or words to that effect.
- A. That is a possibility, yes.
- Q. And that's what you had in mind at that time.
- A. Yes.
- Q. So when you sent this letter over to Danny Yiu & Company, you were actually sending it over to him as solicitor for the vendor, the purchaser possibly acting in person depending on the arrangement which Mr. Shum may or may not have

- made with him when Mr. Shum arrived at his office.
- A. I don't think I went into it that finely.
- Q. But on analysis that would be correct, wouldn't it?
- A. On analysis, I don't think I can say now what was intended but all I was concerned with was that this money went across and these things should come back.
- Q. What you were concerned with was that you should have an undertaking from Danny Yiu.
- A. Yes.
- Q. To give you those documents. 10
- A. Yes.
- Q. But at that time I think your evidence is quite clear that it had not been decided who was to represent Mr. Yiu save that you yourself had decided that you were not going to act for Mr. Shum.
- A. I had decided not to act for Mr. Shum.
- Q. And you knew that Mr. Yiu himself was keen to get the full costs.
- A. Yes.
- Q. He could get it either by acting just for the vendor with Mr. Shum acting in person.
- A. Yes.
- Q. Or he would get it by acting both for the vendor and Mr. Shum. 20
- A. Yes.
- Q. Up to the 27th it had not been made clear to you which of the two choices open to Mr. Yiu he had adopted.
- A. No, I don't think I was told by Danny Yiu.
- Q. In fact, it was not just up to Danny Yiu, it was also a choice open to Mr. Shum.
- A. To Mr. Shum.
- Q. And you had not ascertained from him up to that moment what his wishes were.
- A. No.
- Q. So again then, on analysis when you wrote the letter to Danny Yiu you only knew for a fact that he was acting for the vendor. 30
- A. Yes, but he could possibly be also acting for the purchaser.
- Q. You knew that he was keen to do so.
- A. Yes.
- Q. But you don't know whether his desire had been achieved.
- A. But that was a possibility which had not been excluded.
- Q. I see, so I think as the last question just so that there would be no misunderstanding over this point: at the time when you wrote the letter at page 32, it was a possibility that Mr. Yiu was acting for the vendor.
- A. Yes.
- Q. And it followed that Danny Yiu at that time might or might not have been acting 40 for Mr. Shum – it must necessarily follow.
- A. From my point of view, yes, but I think from the point of view of Mr. Shum if he had been to Danny Yiu's office before he came to me . . .
- Q. But his evidence was he had not been.
- A. Yes, then he ought to know whether or not that would be Mr. Shum's mind as well.
- Q. Assuming that he had not been then you would agree with me, would you not?
- A. Yes.
- Q. Even if he had been, you did not know for a fact that he had been.

- A. I did not ask him.
Q. Because Mr. Yiu might have adopted your useful method of not asking him whether or not he wanted to be represented.
A. Yes.
Q. Thank you.

MR. CHEUNG: My Lord, may I have your leave to ask a few more questions arising out of the cross-examination?

COURT: Yes.

FURTHER XXN BY MR. CHEUNG:

10

Q. You said you asked Mr. Shum to go to Mr. Danny Yiu to pay the balance of the purchase price, to sign the documents and you left it to Mr. Yiu to tout or business if he would, is that correct?

A. It would be up to his initiative, I suppose touting is too bad a word to use.

Q. Did you communicate to my client, Mr. Wong, that you had asked Mr. Shum to go to Mr. Yiu?

A. No.

Q. Did you tell my client you had agreed with Mr. Yiu to re-structure the whole transaction?

A. No.

20

Q. You did not give my client any opportunity to object to an assignment where the consideration would be understated and might be an infringement of the Stamp Duty Ordinance.

A. No, I did not give him a chance.

Q. Tell me, did you seriously think Mr. Yiu would solicit Mr. Shum's custom to act for him in his capacity as purchaser?

A. Yes.

Q. You did?

A. Yes.

Q. He would get no extra costs, would he, if he acted for Mr. Shum as well? 30

A. No.

Q. If he raised the question at all . . .

COURT: Honestly, I understood that that wasn't so.

MR. CHEUNG: That is so. A solicitor acting for vendor and purchaser would get the same costs as he would acting for the vendor with an unrepresented purchaser.

A. Yes, that's right.

Q. That's a possibility if he solicited Mr. Shum's business, Mr. Shum might have said "Look, I think Miss Leung is acting for me." Wasn't that a possibility?

A. I wouldn't be able to say – reply to your question.

Q. According to Mr. Shum's collection in this court, he thought he was (you were?) 40 acting for you (him)?, don't you think, in those circumstances, a question –

soliciting of business by Mr. Yiu might have let the cat out of the bag, namely, a question would arise whether in fact you were acting for him?

A. I don't think so. I mean he may not get any benefit out of this transaction but Mr. Shum – I mean, once there is a relationship of solicitor and client developing, it might be that he will come back later on other things, on a future purchase – I mean it's generating the goodwill rather than exactly just this transaction.

Q. I see. You felt that that might happen because Mr. Yiu might generate some goodwill. You yourself, of course, had no need to generate any goodwill for Mr. Shum to come back, had you?

10

A. No.

Q. And, of course, if Mr. Yiu raised a question with Mr. Shum at all, Mr. Shum might have gone off to another firm of solicitors, wouldn't he?

A. That's a possibility, yes.

Q. In which case Mr. Yiu would be landing himself with having to deal with another set of solicitors.

A. Yes, that's a possibility.

Q. Instead of an unrepresented and unprotected client.

A. Yes, that is a possibility.

Q. That is so, yes. One more question. Whatever your understanding at the end of the day of the 21st of January was, that you were only representing Mr. Shum in the matter of the shelf company, you never at any time, did you, told my client that you were not acting for Mr. Shum or his associates in the mortgage transaction in so many words?

20

A. No, I did not tell your client.

Q. Nor did you ever tell my client that you were not acting for Mr. Shum or his companies (associates?) in that capacity as purchasers?

A. No, I don't think I told Mr. Wong that.

Q. Have you any residual doubt you might have because if you had done so, you'd have told us about it in the three days you've been in the witness box?

30

A. You mean telling Mr. Wong I don't act for Mr. Shum?

Q. Yes, in the matter of the purchase.

A. I don't think I communicated with him after the first meeting other than consulting him on the amount and asking him to give me the cashier orders and he did not come to my office again from the 21st of January. The next occasion he came was the 27th of January with the cashier orders.

Q. I suggest to you the sum total of all that you did and all that you omitted to do was to leave Mr. Shum under the impression that you were acting for him but in fact you left him completely unrepresented and completely unprotected in this matter of purchase and in this matter of the mortgage.

40

A. I don't think I tried to mislead him in any way.

COURT: There is one matter I'm not clear of. You said that in this particular transaction there was every reason why the mortgagor, Mr. Shum, should not believe that you were acting for him. You know you said, I think, in the average transaction, that that would become apparent – you didn't have to tell him that you were not acting?

A. Yes.

COURT: It would be apparent but in this particular transaction and more so than the average, it must have been clear that you were not acting.

A. Yes, I was particularly careful to make sure that he knew I was not acting and that was because I sold him the shelf company.

COURT: When you say the circumstances of this particular case, it was clear – it must have been clear that you were not acting, are you referring to anything else apart from what you understand was said to Mr. Shum by your clerk, Mr. Leung, any other factor apart from that conversation?

A. From the fact that I told him to go to Danny Yiu I think was the most – in my mind, the major factor. That is one thing. And I think the authorization of 38, Volume 2, would also be unnecessary if I were acting for him as the mortgagor. 10

COURT: Not acting for him as the mortgagor, acting for him as the purchaser.

A. But it will be necessary if he was the purchaser.

COURT: If you were acting for him as the purchaser, that would still be necessary?

A. Still necessary, yes.

COURT: Now, was it your normal practice to tell your client when presenting a bill that you were not acting for them as purchasers or mortgagors, whichever the case might be? 20

A. I'm afraid my experience in that is very scant because, firstly, I don't normally present bills, secondly, because if I have to present any bill, it's normally to a large company who knows how to deal with its own interest.

COURT: Do I take it that it is not your practice when dealing with an ordinary man in the street to instruct your clerk on presentation of a bill to say: "Now, this bill is payable by you as mortgagor but we are not your solicitors." 30

A. It's unusual for me to say that.

COURT: Didn't you think that telling Mr. Shum then making that specifically clear to him at the time he paid your bill, wasn't that a little late in the day?

A. Not if he had been to Danny Yiu and Danny Yiu had done something about it. 30

COURT: What, say, if he said to your clerk, "I didn't realize that. I thought Miss Leung was acting for me. I now want to go and take advice."? Wouldn't that have thrown the whole thing into confusion at that late stage?

A. Late stage, yes, it would have that effect but we have never had that happened.

COURT: I think you said that there might have been some confusion in Mr. Shum's mind as to who was acting and that's why you gave these instructions. Do you think there was any confusion in your mind really as to exactly who was acting for who in this transaction? Did you ever really bring your mind to bear as to whether you were acting for Mr. Shum and even the mortgagor or purchaser?

A. I think – I hate to say it, I don't think . . .

- COURT: Might I say before you answer that you said to Mr. Cheung, for instance, relating to a telephone conversation which Mr. Shum rang up about this tenancy as alleged – the question was: “Did you tell Shum not to be so nervous?” and your answer was: “I would not say that to a client.” 10
- A. That might be a slip of the tongue. I think it is my clear recollection that it was very clear in my mind that I don't act for Mr. Shum in any capacity other than the company work but I think why I am standing here being cross-examined is that the manifestations may not be so clear.

COURT: That is a very fair answer. Yes, Mr. Price?

REXN BY MR. PRICE:

- Q. Miss Leung, look will you again at page 27 of Volume 2? In the first paragraph of that letter you tell Mr. Wong or rather his Company what instructions you had received from him the previous day, that's the first paragraph. 20
- A. Yes.
- Q. In the second paragraph you say what instructions you had received from Mr. Shum and you say from Mr. Ma too.
- A. Yes.
- Q. On the previous day had you received from Mr. Shum any verbal instructions at all in respect of the matter specified in the first paragraph of that letter?
- A. Sorry.
- Q. Had you received from Mr. Shum any part of the instructions referred to in the first paragraph of that letter? 30
- A. No.

- Q. What then was the purpose – and what was the purpose of sending copies of that letter to Mr. SHUM and Mr. MA?
- A. To confirm – to let them know what my job was.
- Q. Yes, if your job had gone beyond the sale of the shelf company would that letter have referred to the extra matters you were dealing with for them?
- A. I would have written a separate letter confirming the other instructions.
- Q. Did you write a separate letter?
- A. No.
- Q. You have told his lordship in answer to cross-examination questions that you believed that your – that you had clearly manifested by your behaviour the previous day that except in relation to the acquisition of the shelf company you were taking your instructions not from Mr. SHUM but from Mr. WONG? 10
- A. Yes.
- Q. Now, in respect of the fact that Mr. SHUM was proposing to buy a company – to buy property, or rather his company was proposing to buy the property, who did the talking at the meeting: Mr. WONG or Mr. SHUM?
- A. Mr. WONG did most of the talking.
- Q. Yes. You said I think that Mr. – you said I think that you were given a piece of paper which had the name of Danny YIU on it? 20
- A. Yes.
- MR. PRICE: Now, my Lord, there is a small batch of papers that were – that are in the company file and I think it may be helpful if I hand up this small . . . (Mr. CHEUNG confers with Mr. Price)
- Q. In the file, in the company file, not in any volume, there is this small swatch of paper; when you told his lordship that you were given a piece of paper with Danny YIU's name on it, is it there?
- A. Yes, this is the –.
- Q. Is that the piece of paper you were given?
- A. Yes. 30
- Q. I see, and who produced that?
- A. Mr. SHUM.
- Q. Mr. SHUM. Perhaps his lordship would like to see that.
And that is on May Fung Industrial Ltd. memo paper?
- A. Yes.
- Q. Yes; and it was a photocopy; it was a –?
- A. It was the original.
- Q. Yes, that was the original, I'm sorry, I will wait, if I may, while my friend looks at the papers. (Pause)
And look at the beginning of that: is the paper with the name "North American Meat Packing Company" also something that you had received on that occasion? 40
- A. I don't remember seeing it but I can't think of any other occasion in which that would be given to me.
- Q. That is the piece of paper with the name of company at the bottom, isn't it?
- A. Yes, May Fung Investment Company Limited.
- Q. Yes. When you were asked whether you were given – whether you were shown – whether you were given on this occasion a photocopy of the two Chinese receipts,

you managed, I think, to express some doubt as to whether you took the photocopy of each receipt or whether you were shown or whether you were given a photocopy; are photocopies of those two receipts in that bundle?

- A. Yes, but this has got – .
- Q. That is the Chinese agreement, isn't it?
- A. Yes, but that has got Danny YIU's endorsement on it.
- Q. I think you are looking at the photocopy of the Chinese agreement?
- A. Yes.
- Q. Not the division agreement, it's the receipts . . . 10
- A. . . . This is the division agreement.
- Q. Yes, it is the two receipts I am asking you about.
- A. There is just one receipt here . . . Oh, two receipts, yes.
- Q. There are two receipts there?
- A. Yes.
- Q. Now, those photocopies come out of your file; where would those photocopies come from?
- A. It is not our photocopy machine paper.
- Q. It is not your photocopying machine?
- A. No. 20

MR. PRICE: It might be sensible, since they have now featured, for me to put those in as exhibits. I know it is late to do it but it appears, looking at them while questions were being asked, that that might be a sensible exhibit.

MR. CHEUNG: My Lord, I don't object but how

COURT: Mr. TANG, do you – ?

MR. TANG: No, I don't object.

D2A, B, C, D COURT: Very well, D.2A, B, C, D.

MR. PRICE: I am sorry, my Lord, my learned friend says how it arises, but it was in cross-examination that the lady referred to her having been given the paper.

- Q. Miss LEUNG, you said at an earlier stage in your evidence and you have been questioned at considerable length about this that you had never previously acted for a mortgagee and a mortgagor and that you had never in fact done so? 30
- A. Yes, that's right.
- Q. Now, Mr. TANG asked you a lot of questions seeking to elicit from you the reasons for that. When you told his lordship that you had never in fact acted for mortgagee and mortgagor, were you merely referring to experience, as it were, as a statistical fact, that is to say that you had never in fact acted?
- A. Yes, that's right.
- Q. Had you cause before Mr. TANG asked you what were the reasons to analyse what reasons there were or might be for your lack of experience and your personal view that you would never act for a mortgagor as well as for the mortgagee? 40
- A. It is – I think the great force of my practice of not acting for both was the practice

- but I think sometimes the mortgagors – some of the mortgagors were required to give such a lot of security and protection to the bank that I do sometimes seriously think there is a conflict of interest.
- Q. Yes. What I think I am asking you is this: did the practice come into your – the range of your experience before any reasons for it?
- A. Yes.
- Q. Independently the reasons for it?
- A. Independent of reasons, yes.
- Q. Yes. When you told his lordship reasons you are rationalising . . . 10
- A. . . . Yes.
- Q. . . . something that is part of your experience?
- A. Yes.
- Q. On the 21st of January at that meeting of that day it is apparent from your evidence and from the memorandum you made at page 22 in bundle – in Volume 2 that the question of instalment provision being mentioned in the debenture was something which had disappeared from what was intended as the debenture document by the time that meeting came to an end; that is your evidence, together with the crossing out of the reference to “seven years in principal on reducing balance”?
- A. Yes. 20
- Q. Now, was it any concern – was it to be any concern of yours that there would or might be a separate arrangement about instalments between Mr. WONG and Mr. SHUM – was that to be any concern of yours?
- A. I think I told Mr. WONG to prepare a side letter so that both parties would sign that letter as evidence of the instalment payments.
- Q. When I say “was it to be any concern of yours”, were you to have any part in that?
- A. I think Mr. Edward WONG probably would come back to me if he had any difficulty in getting that letter sorted out.
- Q. And supposing he had not come back to you, would it have been any part of – any concern of yours to enquire whether such a letter had been organised? 30
- A. No.
- Q. Yes. Turn, will you, to the letter at page 32 in Bundle 2 – in Volume 2. You have told his lordship that – as regards the ten you would not have been surprised if Mr. YIU required some extra time to deal with the documents?
- A. Yes.
- Q. As regards the rest of the letter was there in your mind any scope for flexibility?
- A. You mean the documents that he was to send?
- Q. That's right, as regards the rest of the undertaking.
- A. No.
- Q. When you told his lordship in answer to a question – when you – It was put to you that the undertaking was just a form of words. 40
- A. For the days.
- Q. If – and I didn't record it -- if you assented to that proposition, to what were you referring, the proposition that the undertaking was just a form of words?
- A. I was referring to the number of days.
- Q. Is the undertaking just a form of words?
- A. No.
- Q. When you received the letter at page 28, Volume 2, together with the documents that were sent with it, your evidence is that you spoke to Danny YIU, and what

you wanted initially was that an extra confirmor should be joined in the assignment?

A. Yes.

Q. But you were not happy, you told his lordship, with the Chinese agreement. Now, I think the Chinese agreement that you particularly referred to is the partition agreement, the document No. 6 in the list, is that it?

A. Yes.

MR. CHEUNG: Document No. 6 is not the partition.

A. Yes, the date is right.

Q. It is dated the 5th of January and it has on it an endorsement on the 23rd; it is the document at Volume 3 . . . 10

MR. CHEUNG: . . . Oh, I beg your pardon.

MR. PRICE: Volume 3, page 23, the one which has endorsed on it that "we accept that the clerks examined a copy".

Q. And as I understood your answer your principal misgiving was because there were parties to an earlier contract of purchase arranging a partition as between themselves without the asset of their vendor, Lucky Time, is that right?

A. Yes.

Q. Yes; and is that absence of consent – that absence of consent is one of your reasons for assenting to the proposition or agreeing with Danny YIU that instead of there being an extra confirmor there should be a restructuring of the transactions, is that right? 20

A. Yes.

Q. In considering this matter after the receipt of the letter of the 23rd January, in considering it, was there a time schedule in your mind, that is to say, how near was – the expected completion day you had said was the 26th of January.

A. Yes, but it would – I don't remember exactly what my reaction was then but it would be apparent from the previous – from the superior agreements that the completion date was not due until the 29th January.

Q. Yes. 30

A. But having previous experience of Chinese New Year syndrome, I know that I probably ought to put that – the 29th of January – a little forward; and in any event I was told at the first meeting that the parties expected the matter to be completed on the 26th.

Q. Yes, yes, 26th I understand, was a Monday in that year; would that be within your knowledge?

A. I don't remember.

MR. PRICE: Perhaps your lordship would accept it from us, we have looked it up, 26th was a Monday.

Q. So as on the 21st January the time scale was against the mortgage completed by Monday, the 26th? 40

A. Yes.

- Q. And that would have been said to you on Wednesday, the 21st?
- A. Yes.
- Q. So -- Let me ask you: -- was there then, when you received the letter of the 23rd January, 1926 (1976?), a tight time schedule in your mind?
- MR. CHEUNG: I wonder if my learned friend would put that question in a less leading form, because in Hong Kong four days is not a tight time schedule. I would be obliged if my learned friend would not lead.
- Q. Did you regard there as being plenty of time for the restructuring of the agreement?
- A. No. 10
- Q. You didn't. In addition to the Chinese partition agreement as to which you were not happy, what view had you of the two Chinese receipts of which you had received copies, the receipts of the 30th December and the 15th of January, what view had you of them as contractual documents?
- A. Well, the second one is defective in that it doesn't say who the payer was; the first one . . .
- Q. . . . Do you want to look at it?
- A. Yes.
- Q. It's Volume 3 at page 21 with the translation at page 22.
- A. And the first one had Po Fung's name on it. 20
- Q. Yes.
- A. This is not too bad actually.
- Q. I see. Did your view of those two documents play any part in your assent to the proposition that the matter should be restructured? Or perhaps that is not as clear a question as I should have made it. Look at the letter at page 32 in Bundle 2, Bundle 2, page 32: in the undertaking there items (B) and (C) refer to the cancellation of the original Lucky Time to Kai Ming and CHAN Sun-ming contract and the substitution of a new agreement for sale direct from Lucky Time to Bovill, don't they?
- A. Yes. 30
- Q. Now, in assenting to this restructuring instead of having an additional confirmor in the assignment to Bovill, did you view, your view, of the two Chinese receipts play any part?
- A. I don't think I sort of clearly rationalised it but I just had a dislike for them.
- Q. "I just had a dislike for them."
When you received the documents with the letter of the 23rd of January, 1976, did you read through the agreement, the two agreements of the 17th of December?
- A. Yes.
- Q. Now, those agreements appear in Bundle 3 at pages 11 and 17. Was it from reading those agreements that you understood that the sale from HO Sau-ki and Lucky Time were to be completed on the 29th of January? 40
- A. Yes.
- Q. And was it apparent to you from reading those agreements that Danny YIU was concerned in those agreements?
- A. Yes.
- Q. His signature -- Does his signature appear on both of them?
- A. Yes, it is the same signature who signed the letter.

- Q. Yes. Now, you had, I think, a company search made against Lucky Time and on the 24th of January-- this appears in Volume 5 at page 2 . . .
- A. . . . Page 3.
- Q. . . . Was that search something that -- I mean, are you able to tell his lordship when you saw the result of that search?
- A. It would be -- either -- I don't remember -- either when it was returned from our Hong Kong company search department or when I approved the debenture which was drafted by David LEUNG.
- Q. Is it apparent from that -- Was it apparent to you from that search that HO Sau-ki was personally interested in Lucky Time? 10
- A. Yes.
- Q. And had you observed in the Lucky Time's sale agreement of 17th December -- this is page 19 in Volume 3 -- that HO Sau-ki had signed that agreement on behalf of Lucky Time -- page 19 in Volume 3 signed by HO Sau-ki on behalf of the vendor.
- A. It is page 15.
- Q. No, I think you are looking at -- 15 is the Lucky Time purchase.
- A. Yes, Lucky Time sale.
- Q. The Lucky Time sale begins at 17 and the signature on behalf of Lucky Time is at 19; had you observed that agreement had been signed on behalf of HO Sau-ki on behalf of Lucky Time? 20
- A. I remember thinking to myself: I wonder why he sold it to his own company.
- Q. You thought to yourself "I wonder why he had sold it to his own company"?
- A. But I can't remember whether or not I saw the signatures and had an impression made on me.
- Q. Look back to page 15 to which I think you were drawing my attention in Bundle 3. Had it struck you there that HO Sau-ki had signed as vendor and on behalf of the purchaser Lucky Time? This is the sale agreement between HO Sau-ki himself and Lucky Time.
- A. Yes. 30
- Q. Signed by the vendor and signed by HO Sau-ki on behalf of the solicitor -- on behalf of the purchaser?
- A. I don't remember. I don't remember.
- Q. You don't remember if that is right?
- A. No.
- Q. In relation to the amount outstanding under the charges in favour of the Hang Seng Bank, you were asked if you -- it was put to you that Lucky Time might receive less -- would receive less than 4.4 million if that was the amount -- if the full amount was outstanding -- Lucky Time would receive from the transaction less than 4.4 million; do you remember that being put to you by Mr. CHEUNG? 40

MR. CHEUNG: I don't think so.

COURT: I forget who it was but somebody

A. It was Ho Sau-ki.

MR. PRICE: I am so sorry, that is quite right.

- Q. . . . That HO Sau-ki would receive less than 4.4 million?
- A. Yes.
- Q. Would receive less than 4.4 million; and you answered that you were aware that HO Sau-ki had agreed to sell the property for less than 4.4 million dollars?
- A. Yes.
- Q. Now, you have told his lordship – we have looked at the – when you – When being aware of that, were you also aware of the nature of the two agreements that we have now looked at; that is to say, the two agreements HO Sau-ki to Lucky Time and Lucky Time on – to Kai Ming and CHAN? 10
- A. What do you mean by the nature?
- Q. Were you aware of the matters in respect of those agreements which we have looked at now?
- A. I don't remember.
- Q. You don't remember. You see, you told his lordship in this connection that you were not moved to enquire of Danny YIU whether there would be enough money to pay off Hang Seng . . .
- A. . . . Yes.
- Q. . . . Do you remember telling his that?
So far as you were concerned was that something that was covered entirely by the 20
undertaking that you obtained from Danny YIU?
- A. Yes.
- Q. Miss LEUNG, you have told his lordship many times in the course of the last few days that you had never acted for the mortgagee as well as for the mortgagor. If Mr. SHUM had or if SHUM or WONG had asked you whether you would act for Mr. SHUM or his new company as – in respect of the mortgage, what, looking back now, probably would have been your reply?
- A. I probably would have said "Oh, it is not usual for mortgagors to be represented"; and I don't think I would accept instructions.
- Q. Looking back at the matter today, are you able to tell his lordship this whether 30
in your view it is likely or unlikely that you did say that you would act for Mr. SHUM as well as for Mr. WONG in respect of the mortgage?
- A. It would be unlikely that I would have agreed to do so.
- Q. You were asked by Mr. TANG earlier today a series of questions that you pencilled in the date and subsequently write in a firm date; and you told him that the documents were signed in escrow. When on the 27th of January was there in your mind any question that the pencilled date inserted – that the pencilled date inserted in the documents – in any document on that day might have to be replaced by a date out of time for stamp duty purposes?
- A. No. 40
- MR. PRICE: Your lordship will forgive me for one moment, I want to check on one question and answer in chief.
(Pause)
- Q. A series of questions have been put to you on the footing that from a telephone conversation with Danny YIU you got the impression that he was keen to act for the – Mr. SHUM as purchaser.
- A. He was keen that I should allow him to get full costs.

Q. Yes. Well, now, as we have noted your answer in chief, and this may be something that ought to be checked by my friends, your answer in chief was “had impression that he was either acting for SHUM or keen to be acting for him”, that is the form of the question – answer to the question in chief.

MR. TANG: That accords with my recollection and I have a note of that question and answer and that is why I had asked the witness several times whether or not her impression was clear on this point.

MR. PRICE: Yes but what was put to the witness . . .

Q. . . . What was put to you, Miss LEUNG, was that you had the impression that he was keen to act. Now, remembering your answer in chief, are you able to give his lordship any choice in your – as your choice between the two alternatives you first mentioned that he – that either he was acting or he was keen to act? 10

MR. CHEUNG: This witness has really answered that a number of times. Her last answer was “He was keen that I should allow him to earn the full set of costs”. I don’t know whether any choice . . .

COURT: I think she has given . . . quite clearly that there was nothing particular said; it was just an impression she had gained. Whatever relevance . . .

MR. PRICE: That is quite right, that is quite right, perhaps I can put it this way . . . 20

Q. Have you intended in any subsequent answer to qualify that initial answer that your impression was either he was acting or he was keen to act?

MR. CHEUNG: My Lord, I think, with respect, that is a leading question. She has answered questions in cross-examination what she intended before your lordship . . .

MR. PRICE: I think that may be a matter of comment.

Q. In considering – In answering a question or questions from Mr. TANG about the time it would take to restructure the transaction, Mr. TANG was putting to you that the number of things that had to be done for which documents were not already prepared really consisted solely of the cancellation agreement and the preparation of a new sale and purchase agreement, Lucky Time and Bovill Investment; do you remember that being put to you; and those documents, in your view, those documents could or could not have been prepared by the 27th of January? 30

A. It could have been.

Q. Yes, but you told his lordship that you wouldn’t have been surprised if those documents had been ready.
Now, look, will you, at the letter of the – at the undertaking that you obtained – page 32 in Volume 3 – in Volume 2.
Would you have been surprised if the re-assignment from Hang Seng Bank had been

- ready on the 27th of January?
- A. It would not be possible for it to be ready on the 27th.
- Q. It would not have been possible.
At the meeting on the 27th of January was it you who actually struck out the reference to the floating charge in the debenture that had been drafted?
- A. Yes.
- Q. When you did that, on whose behalf did you regard yourself as acting?
- A. On behalf of Edward WONG with his consent.
- Q. Yes; and the question of cancelling the floating charge was raised spontaneously by Mr. SHUM? 10
- A. Any one of the three of them, I don't know.
- Q. Yes. How do you relate that or how do you reconcile that with your assent to the proposition that they were at that meeting not concerned with details?
- A. Because that would be a major factor of having to have the floating charge – in or out it would be a major point in the security, not so much immediately as in the future.
- Q. Just a small matter, I think a correction, but I don't want it to remain on the record: it was suggested to you that certain letters that we see in Volume 2 dated the 27th of January might have been prepared before SHUM and Co. arrived at your office on that day and your answer to that was they might possibly – they might have been and that it was possible too that other letters that we see dated the 27th of January might have been prepared before the parties arrived; do you remember giving that answer? 20
- A. Yes.
- Q. Well, look at the letter at page 39, which is dated the 27th of January.
- A. Yes.
- Q. Now, when was that letter prepared?
- A. That was after the cashier orders arrived because that figure can only be obtained . . .
- Q. . . . Thank you, it is an obvious answer but I didn't want it to be – it is obviously so but I didn't want it to be left as a matter of mere comment. There is another matter of timing on the 27th of January as to which I would like to be clear. Look at the minutes of the meeting, Volume 4, page 76, and have open, if you will as well, the two accounts that were paid on that day at page 43A and B in Bundle 2: Were – Which – Is the order of events such that the accounts were paid – had been paid before the minutes were dealt with? 30
- A. I think so, yes.
- Q. Yes; and is it your recollection that the accounts had been paid before anything else was dealt with by you on that day?
- A. Yes. 40
- Q. Yes . . .

COURT: . . . Before – ?

MR. PRICE: Well, before anything else was dealt with by her. The accounts are at 43A and B in Volume 2.

COURT: The first thing that was done on that day was they paid their accounts?

A. Yes.

MR. CHEUNG: My Lord, that wasn't her answer in chief at all. My friend has put it in a leading form. Her evidence-in-chief was she dealt with other items first and then Mr. LEUNG came in to present the bill.

MR. PRICE: Oh, no, I don't think so. My firm recollection is that's Miss LEUNG's evidence-in-chief.

COURT: My recollection is very much the same as that of Mr. CHEUNG. If that is in evidence then I am surprised . . . I'm afraid I haven't got a note. As I say, that was my recollection. I haven't a full note.

10

MR. PRICE: It was about 2.40 on Monday.

MR. CHEUNG: I have this answer:

“When SHUM and the others came to the office the papers were presented for signature. I did not explain every word to him but the gist of the documents and the three gentlemen immediately objected to the floating charge. They said if they purchased more they did not want such further properties mortgaged to WONG. They were reluctant to sign. I then rang WONG. They were reluctant to sign. I then rang WONG. I had difficulty finding him but he agreed.”

A. What was the question?

20

Q. The question you have answered. We are just checking on what you said in chief.

MR. CHEUNG: She was asked “Did you present the accounts to them?”; “No, my conveyancing clerk did.”; “Had you seen the accounts before presentation?”; “I can't remember but I gave instructions for their preparation.”. Not one word was said in chief. Either she said it afterwards, which is my firm recollection, or else she said nothing about it. This is completely new.

MR. PRICE: I don't think that is right. Well, my recollection differs? and the point was she has also said in cross-examination that David LEUNG had translated one of the documents.

A. Not “had translated” but I . . .

30

Q. . . . But he would have done?

A. . . . would expect that he would have -- he should have done.

MR. CHEUNG: That doesn't lead to the accounts having been presented first.

COURT: This seems to me, if in fact the clerk had presented the accounts, obtained payment and had explained or said “You understand we are not acting for you” before the meeting -- before the transaction -- that seems to me to be of the greatest importance. I can't understand . . .

MR. PRICE: My Lord, the way in which it appears here is "Did they come to the office on the 27th January?"; "Yes". Volume 2, 43, was then immediately put to Miss LEUNG:

"... The two accounts were presented to them by my clerk.
Q. Had you seen them?
A. No."

In other words, the reference to the meeting begins at 27,

"Did they come to your office on the 27th?
A. Yes."

10

And then Volume 2, page 43, is put to her,

"And the two accounts ..." ...

MR. CHEUNG: My Lord, your lordship will also remember Miss LEUNG's other answer – I forget whether it was in answer to Mr. Price or Mr. TANG –

"Did you ask Mr. SHUM and his associates to pay the bill?"

The answer "No" –

"Or go to Danny Yiu to pay the bill?"

The answer was "No, they had already paid us ...".
That was at the end.

MR. PRICE: My Lord, the second note that we have is

20

"Did they come to your office on the 27th January?
A. Yes."

Volume 2, page 43,

"Q. This presented to them when they came?
A. I didn't, my clerk did."

The time may not be as – certainly the intention was to take the meeting in the order.

MR. CHEUNG: There never was any point like that put to the other witnesses. If there was this happened at the end.

MR. TANG: My Lord, I was at pains to draw out from this witness that the proceedings on that afternoon was very hectic.

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MR. PRICE: No, that is not right.

MR. TANG: The impression – and the point that I would want to make eventually is on a hectic afternoon even if Miss LEUNG had said that to Mr. SHUM he might well have missed it thinking that she was only explaining the bill.

COURT: This point is so important that I imagine it must have been put to Mr. SHUM.

MR. PRICE: Both to Mr. SHUM and – I will look it up now – Mr. SHUM and Mr. WONG.

COURT: This is on the 11th of June.

MR. PRICE: Early in the day.

COURT: Yes, first thing . . .

10

MR. CHEUNG: . . . Soon after we started.

MR. PRICE: “You were presented with two bills at JSM?
Yes.”

MR. CHEUNG: The question was “Who presented those bills to you?”

COURT: “By LEUNG – by the clerk David LEUNG”.

MR. PRICE: Well, my Lord, I shall have to look it up.

Mr. TANG: What I have got here is . . .
(Mr. TANG reads out his notes of the 11th June;
Mr. CHEUNG reads out his notes of the 11th June.)

MR. CHEUNG: I have got a similar note and there is one answer which says “Everything was done in a great hurry. We were told to sign papers and bill presented. Payment was demanded and then question of stamp duty arose and we were told this was a matter between solicitors and there was a conversation in English.” 20

It is quite clear from that answer and from the full tenor of all the evidence given by MA, and they were never specifically challenged in cross-examination, that they were told by this David LEUNG JSM were not acting for them before they signed the papers. That is the point which my friend seeks to get out of this witness now. She certainly has not said in cross-examination and certainly an important point like that was never specifically put to those two witnesses that they signed the documents after having explained to them that JSM weren't acting. I object to that question. 30

MR. PRICE: My Lord, I will look overnight. I cannot at the moment see whether there is anything further. Certainly on the passage that my friend Mr. TANG has read the point has not emerged specifically with clarity and I won't ask that question at

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Leung
Wai-ling re-
examination.

this moment.

Q. About the charging for the preparation of the company minute at page 76 of Volume 4, that is the company minute, as to which you told his lordship that "we, as mortgagee's solicitors prepared this sort of minute", does the charge for that appear in the bill made out to Edward Wong Finance Company payable by Bovill Investments or in a company account?

A. It comes under the mortgage bill.

Q. Look at page 2, Volume 2, page 38.

It was put to you that that was not only evidence of the mortgage money – I am using my own language – going to the right destination but it was also in terms which exercised Mr. SHUM's rights over the money. What possibility was there of that money going, by exercise of any right of Mr. SHUM, to any destination other than that specified in the letter? 10

A. No, I don't think there is any other alternative.

Q. No alternative.

MR. PRICE: My Lord, I have no further questions that I need put to Miss LEUNG but perhaps I could – I don't know whether your lordship would propose to rise now – perhaps I could reserve just this that I should like to look through my notes of evidence overnight to see whether I find more about the particular matter that occupied us all a little time, and if so perhaps Miss LEUNG could be treated as not – as with her re-examination only provisionally ended. Subject to that my re-examination is complete. I don't know whether your lordship – I mean I rather deliberately didn't suggest an interruption in the course of the afternoon and I apologise if that was . . . 20

COURT: . . . Not at all, I must admit I was rather happy that you didn't.

(Court and counsel review time table re-hours of sitting)

Adjourned to 9.45 a.m. 31st July, 1980.

4:33 p.m. Court adjourns

31st July, 1980

9:53 a.m. Court resumes Appearances as before.

MR. PRICE: My Lord, I haven't any further re-examination of Miss LEUNG.

I now call Miss TSU. My -- Mr. Mills-Owens will call
Miss TSU.

D.W. 4 Cecilia TSU Shih-yung Sworn

XN. BY MR. MILLS-OWENS:

- Q. Your name is Cecilia S.Y. TSU but your married name is TAM? 10
A. Yes.
Q. And you are going to give your evidence in English but if you feel it is out of your depth then the interpreter is here to assist you. Now, you are the supervisor of the Companies Department in the Kowloon office of Johnson, Stokes & Master, you joined Johnson, Stokes & Master in 1974 and were appointed supervisor in 1975?
A. Yes.
Q. Now, in 1976 I think Mrs. POON was the solicitor in charge of the Companies Department in your Hong Kong office?
A. Right.
Q. And you first became involved in the affairs of Bovill Investments Ltd. as a result of certain instructions given to you by Miss LEUNG Wai-ling?' 20
A. Yes.
Q. Could the witness please have Bundle 4.
Please turn to page 101, the number at the bottom of the page; are you familiar with that document?
A. Oh, yes, because this was prepared by me.
Q. And was that prepared by you as a result of instructions given to you by Miss LEUNG?
A. Yes.
Q. I see that has a date at the top right hand corner, 28th January, 1976. 30
A. Yes.
Q. Is that the date upon which you prepared this?
A. Yes.
Q. And was that the date upon which you were given certain instructions by Miss LEUNG?
A. Yes.
Q. Had you been involved in the matter prior to that date?
A. No.
Q. Now, that speaks for itself: item I sets out the documents received from Miss LEUNG: ITEM II states you received instructions from Miss LEUNG to take clients' further instructions and then item III you record "Having gone through with the documents above mentioned, I found that only two directors had been appointed up to 27/1/1976, the date of the Minutes (I.9) which was presented by three directors. To make the said Minutes become effective, I prepared a Minutes of 40

the First Board Meeting, held on 26/1/1976 and presented by the two 1st directors, wherein was resolved appointing two more directors, Mr. Tsiang and Miss Loh." and then you set out that you also prepared the following ancillary documents. Would you turn please to page 76 in that bundle; are you familiar with that document?

- A. Yes, this is the document which I received from Miss LEUNG.
Q. Yes.
A. On the 28th January, 1976.
Q. That is document No. 9, I think, which is referred to in page 101, item I.1, is it? 10
A. Let me see – Correct.
Q. And that refers to three persons being at that directors' meeting, Mr. SHUM, Mr. TSIANG and Mr. MA; and the point that concerned you, as I understand it, was prior to that only two of them had apparently been appointed directors?
A. Yes.
Q. And that appears on, I think, page 60 of that bundle. So in consequence of that did you prepare the minutes for the first meeting of the company?
A. Yes, I did.
Q. Is that the document at page 67?
A. Yes, it is. 20
Q. And one of the matters dealt with in that document is item 7, "Appointment of Directors": "It was unanimously resolved that TSIANG HUNG WEN and LOH CHU FENG be appointed Directors of the Company and that a return of the said Directors be filed with the Registrar of Companies in Hong Kong." I see that bears the date the 26th January, 1976. If you had prepared it then that must have been backdated to the 26th January?
A. Yes.

MR. CHEUNG: Perhaps my friend would not lead.

- Q. Following the instructions that you had from Miss LEUNG, did the representatives of Bovill come to your office? 30
A. Yes, they did.
Q. And did you make a note of your conference with them?
A. Yes, I did.
Q. Please tell us whether that is the document at page 36.
A. Yes, it is.
Q. And item 3, one of the matters dealt with in that Attendance Note is appointment of two more directors, Mr. TSIANG and Miss LOH.
A. Yes.
Q. I'm sorry, I think following . . . I'm sorry, did you prepare the minutes of the first meeting of the directors, that is the document at page 67, before or after you had seen these three gentlemen on the 28th? 40
A. No, I prepared the minutes of the first board meeting after.
Q. After the meeting?
A. Right.
Q. And that Attendance Note is also dated 28th January, 1976?
A. Yes.
Q. Was that the date upon which you saw those three gentlemen?

- A. Yes, it is.
- Q. So you told us already that therefore the minutes of the first board meeting of directors, which is the document at page 67, which is recorded as having taken place on the 26th of January, was backdated; is there something in the Articles of the Company which deals with that?
- A. Yes.
- Q. Would you please turn to – When you say that please look at page 15, Article 27.
- A. Yes, Article 27.
- Q. Please keep your voice up because otherwise it is difficult to hear.
- A. O. K. 10
- Q. Now, please turn to pages 58 and 59.
- A. Yes.
- Q. Are you familiar with those two documents?
- A. Of course they were prepared by me.
- Q. They were prepared by you and those state there were formal consents by MA and SHUM to their appointment as directors?
- A. Yes.
- Q. And those also bear the date 20th January, 1976, but you told us you didn't handle the matter prior to the 28th of January, 1976 . . .
- A. . . . No . . . 20
- Q. . . . So these also were backdated?
- A. Yes.
- Q. This was merely expressing in writing what by their conduct obviously they had already agreed?
- A. Yes.
- Q. And please look at pages 69 to 70; you prepared some of the documents for signature by the two additional directors?
- A. Yes.
- Q. TSIANG and LOH; I see that also bears the date 26th January, 1976; those also were backdated to correspond with the date of their appointment? 30
- A. Yes.
- Q. Please refer to page 68; did you prepare that document?
- A. Yes, I did.
- Q. That is the notice of situation of registered office, and again dated 26th January, 1976; was that also backdated?
- A. Yes, it was.
- Q. And page 71, Form X, notifying the Companies Registry of the appointment of the four directors; did you also prepare that?
- A. Yes, I did.
- Q. And similarly backdated? 40
- A. Yes.
- Q. Then I believe you also had some correspondence with the Companies Registry dealing with the question of change of name and the incorporation of the Chinese translation?
- A. Yes.
- Q. Anyway, the documents are in this bundle, if it is necessary to go into the details of that. And after the new name had been approved you also prepared the documentation relating to the allotment of shares?

- A. Yes, I did.
Q. And did you in fact also subsequently go to the premises in Hung To Rd.?
A. Yes, I did.
Q. What was the purpose of that visit do you recall?
A. Simply to explain the whole details of the documents to the – to Mr. SHUM – to the four directors; actually I should say to the three directors.

MR. CHEUNG: I can't hear you, I'm sorry.

A. The purpose . . .

INTERPRETER: . . . Before that, "actually I should have said the three directors" – "to Mr. SHUM – to the four directors; actually I should have said the three directors". 10

Q. Yes, go on. If necessary, the shorthand writer can – Perhaps the shorthand writer can read back what she has answered so far.
(Court Reported complies)
Yes, please continue.

A. That is because one of the directors Mrs. SHUM was absent.

Q. Because Mrs. SHUM was absent.

A. And then subsequently I attend the directors to sign all the documents.

Q. The documents that you are talking about now are the formal documents relating to the share certificates, the change of name? 20

A. Right.

Q. Did you have any discussions with the directors of anything regarding the conveyancing aspect of the transaction?

A. No, I didn't.

Q. Do you recall the date upon which you went to the factory premises?

A. I can't remember exactly, I'm sorry.

Q. Do you have any approximate date in your mind?

A. I think that must be some time in February.

Q. You can't get any closer than that?

A. No, I can't. 30

Q. Very well. Do you recall how many meetings you had with the directors of Bovill?

A. Yes, I did, three times.

Q. And do you recall when the last of those meetings was approximately?

A. I can't remember exactly; it must be the 20th something of February.

Q. At that time can you tell us whether you yourself were aware of Danny YIU's disappearance?

A. No, I didn't.

Q. And did you have any discussion at all with any of those directors about Danny YIU's disappearance?

A. No, no, I didn't. 40

MR. MILLS-OWENS: Thank you. Please wait there.

XXN . BY MR. CHEUNG:

- Q. Miss TSU . . .
- A. . . . Yes.
- Q. . . . Do you keep a record of attendance during the day?
- A. During what?
- Q. Do you keep a record of attendances for each day, which clients you attended, the time occupied and the other particulars?
- A. Yes.
- Q. In connection with the attendance?
- A. Sometimes, yes, but not for each attendance. 10
- Q. You don't?
- A. No.
- Q. Why do you sometimes do it and sometimes not?
- A. I did it when I attended to receive instructions from the client but I didn't when I simply attended them to sign some documents.
- Q. Don't you keep a record of attendances for the purpose of making out a bill of costs?
- A. What do you mean by that?
(Interpreter interprets)
We call it time sheet. 20
- Q. Ah, do you keep time sheets?
- A. Yes.
- Q. And these are made up during the day as soon as you have seen the client?
- A. Yes, but not for the year 1976 because the time sheet system was built sometime in 1977 in Johnson, Stokes & Master.
- Q. Now, can you remember when it was the first time that you went to the factory premises at Hung To Rd.?
- A. I can't.
- Q. This meeting which you say you backdated; I think it is document 67 in that bundle. 30
- A. It is page – ?
- Q. 67.
- A. Yes.
- Q. The place where the meeting was supposed to be held was 82 Hung To Rd.?
- A. Yes.
- Q. That is not in fact so, was it, this is merely the registered office of the company?
- A. Well, yes.
- Q. The meeting really was held in the offices of Johnson, Stokes?
- A. Not exactly because the clients discussed the whole matter before I believe. After that they can let me have their instructions how to set up this company. 40
- Q. But so far as you know there was no meeting held at 82 Hung To Rd., ground floor, on the 28th January, was there?
- A. No, on the 28th, no.
- Q. I mean it is the practice of Johnson, Stokes to put in the registered office of a company as the place where board meetings are held, no matter where they are held, is that not so?
- A. Not exactly. We usually prepare the documents according to the facts.
- Q. But if Miss LEUNG said that that was the practice of Johnson, Stokes, Miss LEUNG's recollection would be not quite correct?

- A. Like I said, sometimes we did it.
Q. No. She said that it was the practice of Johnson, Stokes & Master to put the registered office of a company as the place where board meetings are held irrespective of where they are held; now, do you agree that that was the practice of Johnson, Stokes?
A. Yes.
Q. And as for dates of meetings and resolutions you put in whatever date that suited your purposes irrespective of whether those dates were the actual dates or not?
A. Yes.

10

MR. CHEUNG: Thank you.

REXN. BY MR. MILLS-OWENS:

Q. Just one question . . . (To Mr. TANG) Oh, you are cross-examining?

MR. TANG: Yes, I am just finishing writing my note.

XXN. BY MR. TANG:

- Q. Miss TSU . . .
A. . . . Yes.
Q. . . . Why did you go to the factory to attend the three directors instead of asking them to come to your office?
A. Because I did arrange them to come to our office to sign the document but they said it was inconvenient for them to come up to our office and they preferred I went to their factory. 20
Q. Do you do that for all clients or do you only do it for some clients?
A. For the three directors only excluding Miss LOH, that is Mrs. SHUM.
Q. But is this type of service normally extended to clients of Johnson, Stokes?
A. Yes.
Q. Or have you treated them specially in this case?
A. No, no, this is quite ordinary.
Q. And I suppose if you had to go to their office you would charge them more because it would take more time obviously? 30
A. Actually we charge clients based on time spent, yes.
Q. Would you also charge them for travelling expenses?
A. I can't remember exactly.
Q. I suppose you would go by taxi and come back by taxi, wouldn't you?
A. But I remember the clients paid the taxi fees for me.
Q. I see, you remember that you went by taxi; they were paid for by the clients?
A. I can't remember which way I went to the factory but I did remember I returned by taxi and paid by the client.
Q. Do you remember going to the factory very distinctly or – ?
A. I'm sorry? 40
Q. Do you remember going to the factory very distinctly; is this a distinct recollection of yours?
A. No, not really, but I did remember I went to them.

- Q. I see, but how often in the course of a month, as it were, would you be called upon to go to clients' offices or factories?
- A. Twice or three times average.
- Q. Was there any reason why this particular visit should have stuck in your mind?
- A. I think that is because we spoke in Mandarin.
- Q. I see; have you tried speaking to Mr. SHUM in Cantonese?
- A. I think I did at the very beginning when I saw them but then they said they are Shanghainese or something like that and they can speak Mandarin and Mandarin is my mother tongue and that is why I remembered the meeting. 10
- Q. You would agree with me, would you not, that Mr. SHUM speaks Cantonese with a rather thick accent?
- A. I can't remember.
- Q. Did he give you the impression, for instance, when you spoke to him first in Cantonese, that he was not as happy with that dialect as when you spoke to him in Mandarin?
- A. I shouldn't say that I am not happy with . . .
- Q. . . . Mr. SHUM?
- A. Yes, but I can identify from his speaking that he is not a Cantonese.
- Q. Did he feel – did he give you the impression that he was much more comfortable 20 when he spoke to you in Mandarin and when you spoke to him in Mandarin?
- A. Oh, yes, yes.
- Q. Much more comfortable?
- A. Yes.
- Q. He had no difficulty in understanding you in Mandarin at all?
- A. No.

MR. TANG: Thank you.

REXN. BY MR. MILLS-OWENS:

- Q. Just one or two questions, Mrs. TAM.
- A. Yes. 30
- Q. You were asked about document page 67 in that bundle 4 and the reference to Hung To Rd. which is the registered office; was that also the factory premises?
- A. I don't know. I went to the factory. I didn't check with the client what the address is.
- Q. Well, then perhaps – And Mr. CHEUNG said you put in whatever date that suited your purposes; are Johnson, Stokes & Master the only solicitors who do this or is it done commonly by solicitors in Hong Kong?
- A. Oh, it is done common by solicitors in Hong Kong.
- Q. And one of your answers was "clients had discussed the matter before" and then gave you the instructions on the 28th? 40
- A. Yes.
- Q. So in effect what was being done was to record in writing the discussions that you assumed had taken place previously?
- A. Right.

MR. MILLS-OWENS: Thank you very much.

MR. CHEUNG: My Lord, I have an application to make. This witness has referred to time sheets which she kept for the purposes of making out costs. It has been in issue in this case as to whether . . .

COURT: . . . She said they weren't kept in 1976.

MR. PRICE: They weren't kept in 1977.

Mr. CHEUNG: Oh, they weren't kept in 1977.

COURT: I think that is right, isn't it?

A. Yes.

COURT: The time sheets were not kept in 1976; they only started in 1977?

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A. 1977.

MR. CHEUNG: Thank you.

MR. PRICE: Thank you, Miss TSU. I now call David LEUNG.

D.W. 5 David LEUNG Lau-kwan Affirmed

XN. BY MR. PRICE:

Q. Mr. LEUNG, would you give your evidence in English or in Cantonese?

A. In English.

Q. If you get into difficulty we will switch to having my questions translated and your answers. Your full name . . .

COURT: . . . If there is any question that you are not at all clear of, please ask for it to be repeated. 20

Mr. PRICE: Thank you, my Lord.

Q. Your full name is David LEUNG Lau-kwan, is that right?

A. Yes.

Q. And what is your job?

A. Conveyancing Clerk.

Q. With which firm?

A. Johnson, Stokes & Master.

Q. And at which office of that firm?

A. 5th floor, The Hongkong & Shanghai Bank Building, 673 Nathan Rd.

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Q. That is the Kowloon office?

A. Kowloon office.

Q. And how long have you been a conveyancing clerk with Johnson, Stokes & Master?

A. About eight years.

- Q. Yes; and how long have you been with Johnson, Stokes & Master altogether?
A. Over ten years.
Q. Could you please have Volume 2, page 43 – Do you remember being concerned with a transaction involving Edward Wong and Bovill Investments?
A. I only remember a little.
Q. You don't remember?

INTERPRETER: "I only remember a little".

- Q. I see. Would you turn, having looked briefly at that, would you turn back to page 30, that is a memo from Kowloon office David LEUNG to Mrs. CHAN in the Hong Kong office and referring – and it says, "COMPANY SEARCH LAND LUCKY TIME FINANCE COMPANY LTD. KAI MING INVESTMENT COMPANY LTD." and at the bottom, "A/C: EDWARD WONG FINANCE CO." – Do you see that? 10
A. Yes.
Q. Are you able to tell his lordship what that document refers to?
A. It just asks the Hong Kong side to make a company search.
Q. It is asking?
A. Yes.
Q. And who is asking?
A. I gave these instructions to the Hong Kong side. 20
Q. Yes, I see, and did you then receive back those searches, the results of the searches?
A. The result I can't remember.
Q. Open, would you, Volume 5, at pages 3 and 5: are those the searches or the results of the searches . . .

MR. CHEUNG: . . . Perhaps my learned friend would ask this witness, who remembers very little, what he does remember about them and not put . . .

MR. PRICE: . . . Certainly.

- Q. Are you able to say whether those are the searches that were received in response to your . . .

MR. CHEUNG: . . . I still object to that form of . . . 30

COURT: . . . Do you recognise that document?

- A. Yes, I recognise that document; these are the searches I received from the Hong Kong side, I mean from the Hong Kong office.
Q. I'm sorry, would you speak loudly so that we can all hear. Do you recognise those as the searches you received from the Hong Kong side?
A. Yes.
Q. Yes. Look, will you, at page 31, Volume 2; can you tell his lordship do you recognise that document?
A. Yes.
Q. Tell his lordship what that is. 40
A. This is the land search instruction which I gave to the Hong Kong side.

Q. Open Volume 5, will you; turn to page 18.

COURT: 80?

Q. 18 in Volume 5; it is a page which opens out; that's it.

Do you recognise that?

A. Yes, I recognise this.

Q. What is it?

A. This is the land search which I received from the Hong Kong office.

Q. That is the land search you received from the Hong Kong office?

A. Yes.

Q. Yes. Go back now to Volume 2 and look at the letter at page 28, could you for the moment simply read that, the first page of that letter, not aloud, to yourself.

A. "We thank you for your letter".

Q. I want you just to look – remind you – to read the first page of that letter with its reference to a number of documents.

A. Yes, I have read.

Q. You have read that. Are you able, having read that, are you able to say now whether you remember being concerned with those documents? Well, let me take you to another file. Open Volume 3, will you, Volume 3, page 11. Page 11 is an agreement dated the 17th of December, 1975, for sale between HO Sau-ki and Lucky Time Finance Co. Ltd. of the premises in respect of which you have looked at the search document. Is that a document which you recognise?

A. Yes, I recognise this.

Q. Look at page 21, that is a receipt in Chinese in which Mr. CHAN Sun-ming acknowledges that he has received a hundred thousand dollars from Po Fung Enterprise Ltd. in respect of ground floor of this property. Is that a document you recognise?

A. Yes.

Q. Look at page 27, that is a receipt again in Chinese in which Mr. CHAN Sun-ming acknowledges that he received \$85,000 as second deposit on the property; is that a document you recognise?

A. Can't remember.

Q. You can't remember that.

Look back at page 23; here is a document in which Mr. CHAN Sun-ming and Kai Ming agreed to share their purchase of the property, Mr. CHAN Sun-ming purchasing the ground floor and Kai Ming the upper floors; is that a document you recognise?

A. I can't remember.

Q. You can't remember that as well.

In Volume 2, will you look at page 32, Volume 32 (2?), page 32; there is a letter or there is a carbon copy of a letter sent by your firm to Danny Yiu & Co. and there is a copy of it at page 34, the same letter returned with a signature at the bottom of each page. Are those – Is that letter and copy letter – Are those documents documents you recognise?

A. Yes.

Q. And you have some recollection of them?

A. Yes, that's right.

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- Q. Did you have any part in the preparation of the letter?
A. Yes, I drafted this letter for Miss LEUNG's approval.
Q. Was that in your capacity as conveyancing clerk?
A. Yes.
Q. And before doing so had you examined certain documents?
A. At that time I of course examined some documents but now I can't remember --
at the time I draft this letter.
Q. Yes. Would you look at Volume 3, page 39; if you could look at it and familiarise
yourself with it, that is a debenture for securing credit facilities to the extent of 10
1,355,000 and in consideration of Edward Wong Finance Co. Ltd. granting to
Bovill Investments Ltd. credit facilities to the extent of that sum; the document
continues as a debenture with a good many provisions extending over several pages;
do you recognise that document?
A. Yes.
Q. Who drafted it?
A. It was a standard form.
Q. Are you able to say who prepared that document?
A. I prepared it.
Q. And from whom did you receive instructions to do so? 20
A. Miss LEUNG.
Q. Now, let's go back to Volume 2 at page 43; turn to page 43, will you, there are
43A and 43B. Look first at 43B. Now, that's a bit -- Would you look at the bottom
left hand corner of that document where it says "Matter No. WLL/78204/DL";
to what do the letters "DL" refer?
A. David LEUNG.
Q. Is that -- And what does that indicate to you?
A. "D" for "David" and "L" . . .
Q. . . . Does that indicate that you played a part in this matter?
A. Yes. 30
Q. What part?
A. Doing the draft -- doing the draft debenture.
Q. Did you have any part in connection with this particular account?
A. You are just asking me what I have done?
Q. Did you . . .

COURT: . . . I'm sorry, if you don't understand the question, would you please have it translated.

- Q. Yes. Did you have anything to do with this particular bill?
A. I just drafted this bill.
Q. You drafted this? 40
A. Yes.
Q. I see. It is headed "Edward Wong Finance Company Ltd. payable by Bovill
Investments Ltd."; is that a usual or an usual form of bill?
A. It is the usual form of bill.
Q. Yes; when that form of heading -- Does that form of heading indicate to you which
of the two companies mentioned is your firm's clients?
A. Edward Wong Finance Company Ltd.

Q. And why does it then say “payable by” another company, Bovill Investments Ltd. – why?

A. Because if we are not acting for the party – we are not acting for Bovill Investments Ltd. and the bill was payable by . . .

MR. CHEUNG: . . . If I am not acting for Bovill?

MR. PRICE: He says “We are not acting for the party Bovill Investments Ltd.”. is that – ?

A. Yes, we are not acting for Bovill.

MR. TANG: Can I ask this witness to speak louder because I distinctly heard “If we are not acting” and then he repeated and he dropped the word “if”.

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Q. Well, I am so sorry perhaps you will go back over that. Why does the heading show that the bill is payable by Bovill Investments Ltd.?

A. Well, there are two forms of bills, you see.

COURT: Let everybody get that down before you continue.

A. (Cont.) For the first, if we are acting for a party who pay the bill, we will simply put in, say, suppose the name of the client; that is O.K., the bill must be payable by him. For the second, if we act for the party who does not pay the bill, just like this one.

Q. So this bill indicates that Bovill Investments were to pay the bill?

A. Yes.

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Q. Now, how would – how was that payment obtained: how and by whom?
Or perhaps I can – what procedure – Perhaps I can substitute, starting the question, what procedure do you adopt in your firm for the obtaining of payment of bills?

A. Well, when a client comes to our office to sign the document we just give him the bill or we send the bill to his office.

Q. And when a bill is payable by somebody who is not the client, what procedure is adopted then?

(Question translated to witness)

A. Even though that somebody is not our client he must come to our office to sign the document.

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Q. When he comes to the office to sign the document, what happens about the bill that he must pay? I am asking you for the moment about ordinary procedure.

INTERPRETER: He is murmuring in Cantonese.

MR. PRICE: Well, translate.

COURT: I think it would be much more satisfactory if all this were translated into Cantonese and I think it would be much better if you were to give your answers in Cantonese.

MR. PRICE: Very well, let's continue in that way.

- Q. Look at this bill: can you tell us – can you tell his lordship what was done about the payment of this bill that was payable by Bovill Investments Ltd?
- A. (Witness speaks in English) I can't remember.
- Q. Now, you say you cannot remember; are you able to re-construct what happened from looking at the bill?
- A. (Witness speaks in English) So far as I am concerned, you see, when a client comes to sign document I give the bill to him direct.

MR. PRICE: Yes, I think we're going to have this in Cantonese but . . .

COURT: . . . As I say, I think you would be better off giving your evidence in Cantonese, 10
if you are quite happy to give it in English go ahead but it is very important –
each word you say is important; do you understand that?

(Interpreted evidence from here onwards)

- A. When he comes all the same I will present the bill to him.
- Q. Yes. As between you and Miss LEUNG, who would present the bill?
- A. I have no recollection as far as this case is concerned – as far as this case is concerned – as far as this bill is concerned.
- Q. Yes, I see. According to your ordinary procedures in the case of a bill presented – prepared by you, as between you and Miss LEUNG, who would present the bill to the client? 20
- A. Normally I presented the bill.
- Q. To the party paying the bill or to the client?
- A. To the party paying the bill.
- Q. According to your ordinary procedure, when presenting a bill like this to the party paying the bill, what – would you give to the person paying the bill any explanation of the items in the bill?
- A. I would explain to him.
- Q. Yes. In this particular bill the first item refers to a document which you had prepared, the debenture? 30
- A. Yes.
- Q. According to your ordinary procedure, would that document be shown to the client?
- A. Yes, I would.
- Q. And would it, if it was a document in English, would that document have to be translated?
- A. Yes.
- Q. And who would provide the translation?
- A. By me, if – only if that case was in my charge.
- Q. Ah, yes.
- A. Or prepared by me. 40
- Q. Well, then, looking at this bill and looking at item 1, are you able to tell his lordship whether in accordance with your ordinary procedure you would have given to the person paying the bill and an explanation of the debenture?
- A. Yes.

MR. CHEUNG: This witness has already twice said he cannot remember anything about this particular bill's presentation or what have you; and I object to the leading form of my learned friend's questions.

COURT: As I understand it, Mr. CHEUNG, what he is saying is his practice, what his normal practice is. He cannot say whether he did do it in this case.

MR. CHEUNG: His word was normally.

MR. PRICE: Yes, that is the question I am asking.

Q. Now, could you for the moment, keeping that page, turn to Volume 3 at page 60. At page 60 there is a document which is a guarantee by the directors of Bovill Investments of the company's liabilities to Edward WONG. Now, look back at your bill at page 43B, the second item in that bill refers to the preparation, engrossing and completing of a joint and several guarantee; is the guarantee a document that you recognise? 10

A. Yes, I do.

Q. Who prepared that?

A. I did.

Q. You did. According to your ordinary procedure, when presenting a bill referring to a document like this, would you provide an explanation of the document? 20

A. Yes, I would.

Q. Yes. According to your ordinary procedures, at what -- would a bill of this kind be presented before, after or after the documents in question had been actually executed?

A. The bill is present -- the bill is prepared at the same time when the draft is made -- when the draft document has been made.

INTERPRETER: He said, firstly, he said at the same time -- later he said after the document.

Q. I am not asking you about the preparation of the bill or the draft but about the presentation of the bill to the person paying it and the execution of documents referred to in it. 30

A. After the execution of the documents that the bill is presented.

Q. I see; so let's take your ordinary procedure then: you have told his lordship you would explain the documents of the kind referred to here, the debenture, and the guarantee.

A. Yes.

Q. That's right, would you be concerned with their execution according to ordinary procedure?

A. I would be concerned because at the time of the execution of the document or documents I was present. 40

Q. You were present, I see. And after --
And then after execution you obtained the payment on the bill; is that the procedure?

- A. In this particular case?
- Q. In a case of this kind.
- A. Normally after the document or documents has or documents has or have been executed I invariably presented the bill.
- Q. Yes. In a case where Miss LEUNG was involved in the execution of the documents, would such a bill be presented by her to the client or the person paying the bill?
- A. It doesn't matter. Normally it doesn't matter whether the bill is presented by her or presented by me.
- Q. Yes. Are you – Can you tell his lordship who presented the bill in this particular case? 10
- A. I cannot recall.
- Q. No. Where a bill like this is made out to a client but payable to another person, a mortgagor, would any explanation of that be given to the person paying the bill – would any explanation be given to the client over its . . . I'm sorry, to the person paying the bill of its obligation to pay the bill?
- A. Yes.
- Q. What explanation – what explanation?
- A. The explanation that “we do not represent you; however, the bill will be paid by you.”
- Q. Do you remember Mr. Danny YIU's absconding from Hong Kong? 20
- A. I don't understand your question.
- Q. I see.
- A. Remembering – You are asking me whether I remember or not Danny YIU absconding from Hong Kong?
- Q. Yes, do you remember hearing that Danny YIU had run away from Hong Kong?
- A. After that.
- Q. Yes, after that, yes, I see. Are you able to – Do you remember having caused to ring Danny YIU's office?
- A. I did.
- Q. You did ring his office? 30
- A. Yes.
- Q. For what purpose?
- A. I remember in respect of this case I had sent – our solicitors firm had sent money over to ask for a title deed and it was overdue.
- Q. Yes.
- A. That is why I rang up Danny YIU in order to press for the title deeds.
- Q. Look at page 32 in Bundle 2, would you; that is a document you have looked at already and it contains a reference to an undertaking by Danny YIU within a period of time to send over documents specified there.
- A. Yes. 40
- Q. Is it those documents that you referred to as the title deeds that were overdue?
- A. Yes.
- Q. How did it come about that you telephoned Danny YIU's office about those overdue title deeds?
- A. Because it – it was because in this case I was concerned in the preparation.
- Q. Yes, I see. Was that a follow up according to ordinary procedure or was it something special?
- A. It is the usual follow-up.

- Q. Is there anything else that stands out particularly in your memory about the Bovill transaction and instructions that you received from Miss LEUNG in respect of it?
- A. I will tell you item by item whatever I remember.
- Q. Yes.
- A. Miss LEUNG's instructions -- Miss LEUNG instructed me to prepare a debenture.
- Q. We have had that, yes, I see, well, she instructed you to prepare, is that the debenture that we have looked at already?
- A. Yes.
- Q. Yes, and from whom did you receive instructions to prepare the account that we see at page 43B? 10
- A. Miss LEUNG did.
- Q. Looking now at the account, is there anything which -- about it which suggests to you that you departed in any way from ordinary procedures?

MR. TANG: This witness cannot recall whether he had anything to do with the bill apart from its preparation.

MR. PRICE: I didn't ask him whether he remembered. I asked the witness "Looking at the account is there anything about it which suggests to you that you departed in this case from the ordinary procedures?"

A. Nothing in particular. 20

MR. PRICE: Thank you.

COURT: Yes, any questions?

MR. CHEUNG: Perhaps you would like to rise now?

COURT: Yes.

11:17 a.m. Court adjourns

11:40 a.m. Court resumes

Appearances as before.

D.W. 5 – David LEUNG Lau-kwan o.f.a.

Exh. P3
Exh. P3

MR. CHEUNG: Can Mr. Leung please be handed Exhibit P3, a bundle of letters?

(Witness handed the exhibit.)

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
David Leung
Lau-kwan
cross-
examination

XXN DY MR. CHEUNG:

Q. Would you please turn to a letter dated the 15th of November 1976 from your firm to Messrs. C. Y. Kwan & Co.?

MR. CHEUNG: It would be F in that bundle, my Lord. I haven't marked mine.

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Q. Now, that letter does not refer to this transaction about Bovill at all but you see that the first paragraph says: ". . . we now send you herewith a cashier order and a cheque both in your favour for a total sum of \$10,000,000.00 being balance of the purchase price payable by (so and so) upon completion of the purchase of the above premises." Is that correct?

A. Yes.

Q. And the next paragraph says: "The said cashier order and the said cheque are sent to you against your firm's undertaking:— 1. to let us have the following documents within 14 days." You see that?

A. Yes.

20

Q. Normally, does your firm simply send out cheques payable to the purchaser and in that form as contained in that letter?

A. This is one of the practices.

Q. One of the practices. Would you look at the next page of that letter, the last paragraph: "Please sign and hand to the bearer of this letter the duplicate of this letter by way of confirmation that you will comply with your undertaking . . .?"

A. Yes.

Q. Is it unusual to ask the solicitors for the other party to sign a copy letter to confirm that they would comply with an undertaking?

A. It is not unusual.

Q. Would you turn to a letter dated 12th of October 1979? Again, a cheque is sent for the balance of the purchase price and the second paragraph says: "Our cheque is sent to you on your undertaking not to release the balance. . .to the vendor unless and until the Assignment has been executed." Now, that letter did not ask Deacons to confirm in writing that they would comply with the undertaking, is that correct?

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A. I do not know because this case was not – that case was not handled by me. Therefore, I am not in a position to say, by doing so, whether it was correct or not correct.

Q. But do you sometimes use this form which merely says "We send you the cheque on your undertaking." without asking for confirmation of compliance?

A. Yes, yes, I did that sometimes.

Q. When do you use one form which requires the copy letter being signed to confirm compliance and the form that does not require?

40

- A. I require the confirmation by way of the signing of the copy letter when a new building has been erected and the flat or flats have not yet been sold by the owner.
- Q. Are there any other circumstances when you would use that form of letter asking the copy to be signed and returned?
- A. I myself did not. However, I cannot say for sure for other people.
- Q. But, of course, if the solicitor in charge told you to use the form requesting confirmation of compliance, you would use it, wouldn't you?
- A. That's right.
- Q. Would you have a look at the letter which you drafted for Miss Leung in this case which is in Volume 2, page 35. "We shall ask our clients to put us in funds with the mortgage proceeds . . ."
- A. Yes.
- Q. ". . . upon receipt or your undertaking that you will do (so and so)" Do you see that?
- A. Yes, yes.
- Q. And at the end it ends with the paragraph "Please give us your undertaking as suggested above by signing and returning to us the duplicate of this letter by the bearer of this letter."
- A. Yes. 10
- Q. Why did you use that form of letter in this case as this was not a new building?
- A. By new building, what I meant was there had never been any DMC, Deed of Mutual Covenant.
- Q. Can you remember whether or not Miss Leung instructed you to use this form of letter in this case?
- A. In this case I remember that Miss Leung instructed me that the duplicate copy be signed.
- Q. She gave you those specific instructions?
- A. Yes.
- Q. Did she tell you why she wanted to use that form? 30
- A. Yes.
- Q. What was the reason?
- A. It was because the completion date was drawing near and then we were running out of time in waiting.
- Q. Was it a reason that Danny Yiu & Company was a firm consisting of one sole proprietor?
- A. It has nothing to do with that.
- Q. Was it one reason perhaps that Danny Yiu was a comparatively newly qualified solicitor?
- A. I am not sure. 40
- Q. Was there in 1976 some list of solicitors whose cheques would have to be cleared before money was paid out – before payment is drawn against that cheque?
- A. I have heard of that but I never saw that list.
- Q. So you do not know whether Danny Yiu & Company was on that list in 1976.
- A. I did not know.
- Q. Did you yourself take this letter over to Danny Yiu & Company to obtain their signature?
- A. No.
- Q. Had you heard of Danny Yiu & Company at the time when you handed this transaction? 50
- A. I knew that there was such a solicitor's firm. However, I knew nothing about the affairs of the firm.

- Q. At that time?
- A. At that time.
- Q. Would you please look at the Debenture which was signed in this case by the Directors of Bovill, Volume 3, page 39 – signed by Shum, I beg your pardon. This is the debenture you prepared?
- A. That's right.
- Q. And would you turn to page 56? Do you see that the interpretation clause which reads: "... interpreted to the Directors of the Company by Clerk to Messrs. Johnson, Stokes & Master." has not been signed? 10
- A. That's right.
- Q. Would that indicate to you that you did not interpret this document to whoever signed it?
- A. It does not indicate that. If the client or the person signing the document said that he himself knew what he was signing and that he understood, in that case it was not necessary for us to interpret.
- Q. Can you remember whether in this case that was so that you were told that the person signing understood it and that there was no need for you to explain or interpret the document?
- A. I do not remember now the situation at that time. 20
- Q. Would you turn to the Guarantee which was signed which begins at page 60? Would you turn to the last page, page 63, where there is no interpretation clause? If it had been interpreted line by line, whoever interpreted would have signed it as having done so.
- A. Should have been the case.
- Q. And the absence of an interpretation clause there would indicate that it had not been so interpreted – not interpreted, not explained, is that right?
- A. Not necessarily so because if he knew the contents or if they understood the contents, then it was not necessary to add that clause.
- Q. You mean if they understood the English? 30
- A. No, no, if some clients said that it was not necessary to have the contents explained, and that they knew the contents, that it was merely a standard form, then it was not necessary for us to interpret.
- Q. You have no recollection whether you either explained or interpreted this document to the three gentlemen who signed.
- A. I do not remember that.
- Q. Do you remember whether Miss Leung explained or interpreted that document to the three persons who signed?
- A. I do not remember.
- Q. Do you remember whether Miss Leung interpreted or explained the Debenture to Mr. Shum who signed it? 40
- A. I do not remember.
- Q. Now, your firm from time to time act for vendor and purchaser in a sale and purchase of property?
- A. Normally, we specified which party we represented.
- Q. I am not asking you whether you specified or not; my question was: does your firm from time to time represent both vendor and purchaser?
- A. Yes, the same parties instructed the same solicitor.
- Q. In some of those cases the sale and purchase agreement would provide that the

purchaser should pay the whole costs. That frequently happened, did it not?

A. Yes, should have been paid all by the purchaser.

Q. Now, in that case if you were representing both the vendor and the purchaser but the purchaser had to pay the whole bill, would your fee note be headed in the same way as Document 43B? Supposing you acted . . .

MR. INTERPRETER: That's Volume -- ?

COURT: Volume 2.

MR. CHEUNG: Volume 2, 43B

Q. Let me repeat my question. Supposing you had acted for Edward Wong Finance Company as vendor and you also acted for Bovill Investments as purchaser but the whole costs were payable by Bovill Investments Limited, would your bill be headed exactly the same way? 10

A. It is a very difficult answer because I did not understand your question.

Q. You made out bills in transactions involving sale and purchase, have you not?

A. We act for only one party.

Q. You have never acted for both parties.

A. As far as I am concerned, I never did anything like that.

Q. Not even in a sale and purchase transaction.

A. Suppose we were doing things for the vendor and the purchaser . . . 20

Q. Yes?

A. . . . there must be a party who came up to our office to look for us first.

Q. Yes?

A. In that case if we were asked to represent that party, then we were to represent that party. If the other party, in order to save money for paying fees to a solicitor, would also ask us to do it for that party, then we would specify to that part that we were not representing that party.

Q. So let me get this straight. Supposing you have a regular client who sells a lot of flats, right, he comes along with a purchaser of one flat, they come to your office together, and the purchaser says, "I want your firm also to act for me." do you say whether your firm would agree or not agree to act for him? Not what you said but would you in fact agree or not agree to act for him? 30

A. In this case I do not know what other people would do in this case.

Q. What would you do?

A. I never did things of that sort.

Q. So you have never acted for vendor and purchaser together in a sale and purchase transaction. Is that what you said?

A. Both parties came to look for me, but usually my client came up first.

Q. But supposing afterwards he brought the purchaser along and the purchaser says he, the purchaser, wants you to act for him, what would you do then? 40

A. I would all the same do it for him. However, I would specify to him that I wasn't acting for him.

Q. That's what you would do in the case of a sale and purchase, is that correct?

A. That's right.

Q. You do not send him away, you do not say, "I cannot act for you. Go to another firm of solicitors."

A. I would not.

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
David Leung
Lau-kwan
cross-
examination

- Q. In the case of a landlord and tenant wanting to have a lease signed, the landlord is the client who comes first and he brings along the tenant and the tenant says to you, "I would like you to act for me in the matter of preparing this lease." you would say to him, "Yes, I will do it for you but I must tell you I do not act for you." Is that right? Exactly the same as you do with the purchaser.
- A. In respect of tenancy I mostly said that. Whoever looked me up first I would represent him.
- Q. Supposing it's the landlord who comes first, he is your regular client, he then brings a tenant along, you would say, "All right, I will do this work for you but I must tell you I do not formally represent you." 10
- A. Yes, yes, I should have said that.
- Q. And in the case of a mortgagee who is a regular client, he comes to you first, he then brings along the mortgagor, the mortgagor says to you, "I want you to act for me."
- A. I very seldom deal with this sort of case. Therefore, I dare not answer you.
- Q. Can you remember dealing with such a case?
- A. I never did. Normally, I usually deal with banking mortgage.
- Q. Yes but supposing the customer who wants to borrow from the bank on a mortgage came to you also and he says, "I want you to act for me as well as act for the bank." 20 have you had that kind of transaction?
- A. No.
- Q. If today, tomorrow a customer or one of the banks who are your regular clients came to you and said, "I want to borrow some money from the bank on a mortgage. Will you please act for me as well as the bank in this transaction?" would you like to tell my Lord whether you would treat him in exactly the same way as you treat a purchaser or a tenant?
- A. Yes, I would.
- Q. And can you say whether solicitors in the firm would do exactly the same as you would do, namely, you were following their practice? 30
- A. Yes.
- Q. Tell me. Can you remember the actual date when the file on this matter was opened or can you not?
- A. What do you mean by that?
- Q. You had a file for this transaction involving the mortgage of the ground floor of 76, Hung To Road.
- A. Yes.
- Q. The first letter that was written in this case is at page 23 in Volume 2 and the top left hand corner contains a reference WLL/78204.
- A. Yes. 40
- Q. The previous page contains a handwritten note. Do you recognize that as Miss Leung's handwriting?
- A. Yes.
- Q. Were you present when she interviewed Mr. Wong and Mr. Shum?
- A. I do not remember.
- Q. Have you any means of telling when the file in this matter was opened – what date was it opened?
- A. I do not remember now.
- Q. Please look at page 115. Is that a card or what is it?

- A. This is a card for opening a file and this card was to be stuck on the cover of the file.
Q. And this shows that the file was opened on the 21st of January 1976.
A. Yes.
Q. You would rely on that as showing the date when this file was first opened?
A. Yes.
Q. Yes, thank you.

XXN BY MR. TANG:

- Q. Mr. Leung, would it be a correct understanding of your evidence that you have never dealt with a case where – It would be correct to say, would it not, so far as this particular matter is concerned and that's the Mortgage by Bovill in favour of Edward Wong & Company Limited, all that you can remember is that you prepared the Debenture? 10
A. Yes.
Q. You prepared the bills.
A. Yes.
Q. You helped – drafted the letter asking for an undertaking from Danny Yiu Company.
A. Yes.
Q. And subsequently you also telephoned Danny Yiu & Company to see – to chase after the deeds. 20
A. Yes.
Q. These are all the things that you can remember.
A. Right.
Q. The rest of your evidence relate to your personal general practice.
A. Right.
Q. The rest of your evidence relate to your personal general practice.
A. Right.
Q. Now, would you look at Volume 2, page 43 please? Look at 43B please and look only at the heading. It says: "Edward Wong Finance Co. Limited (Payable by Bovill Investments Limited)" Do you see that? 30
A. Yes.
Q. Now, I don't know if I am correct or not. If I am incorrect, please tell me. The heading signifies to you, first, that Edward Wong Finance Co. Limited is your firm's client.
A. Right.
Q. In this case I suppose you realize that your firm holds a general retainer from Edward Wong Finance Co. Limited.
A. I am not sure.
Q. I see and it also signifies to you that Edward Wong Finance Co. Limited must have made the first approach to your firm in connection with this matter. 40
A. I dare not say one way or the other.
Q. So that does not signify to you.
A. I did in accordance with Miss Leung's instructions. In this respect I know nothing about it.
Q. Were you instructed particularly to have this heading in such wording?

- A. Yes.
- Q. And you just accepted her instructions?
- A. Yes.
- Q. And you didn't bother to think about it.
- A. Yes, because I knew that in this case I acted for Edward Wong.
- Q. You mean you believed in this case that your firm acted for Edward Wong Finance Co. Limited?
- A. Right, she told me to do it.
- Q. She told you to use this particular wording. 10
- A. She told me that we were acting for Edward Wong. I came to know that when I was preparing the draft?
- Q. What exactly did she say to you?
- A. She instructed me to prepare a Debenture to the effect that we were acting for the mortgagee.
- Q. And that's all.
- A. Right.
- Q. And you inferred from that that your firm was acting for the mortgagee.
- A. It's not inference. She actually told me that.
- Q. What she told you was: "Prepare a debenture. We act for the mortgagee." 20
- A. That's right.
- Q. And then you prepared the Debenture.
- A. That's right.
- Q. And subsequently you were asked to prepare a bill.
- A. Right.
- Q. And you were told to use this particular heading.
- A. I prepared the bill but I do not remember whether or not this heading was put there by me or not.
- Q. I see. You just used a standard form heading for this transaction.
- A. That's right. 30
- Q. And you, I think, have already told my Lord that you would use this heading if Edward Wong Finance Co. Limited was your firm's client but the fees were payable by somebody else.
- A. That's right.
- Q. So so far as you were concerned between your firm and Bovill, Bovill was liable to pay your firm the fees.
- A. Normally, the fee is paid by the mortgagor.
- Q. But in this case that was how you considered the matter.
- A. That's right.
- Q. And this was meant to indicate that the obligation to pay the fees to your firm was on Bovill Investment Limited. 40
- A. That's right.
- Q. If instead of Bovill it was Edward Wong Finance Co. Limited who was responsible for the payment of the fees, the words "payable by Bovill Investment Limited" would not appear.
- A. That's right.
- Q. So these words in brackets signified between your firm and Bovill and Edward Wong Finance Co. Limited who was responsible to pay the fees.
- A. That's right.

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
David Leung
Lau-kwan
cross-
examination

- Q. Now, forgetting that we are dealing with this particular transaction, let's assume that we are dealing with another mortgage. Let's say, A Finance Company Limited and the mortgagors, B Investments Limited, and the fees were payable by B Investments Limited.
- A. Yes.
- Q. Now, when presenting the bill for payment, you would tell B Investments Limited that: "You are obliged to pay our firm this fee." would you not?
- A. Yes, I am positive that the fee would be paid by the mortgagor.
- Q. Not only would be paid, he would be liable to pay it. 10
- A. Yes.
- Q. Assuming again in that hypothetical case, you had not been told by anybody whether your firm was only acting for the mortgagor or for the mortgagee – assuming that had not been said to you, you wouldn't then take it upon yourself, would you, to tell the person to whom you presented the bill whom your firm considered it to be representing because that would be a matter for the solicitor in charge of the matter?
- A. That's right.
- Q. Again, dealing with your general experience in the presentation of bills, you have already told my Lord that when documents like Debentures are presented to clients for signature, clients would sometimes say: "Well, it's just a standard form. Don't bother interpreting it to me. Tell me where to sign and I'll sign." 20
- A. It's true that we didn't in that case explain the contents in full. However, we must tell that person what sort of property had been mortgaged.
- Q. Right, you would say to that person, for instance, this is the mortgage on property A and he will say, "Don't bother about the details. Just tell me where to sign."
- A. Yes.
- Q. Similarly with the presentation of bills to clients . . .
- A. I have something else to say.
- Q. Yes. 30
- A. Sometimes when a customer comes, the customer asked whether this property was the property mortgaged and when I said yes, it means to say that I have not explained the contents to him.
- Q. So you would consider yourself – you would consider it unnecessary to explain the contents in cases where he says he does not want to hear a long detailed interpretation. There is nothing wrong with that. I am not criticizing your fault.
- A. That's right.
- Q. Similarly with the presentation of bills, some clients would say to you, would they not, "Don't bother explaining. Just tell me how much and I will give you a cheque." Some clients would do that. 40
- A. Yes, some clients would say that they know the contents of the bill.
- Q. Yes, I mean just like going to a restaurant, some people study the bills minutely and some people just don't bother.
- A. That's right.
- Q. Thank you.

REXN BY MR. PRICE:

Q. You told his Lordship in answer to Mr. Cheung that you had heard of a list of solicitors whose cheques would have to be cleared. I noted your answer: "I have heard of that but I never saw that list."

A. That's right.

Q. Can you tell his Lordship when you first heard of such a list?

A. I think it was in the year 1978, that is, about two years ago.

Q. You were asked questions about interpreting documents and the absence of the interpretation clause at the end. Is there a distinction between explaining a document and interpreting it line by line as was put to you? 10

A. No difference at all.

Q. No difference. I see. Yes, you told his Lordship that you have never acted in a case for both vendor and purchaser and you were asked a hypothetical question in respect of this: what would have been your reply if asked to act for the purchaser as well as for the vendor? Have you ever considered that possibility before it was asked you in this court?

A. I have not given this matter some thought.

Q. Is it some thought or any thought before being asked the question in this court?

A. It is different to answer.

Q. Then you were asked this hypothetical question . . . 20

MR. INTERPRETER: I think the more appropriate translation should have been: "I have not given this matter much thought" instead of "some thought".

MR. PRICE: Yes, I see.

Q. You were asked this question: if tomorrow a bank's customer came and said, "I want to borrow money on mortgage. Please act for me as well as for the bank." would you respond in the same manner as if a purchaser had asked you to act for him as well as for the vendor? You were asked that question. I don't want you to tell me again the answer. What I want you to tell his Lordship is this: what exactly would you say in such a case? 30

A. I have forgotten your question.

Q. You see, it was put to you that if a bank's customer came and said that he wanted to borrow money on mortgage and wanted your firm to act for him as well as for the bank, your response would be as in the case of a purchaser asking the same question.

A. Yes.

Q. Now, you have told his Lordship that you have never been faced with that problem . . . 40

MR. CHEUNG: I do not quite agree that's the effect of the witness's answers to my question.

MR. PRICE: I'd say it is. "I want you to act for me. I have not had that transaction immediately preceding this."

MR. CHEUNG: Not in the subsequent replies, my Lord. I do not agree that my learned friend has summarized the effect of his answers.

MR. PRICE: No, my Lord, my note says this: the first question – “Supposing a bank customer says, ‘I want you to act for me as well as for the bank.’” answer – “I have not had that transaction.” Then my learned friend went on to ask this question: “If tomorrow a bank’s customer came and said, ‘I want to borrow money on mortgage. Please act for me as well as for the bank.’ would your response be as in the case of a purchase asking that question?”

MR. CHEUNG: My Lord, that is perfectly correct. I was referring to his answers to my question about vendors and purchasers. I do not agree that the effect of his answer to that series of questions is that he had not been approached before, he had not accepted instructions, thus would say to a client, “Formally, I do not represent you.” Perhaps your Lordship would clear it up first before my friend . . . 10

MR. PRICE: My friend is going back to the previous question which is: “I have never acted for vendor and purchaser together.”

MR. CHEUNG: For?

MR. PRICE: For. “If asked . . . ” “If asked,” it then goes on, “what would you have done?” and then he have an answer and that’s what I put to him.

COURT: I think that’s . . . 20

MR. PRICE: I think that’s absolutely correct.

COURT: “If asked . . . ”?

MR. PRICE: “If asked . . . ”

MR. CHEUNG: If your Lordship would consult the note of the shorthand writer, he certainly said at first he had not acted for purchaser and vendor together but my series of questions were asked in such a way that what would have happened if you had done that and he gave certain answers and in fact I think he went on to say he has done so on previous occasions so that’s what he has done, that was his practice. Perhaps your Lordship would clear that up.

MR. TANG: I’m afraid my notes accord with my learned friend Mr. Price’s recollection, my Lord. 30

MR. PRICE: My Lord, it is very often the case, of course, that standing on one’s feet, one believes one has asked questions. . .

COURT: Your question now, Mr. Price, is what?

MR. PRICE: My question you see, my Lord, I did not put to him – I did not put to him

again what he had said he would reply to the hypothetical question if asked by a purchaser. I went on from that to what my learned friend had put to him about the hypothetical situation of the bank customer. Now, my Lord, the purpose of this was – my friend's question about that was framed in this form that: "Would you have responded as for the purchaser and what I want to – and because there was a particular answer to that," I asked Mr. Leung "In those circumstances," although it's a hypothetical case, "what exactly do you think you would say if it happened?"

- Q. Now, Mr. Leung, have you followed that? If tomorrow a bank's customer came and said, "I want to borrow money on mortgage, will JSM act for me please as well as for the bank?" the bank being already your client, what do you think would be your reply? 10
- A. Then I would have to ask the solicitor as to whether or not our firm could also act for that person.
- Q. Then my friend went on, Mr. Cheung went on to ask you whether you were able to say whether solicitors in your firm would give the same answer as that he put to you. That was a hypothetical question. Have you ever known solicitors in your firm being asked that question?
- A. I do not know. 20
- Q. Look please at Volume 2, page 43B and look please at the heading to that bill. You told his Lordship the reference to Edward Wong Finance Co. Limited means Edward Wong is your client.
- A. That's right.
- Q. "(. . . payable by Bovill Investments Limited)" means that the bill is to be paid by Bovill. Suppose had not paid, to whom do you think Johnson, Stokes & Master, your firm, would have looked for payment if Bovill had failed to pay?
- A. I don't know.
- Q. You were asked by Mr. Tang this question: assuming that you hadn't been told whether your firm was acting for the mortgagee or the mortgagor, would you tell the person to whom you presented the bill whom your firm represented? 30
- A. I would.
- Q. In such a case before presenting the bill, you would have to make out the bill, would you not?
- A. Yes.
- Q. How would you head it if you hadn't been told?
- A. I would have to ask, "Is this the first", before I prepare the bill?
- Q. Had such a situation ever occurred in your experience?
- A. No.

MR. PRICE: I have no further questions, my Lord. 40

MR. CHEUNG: My Lord, to put the matter beyond doubt, may I invite your Lordship to ask this witness whether he has in fact ever been approached by a purchaser to act for him, the vendor having come first and if he has had such experience, what his response was?

BY COURT:

Q. Has any situation occurred where, you being the solicitor to the vendor of property, the purchaser has subsequently asked if your firm would also act for him?

ME. CHEUNG: That's right.

A. I myself did not do it.

Q. That has never occurred to you?

A. That's right.

MR. CHEUNG: My questions relating to landlord and tenant were more related to whether a tenant . . .

10

Q. Has it ever occurred in the landlord and tenant relationship, that is, you being solicitors to the landlord, has the tenant every asked if you would also act for him?

A. I myself did not do it.

Q. As a matter of interest in a conveyancing – in Hong Kong conveyancing or property, does the vendor's solicitor prepare a statement, a settlement statement, setting out the amount owing, the amount required to settle?

A. Yes, that is the case.

Q. It's done. Was there ever a settlement statement in this matter?

A. I do not know because I did not see it.

Q. We have a letter from Danny Yiu saying – setting out in his letter the amount required.

20

MR. PRICE: Your Lordship is thinking of the letter at page 29, the letter on 28 and 29 in Volume 2. Yes, I think your Lordship is. Page 29, the penultimate sentence.

COURT: Yes, it's a letter from Danny Yiu. It says: "For your information, the balance of purchaser price payable on completion is \$1,640,000.00"

A. Yes.

Q. Now, but is that all that you get or do you get a statement showing how that amount is made up?

A. I do not remember as to how this amount came into being.

Q. My question is: "Do you normally get a statement setting out how the balance of purchase price is made up or do you just simply get a blank statement, the amount is as in this letter?"

30

A. Both cases do happen, sometimes in this form, sometimes in giving out the full particulars.

Q. Is it customary, for instance, to apportion between vendor and purchaser rates and insurance?

A. Normally, this is settled by themselves.

Q. Settled by themselves. The solicitors do not enter into it. It's the parties themselves to sort that out.

A. If that has been sorted out by the parties, then it will not be our business to deal

40

with the matter.

MR. PRICE: I should like to invite your Lordship to ask this. I think your Lordship is referring to what in my experience is called the completion statement, a completion statement on a purchase as between a vendor and purchaser and if your Lordship's question -- would your Lordship therefore ask whether as between a vendor and purchaser here in Hong Kong, there would be such a completion statement and then whether such a completion statement would be the concern of a person who is advancing some money to the purchaser.

COURT: I understand his answer is that sometimes there is such a statement and sometimes there isn't. 10

MR. PRICE: That would be as between vendor and purchaser. Suppose then a client for whom you are acting is lending money to a purchaser and your only interest in the transaction as solicitor is as mortgagee's solicitor -- future mortgagee's solicitor - do you as mortgagee's solicitor see the completion statement?

Q. If there is a completion statement or separate statement, you are acting as mortgagee, do you see it?

A. No. I do not see it.

Q. Do you send out completion statements if you are acting for a vendor?

A. Yes. 20

Q. Always?

A. Yes, if we were to act for the vendor, the completion statement is given out by us.

Q. That you are saying you do not always receive one if you are acting for a purchaser.

A. That's right.

Q. Yes, thank you, Mr. Leung.

MR. PRICE: I have no further question for Mr. Leung. I merely ask: can he be released?

COURT: Yes.

(Discussions between Court and Counsel as to the transcript of cross-examination of Mr. Leung.)

COURT: 2:30 30

1:02 p.m. Court adjourns.

2:34 p.m. Court resumes.

Appearances as before. (Mr. Cheung absent)

MR. PRICE: I call Mr. McElney.

D.W. 6 -- Brian Shane McELNEY Sworn in English

XN BY MR. PRICE:

- Q. Mr. McElney, would you tell his Lordship your full name?
A. Brian Shane McElney.
Q. And where do you live?
A. I live at Flat 304, Rocky Mount, 39, Conduit Road.
Q. And what is your professional business?
A. I am a solicitor and notary public.
Q. And when were you admitted as a solicitor?
A. I was admitted as a solicitor in Hong Kong in January 1957.
Q. And you said in Hong Kong, does that mean you were admitted elsewhere? 10
A. I was admitted as a solicitor in England in, I think, July or August of 1956.
Q. Yes, and do you practice in Hong Kong in the firm of Johnson, Stokes & Master?
A. Yes, I have done so since my arrival here.
Q. And are you a partner in that firm?
A. I am a senior partner of the firm.
Q. When you joined – that was the firm you joined when you came to Hong Kong.
A. Yes.
Q. When did you become a partner in that firm?
A. June the 15th 1965.
Q. Have you been a member of the committee of the Law Society of Hong Kong? 20
A. Yes, and still am.
Q. Were you a member of the committee of the Law Society in January 1976?
A. Yes.
Q. At that time was Mr. Edmond Cheung also a member?
A. Yes, I believe he was, yes.
Q. Mr. Edmond Cheung has told his Lordship that members of the committee at that time had heard of Danny Yiu's reputation as a gambler. Now, with that preface, let me ask you this. Had you any knowledge of Danny Yiu or his reputation in January 1976?
A. I had no knowledge of that reputation. Frankly, I doubt if I had much knowledge 30 of Danny Yiu. I wouldn't have known what he looks like let alone any details so intimate as that. I cannot recollect ever having had any or heard anything to his detriment either in January 1976 or before January 1976.
Q. Now, with that, you can't remember having heard anything to his detriment inside or outside the committee of the Law Society.
A. Both inside and outside. I simply -- I certainly haven't heard anything.
Q. Could you open the Volume 2 of the papers in front of you?
A. Yes.
Q. And look at page 34. Before I ask you the detailed question, I want to ask you – can I ask you this generally? Are you familiar with the history of this matter that 40 is before his Lordship? Have you made yourself familiar since this litigation started with the matters in issue?
A. I certainly have read the files – our files on the matter, yes.
Q. Then, you are aware, are you, that in December 1975 one Ho Sau-ki agreed to sell to Lucky Time Finance Company Limited a building which is – part of which is the subject matter of these proceedings?
A. I remember that there was such an agreement. At this stage I don't know whether I have all the details right. I very much doubt that I have.
Q. It's all preliminary to the question I want to ask you. On the same day as Ho Sau

- Ki agreed to sell to Lucky Time, Lucky Time Finance Company Limited agreed to sell the whole building to Kai Ming Investment Company Limited and to Chan Sun-ming.
- A. Yes.
- Q. Those two Agreements were in English?
- A. I believe that's correct, yes.
- Q. In January of 1976 Chan Sun-ming and Kai Ming Investment Company Limited entered into an agreement in the Chinese language without Lucky Time being a party to it which provided for Kai Ming Investment Company Limited to take the upper floors of the building they were buying and Chan to take the ground floor. 10
- A. Yes.
- Q. And Chan gave a Chinese receipt in the Chinese language showing that he was to sell the ground floor to Po Fung, a company of a Mr. Shum.
- A. Yes, I cannot recall all these Chinese agreements. I do not remember seeing Chinese agreements.
- Q. I see. That position was established that a meeting on the 21st of January that your firm, Miss Leung, was to make arrangements for a mortgage debenture to secure a loan to be made by Edward Wong Finance Company to Mr. Shum or his company in respect of this purchase and that was in respect of the purchase of the ground floor only. Look will you at the letter of 27th of January 1976? 20
- A. That's document number?
- Q. No. 34 in Volume 2.
- A. Document No. 34 here seems to be a letter of the 26th of February 1976.
- Q. I think you may have the wrong volume.
- A. Volume 2. which volume are you referring to?
- Q. Perhaps you would look at the bottom right hand corner. There may be more than one numbering.
- A. I'm sorry. There is, yes, my apologies. 30
- Q. Sorry, it's the numbering at the bottom right hand corner.
- A. Yes, yes.

2:40 p.m. Mr. Cheung enters.

- Q. Miss Leung arranged with Danny Yiu who was the solicitor dealing with the matter at least for the vendor, Mr. Chan.
- A. Yes.
- Q. . . . that the agreement by which Lucky Time had agreed to sell to Kai Ming and Chan Sun-ming together should be cancelled.
- A. Yes.
- Q. That appears at (1) (b). 40
- A. Yes, I see that.
- Q. And that there should be a new agreement for the sale of the ground floor direct from Lucky Time to Bovill.
- A. Yes.
- Q. And it has been suggested that in relation to stamp duty that cancellation of the intermediate agreement and substitution of a new one could produce irregularity because the assignment would then state not the full amount that had been agreed

- to be paid by the ultimate purchaser . . .
- A. Yes.
- Q. . . . but a smaller sum. Now, have you observations as senior partner in your firm on that aspect of the procedure adopted in this case?
- A. First of all, I think when you are dealing with rather – it's a lot of Chinese agreements which have problems about registration, you want to get rid of them and straighten it out in the European language which is the language used for land registration.
- Q. That's the first point. 10
- A. That's the first thing. The question of stamp duty. I do know that – I believe it's the University of Hong Kong's theory that Cancellation Agreements themselves are liable to stamp duty but this has never been accepted by the profession outside the University at any rate and Cancellation Agreements are and almost daily – they are daily occurrence certainly in our office and I think that would be in most solicitors firms in the Colony.
- Q. Yes.
- A. There's nothing wrong in an assignment which follows a cancellation and follows a new agreement at that price, the same price as what was originally provided that the Stamp Duty Office is informed of the facts that some money has – that the assignment does not actually – there was consideration paid outside. There's nothing wrong with the assignment but one has to be careful in making sure that the Stamp Office is told the position so far as the solicitor knows it. 20
- Q. Yes, right, does your firm today have a list of other solicitors firms in respect of which there is some control over the drawing of money against cheques received from those firms?
- A. The Accounts Department has an unofficial list . . .
- Q. An unofficial list.
- A. . . . which they should follow. In that instance, they shouldn't be drawing money against uncleared cheques of those solicitors firms. 30
- Q. That's the significance of the list. They shouldn't be drawing money against the uncleared cheques of those firms.
- A. Without further reference to a partner.
- Q. Without further reference to a partner. Are you able to say how long such an unofficial list has been operating?
- A. It's certainly been operating for several years but I know it wasn't in existence at the time of the Danny Yiu affair.
- Q. So that in January 1976 would such a list have been in existence?
- A. No.
- Q. If the name of a firm appears on that list, does that have any bearing as you understand the practice of your firm on the question whether you would have now a Hong Kong style completion of a conveyancing transaction which involved paying money over to the particular firm? 40
- A. Yes, I understand that. First of all, I think one has to make it quite clear that Hong Kong style completions are not only the general rule but it's 99.999 per cent of all cases and I doubt if English style completions, to give it a different connotation, would occur – you can probably count them on the fingers of one hand in any year probably out of thousands of transactions.
- Q. Yes.

- A. The significance of the list is that when you are dealing with those particular firms, depending on the amount of the cheque, a partner would be asked, "Is it o.k. to draw a cheque in favour of this particular firm for ten million dollars?" or something and the partner would then say, "Well, ten million might sound a bit high. Is there a way that can – you know, should we draw a cheque in favour of that firm?" and a judgement is exercised.
- Q. Yes.
- A. A judgment is exercised. The reasoned judgment is exercised on whether we should proceed with drawing of a ten million dollar cheque. 10
- Q. Yes.
- A. We might suggest that there's another way round it, for instance, we could draw the cheque to the vendor rather than to the solicitor.
- Q. Yes.
- A. One would also – Again, the number of transactions that one deals with people whose names are on the list is probably relatively very very small.
- Q. The number of transactions you deal with firms whose names are on the list may be relatively small.
- A. Yes.
- Q. Yes. 20
- A. Almost by definition they are probably relatively small firms of relatively – people who haven't been qualified that long.
- Q. Who makes up that informal list?
- A. I did that.
- Q. You?
- A. I did, yes.

MR. PRICE: Those are all my questions for Mr. McElney, my Lord.

XXN BY MR. CHEUNG

- Q. Mr. McElney are you quite familiar with the facts surrounding this transaction up to the time Danny Yiu disappeared? 30
- A. I reviewed the file immediately after the events which occurred but I can't say – I reviewed this in the last year or so . . .
- Q. So at one time . . .
- A. . . . so I may be a bit hazy about the actual details of the transaction at present.
- Q. The search card in this case reveals that one Mr. Ho Sau-ki was the registered owner.
- A. Correct, I believe that's so.
- Q. Would you perhaps look at the search card to refresh your memory? It's in Volume 5, page 18.
- A. Yes.
- Q. On the reverse of the search card appear three incumbrances in favour of the Hang Seng Bank. 40
- A. Correct.
- Q. Your attention has been drawn to the fact that there was a sale from Ho Sau-ki to Lucky Time at – I think it was 3.8 million dollars.
- A. 3.8?

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Brian Shane
McElney
cross-
examination

Q.
A.
Q.
A.
Q.
A.

That's in bundle 3 at page 11. Have you seen page 11 in bundle 3?
Yes, I've got that.
You see that the vendor there is Ho Sau-ki and that the consideration stated in paragraph 2 is 3.8 million dollars?
Yes.
All right. On looking at the search card, you would realize that money upto the full amount of 4.4 million could have been advanced by the Hang Seng Bank.
Yes.

- Q. And you would agree with me that in the ordinary way the security would cover not only the principal advanced but would cover all arrears of interests and costs and everything else?
- A. Yes . . . it depends on the terms . . .
- Q. That would be a fair – certainly a very probable thing?
- A. Yes, but the difficulty is that it is banking facilities and therefore the interests would be added to the bank account. The bank account is only secured to a certain extent.
- Q. Yes, but you say it could exceed the principal?
- A. It could, in certain circumstances, yes. 10
- Q. Now I don't know whether you have been referred to the search in the Companies Registry about Lucky Time Finance Co. which is on page 3 of bundle 5?
- A. Yes.
- Q. And that shows the paid-up capital of Lucky Time is \$200?
- A. Yes.
- Q. That there are two shareholders?
- A. Yes, so Mr. HO Sau-ki was selling to himself and another person.
- Q. Please don't quite jump in answering my question. But do you agree that shows there were two shareholders in that company?
- A. Yes. 20
- Q. And four directors?
- A. Yes . . . five directors.
- Q. Five directors, I beg your pardon. Now with that knowledge available to you would you, acting for the mortgagee in this case, enquire how much was actually outstanding under the mortgage – under the encumbrances in favour of the Hang Seng Bank? The property was being sold for 3.8 million when it was mortgaged to secure 4.4 million and HO Sau-ki was selling to a company of which he was one of two shareholders, one of five directors.
- A. I don't quite know how much he onsold for because that would obviously be of some relevance. 30
- Q. He onsold for some 5 million . . . Lucky Time sold to Kai Ming and CHAN Sun Ming – document 17 in bundle 3, page 70 rather.
- A. 5.25 million.
- Q. For 5.25 million.
- A. But I think that's relevant, isn't it?
- Q. That is relevant, but with that information in front of you, would you take any steps to enquire how much was owing to the Hang Seng Bank?
- A. A purchaser who is purchasing a property – the money is being sent against a clean title for a re-assignment of these premises. There is 5.25 million going to HO Sau-ki and his company. 40
- Q. It's going to Lucky Time, not to HO Sau-ki?
- A. Yes, but HO Sau-ki is – if you look at the –
- Q. Forgive me, HO Sau-ki is not Lucky Time?
- A. Well, he is a 50 percent owner of Lucky Time.
- Q. 50 percent owner one of five directors. Would you acting for your client, mortgagee, or some of whom purchasing the ground floor, would you enquire or would you not as to the amount outstanding?
- A. I don't think I would be concerned with it because first of all, actually I think, I believe I know HO Sau-ki slightly. I have dealt with him in conveyancing

- transactions before. So perhaps it's a little unfair to my point of view, my personal knowledge that he is quite a rich man. But if he enters into a contract to sell and to convey a good title he also agrees – free from encumbrances and therefore it is Mr. Ho's responsibility to get rid of the mortgage.
- Q. It's Mr. Ho's responsibility?
- A. Yes, and Mr. Ho therefore has to come up with whatever money is necessary, whether it be 10 million or whether it be 3 million . . . One doesn't know what the figure is.
- Q. But supposing you didn't know Mr. Ho personally – I am not sure I entirely agree with your assessment on Mr. Ho. 10
- A. Well, I have dealt with him on other matters.
- Q. I think you'd better leave personal experience of Mr. Ho outside . . .
- A. Yes, I agree, I don't think it's relevant.
- Q. Would you, not knowing him, not at least take the precaution of ascertaining either from Danny Yiu or from the bank or from C.Y. Kwan and Co. how much was outstanding under the mortgage?
- A. No, I would not because I don't think I have ever done it before.
- Q. Would it be in any way –
- A. It's the vendor's responsibility to get rid of these mortgages and that's what he is selling in that basis. 20
- Q. Your duty is to protect your client to see that he gets a good title, a valid mortgage, is that not right?
- A. Yes.
- Q. There could be a possibility – that's what it boils down to –
- A. Yes.
- Q. – then that Mr. HO Sau-ki, for some reason unknown to us, would be unable to discharge that mortgage because he was only selling to Lucky Time for 3.8 million?
- A. But then moneys would be returned, the transaction wouldn't have gone through. It couldn't have gone through. 30
- Q. You would, in other words, rely on the solicitor for the other side, Danny Yiu, to return the money in case that happened?
- A. That would be his obligation, of course.
- Q. And you would rely upon him to do so?
- A. Yes.
- Q. But you wouldn't take the precaution, as I understand you, of finding out how much was outstanding under the mortgage?
- A. No, because HO Sau-ki is the person who has to discharge it whatever the amount is.
- Q. But supposing he failed to discharge it and there is in the Law Reports of Hongkong a case where he had to be made to discharge it? 40
- A. The transaction could never have gone through.
- Q. I see, the transaction would never have gone through because you would rely on the solicitor acting for him to return the money to you?
- A. The vendor would probably have to be sued for specific performance.
- Q. You are acting, Mr. McElney, forgive me, for the mortgagee in this case?
- A. Yes.
- Q. Not for the purchaser?
- A. I agree.

- Q. What you say is if Mr. Ho, for some reason, failed or was unable to discharge his debt to the Hang Seng Bank you say that transaction would not go through?
- A. And the moneys would all be returned to the mortgagee.
- Q. And you would rely on the solicitor who had received the money to comply with the undertaking, that is what you say?
- A. Yes, like any other firms would in the Colony.
- Q. I suggest to you, that in this respect you differ from the President of the Law Society who says it would be an ordinary precaution to take to find out what was the outstanding debt to the Hang Seng Bank. Do you disagree with that statement? 10
- A. I do, yes.
- Q. Would you take the precaution of making the cheque which your client, the mortgagee, was advancing, would you advise your client to make the cheque payable to the Hang Seng Bank and not to the solicitor representing HO Sau-ki and Lucky Time?
- A. If that occurred I do not think the solicitor could give any undertaking because he's got to split the money according to whoever is entitled to it.
- Q. But he, you say, was responsible; he gave an undertaking that his client would obtain –
- A. A discharge. 20
- Q. – a discharge. Would it not be a precaution to take, to make the cheque payable to the ultimate receiver which in this case would be the Hang Seng Bank?
- A. That is not necessarily so. It is rightly pointed out that the mortgagors might only have a thousand dollars outstanding on any of them so that the ultimate receiver would not be the Hang Seng Bank. It is perfectly true that nowadays, as a presumptive case of Danny Yiu, one occasionally does make arrangements, when we are talking about people on the list, if you like to put it that way, to draw cheques in favour of the client rather than the solicitor, and the client's mortgagees rather than the solicitor. I mean that has happened on certain occasions since. That is by special arrangement with the solicitor concerned and he accepts that as, you know, his undertaking is given against the cheques which are made up in that way. 30
- Q. But your reason for – in this case at this time, January 1976 – your reason for not making out a cheque in favour of the Hang Seng Bank would be you don't know how much is owing to Hang Seng Bank?
- A. That's correct, and you don't know how much is coming in from – my recollection was that this was not the only transaction Mr. Edward Wong had – money to come in from other purchasers to pay off the Hang Seng Bank.
- Q. On the surface of it Lucky Time would get \$5 million?
- A. Yes. 40
- Q. And HO Sau-ki would get \$3,800,000?
- A. Could be.
- Q. On the face of it there was a possibility that he would not be able to discharge his indebtedness to Hang Seng Bank unless he made some arrangement with someone else, is that correct?
- A. Unless he made some arrangement with the bank, on the face that might be so.
- Q. Or with Lucky Time?
- A. Yes.
- Q. Now is it in any way improper in your firm's position to ask Danny Yiu how much

was outstanding under that mortgage? Would it be contrary to professional etiquette in any way?

A. No, I don't think so.

Q. It would not be contrary to professional etiquette to ask either the Hang Seng Bank or their solicitors, C.Y. Kwan and Co., or whoever acts for the Hang Seng Bank?

A. The Hang Seng Bank certainly would not give the information to you because a breach of confidentiality would be involved.

Q. They would probably refer the matter to their solicitors?

A. Right, but also their solicitors wouldn't be able to. Remember Edward Wong, down the bed somewhere, is not a direct relationship indeed. I too remember we got into a frightful tangle on one particular transaction where we were asked by another firm of solicitors, "How much is owing on the mortgage because we want to pay it off?" and we gave the information. We found we supplied it to the wrong person. So –

Q. But to complete my question before you answer –

A. But you could certainly have asked Danny Yiu and he might have asked – but he would have asked if he had to, he would have known the information.

Q. Equally, if an enquiry were addressed to either the Hang Seng Bank or C.Y. Kwan, they could supply you the information provided they got HO Sau-ki's consent, is that right?

A. Yes, they could, but it certainly wouldn't have been proper for us to have gone to C.Y. Kwan, the purchaser's solicitors, for with whom we were dealing was Danny Yiu.

Q. But you could have addressed the enquiry to the Hang Seng Bank?

A. No, we couldn't. We would have to have gone through Danny Yiu.

Q. At any rate, you could have asked Danny Yiu for that information?

A. We could have asked Danny Yiu, but whether he got any information –

Q. And perhaps ask him for confirmation from the bank that such and such an amount was outstanding – there would be nothing improper in doing that?

A. Nothing improper, of course not.

Q. I suggest to you that was a simple step to take, exercising ordinary care to protect your client's interest in this case.

A. Well, it would be most unusual.

Q. Now your attention has been drawn to the fact that there was a restructuring in this case whereby certain Chinese agreements were got rid of and the assignment from HO Sau-ki would understate the consideration by \$110,000. Would you have asked for a copy of the cancellation agreement, a draft of the cancellation agreement referred to in paragraph 1(b) of the letter from your firm to Danny Yiu, page 34 in bundle 2?

A. Would we have asked for it?

Q. Would you have asked to see the draft of the cancellation agreement?

A. I shouldn't have thought so because the cancellation agreement is the simplest possible document.

Q. Have you been informed that part of the restructuring in this case involved treating Mr. CHAN Sun-ming, the man who sold to Bovill –

A. Yes.

Q. – treating the profit of \$110,000 he made as commission and treating him as the

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- broker in this transaction? Have you heard of that twist in this case?
- A. No, I can't say I have heard of that.
- Q. Well, let me tell you what I understand your assistant solicitor agreed to. She rang Danny Yiu and asked that CHAN Sun-ming be joined as a second confirmor in the assignment. That would be the proper thing to do?
- A. Yes.
- Q. That would also be quite simple to do?
- A. Yes.
- Q. But instead she discovered Mr. Danny Yiu was unwilling to. Would you in those circumstances have insisted or not insisted on an assignment with CHAN Kai-ming (sig.) as a second confirmor? 10
- A. Well, he either had to be in it or you had to get rid of his interest by cancellation.
- Q. You wouldn't have insisted on CHAN Sun-ming being a second confirmor in the assignment with the consideration correctly say so?
- A. That is one of the ways of dealing with the matter.
- Q. But you wouldn't have insisted on it?
- A. If they wanted to do the transaction the other way one tries to facilitate the transaction.
- Q. The way they thought out for facilitating this transaction was to treat Mr. CHAN Sun-ming as a broker? 20
- A. Yes.
- Q. And the profit he made on the re-sale to Bovill as commission, broker's commission?
- A. Yes.
- Q. Would you have come to such a restructure?
- A. Whether I would have done it myself in Danny Yiu's position I wouldn't like to say, but we were acting for the mortgagee and how the mortgagor wants to deal with this affair was really none of our business provided the title was in order.
- Q. And provided that you have some kind of undertaking from Danny Yiu that the understatement of the consideration would be disclosed to the Stamp Duty Office? 30
- A. I thought we were doing the stamping of the agreement.
- Q. I am talking of the assignment from Lucky Time to Bovill.
- A. Yes, that would normally be stamped by us for the simple reason that, to get all the documents registered correctly in the right order we would normally attend to the stamping. If you look at the letter of the 27th January, 1976 you will see that the undertaking is to send us the assignment duly executed and attested, "and also your cheque in payment of the stamp duty and registration fee payable on the assignment." So of course it is we who would be doing the stamping which is generally the position.
- Q. Can you explain why subsequently Miss Leung asked Bovill not to pay the stamp duty to your firm but to go over to Danny Yiu to pay it to Danny Yiu? 40
- A. Because we were not acting for Bovill in the purchase and therefore it would have been wrong for him to pay us the stamp duty direct. He pays that to his own solicitor which is Danny Yiu and Danny Yiu's undertaking covers sending us the stamp duty.
- Q. So it was up to your own solicitor to see that the stamp duty was disclosed – the understatement of the consideration was disclosed to the Stamp Duty Office, is that right?
- A. We would be making the return to the Stamp Duty Office.
- Q. Now you say that you were not acting for the mortgagor, purchaser, Bovill? 50

- A. Correct.
- Q. Do you have any rule in Johnson Stokes that you don't act for a mortgagor at the same time as you act for a mortgagee – a rule?
- A. I almost unheard that we should act for the mortgagor as well as the mortgagee. We would be placed in an impossible position. When you say "act", I mean obviously if the mortgagor says, "Can you explain what this particular piece of mortgage means?" we would obviously explain it to him, but that's not acting in the sense that I think you are asking me the question.
- Q. Let me make it quite clear. You have a client who is a mortgagee, not necessarily a bank, and he brings along the proposed mortgagor who asks you to act for him. My question is is there any rule in Johnson Stokes which says all solicitors in your firm must tell that client to go away, "We won't act for you"?
- A. I don't think there is a rule as such, but we just never do. One doesn't lay down sort of rules in writing, sort of army regulations.
- Q. But you normally act for banks, I take it?
- A. Yes.
- Q. Absolutely, and you wouldn't say to the mortgagee and mortgagor, "It wouldn't sound very nice for such a company to buy a property and it wouldn't sound very nice for you, Mr. Mortgagee Client; to accept a mortgage from such a company." You wouldn't dream of saying that, would you?
- A. I shouldn't think so. I don't. No.
- Q. And if the mortgagor expressed, or the mortgagee and the mortgagor said to you, "We want you to act for both of us in this transaction," you would definitely say, "I can't, there would be a conflict of interest. Please go and find somebody else if you want somebody else to act," is that right?
- A. Yes.
- Q. And you wouldn't go on to offer to sell to the mortgagee another shelf company which you have, as it were, on your shelf ready to sell?
- A. If they wanted one I would sell it to them.
- Q. But you wouldn't take the initiative in suggesting that they buy another shelf company because the name of this one wouldn't sound right, would you?
- A. Well, if that's the only reason, no, of course not. But if it doesn't have the necessary power or something like that, of course, we would offer it to them.
- Q. Assuming it has all the necessary power merely because the name was a bit odd, you wouldn't suggest it?
- A. No, why should I?
- Q. Because the name can be changed at any time?
- A. Exactly.
- Q. Absolutely. Now wouldn't another reason for not suggesting it would be if you did sell another shelf company to the mortgagor you would have to do various things for him, like transfer of shares, getting resolutions and minutes out?
- A. Right, but there is no conflict in acting for him on that.
- Q. No, no, I am not saying there is. But if you did sell a shelf company it would involve a fair amount of secretarial services?
- A. It probably would, yes.
- Q. And if the mortgagor were not firmly told, "We can't possibly act for you in the mortgage there would be a conflict of interest," if invited to act the mortgagor was firmly told, "Can't, there is a conflict of interest," wouldn't selling him another

shelf company and providing the secretarial services give a layman the impression that you were acting not only in the matter of selling him a shelf company but acting for him in the mortgage transaction?

A. I don't think so frankly. They are entirely different transactions. One is selling a shelf company and one is a mortgage transaction.

Q. But I think you would be at least frank enough to say to the client expressly, "Now selling you the shelf company is a different matter altogether. But please understand I cannot act for you in the matter of the mortgage as there would be a conflict of interest."

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A. We would have told him, I am sure.

Q. You would have told him?

A. It's most unusual – and I make this quite clear – it's most unusual for a mortgagor ever to instruct his own solicitor. He takes the document that is produced by the mortgagee at its face value. He goes away and reads it, and he normally accepts it without consulting anyone.

Q. And generally speaking, most mortgagors would have to accept a mortgagee's terms anyway?

A. Yes, exactly.

Q. But some may wish to have the protection of a solicitor's advice?

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A. Yes, but I think the truth to be told that in all my 25 years of practice as a solicitor I doubt if I have been asked on more than half a dozen occasions to act for the mortgagor only.

Q. To act for a mortgagor only?

A. You know what I mean?

Q. Yes.

A. Another firm of solicitors actually doing the mortgage for the mortgagee and somebody coming on to me and saying, "Will you review the mortgage?" Very unusual in Hong Kong.

Q. Is it very unusual also for a mortgagee to come along with the mortgagor and both of them say, "Please act for both of us in this transaction." Have you had experience of that?

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A. It's certainly very common for the mortgagee and the mortgagor to come in together and say, "I want to mortgage this property to this gentleman. Here are the title deeds. Please get on with it."

Q. Would it also be common for them to say, "We want you to represent both of us"? I just want to know your experience.

A. People don't do it that way. They are accepting the mortgagee's terms of the loan. Therefore all you have got to do is to structure the loan according to those terms. People don't, when they come to the office, say specifically, "Can you please act for us?" or "Can you please act for somebody else?" That's not the way business is normally conducted. It's not in definite sort of – I don't know how to describe it – precise legal words that they have to give.

40

Q. But you say mortgagee and mortgagor often come together – I mean sometimes?

A. Yes, sometimes come together. Obviously they don't do it when it's a bank because the bank writes to you instructing you. A bank doesn't normally bring along its clients. But when we are talking about a personal mortgage, for instance, it's quite often that they come along together and say, "Here are the title deeds, can you get on with it?" But it's the mortgagee who gives the instructions to us, not the

- mortgagor. He just is there to produce the title deeds and say, "This is the guy I am dealing with."
- Q. But do you say, "Look, I don't act for you. I am only acting for the mortgagee. There may be a conflict of interest."?
- A. I don't think one says that in that sort of situation. He says – well, you don't sort of say, "Well, I can't act for you. I can act for you." I mean all you are doing is structuring the transaction. You are structuring the mortgage according to the mortgagee's instructions and all that a mortgagor is doing is coming in and giving you the title deeds. 10
- Q. They come together, they both think you are acting for them because they give you instructions jointly together. You don't say to the mortgagor, "I am only representing the mortgagee's interest. If you want to be protected go and see another solicitor."
- A. It's not the way things happen.
- Q. It's not the way things happen because you get the same costs whether you act for the mortgagee alone or whether you act for the mortgagee and the mortgagor together, is that not right?
- A. Yes, but nobody does act for the two together.
- Q. But the rule in the Law Society is that if you act for both together you don't get any extra costs, is that right? 20
- A. When you are talking about assignments you are absolutely right.
- Q. No, no, I am talking of mortgages.
- A. For proving a mortgage on behalf of the mortgagor one is entitled to charge a half-scale charge.
- Q. When you are acting together for the both of them?
- A. But it doesn't occur. When do you act for them together? You don't.
- Q. I see, you just say you don't act for them together?
- A. You are acting for the mortgagee. This is the point I have been trying to get across.
- Q. But you don't say to them, "I am just representing you, the mortgagee; I am not representing you, the mortgagor"? Things don't happen that way, you say? 30
- A. They don't happen that way, that's correct, generally.
- Q. Wouldn't you think it's possible that most laymen who come to you in those circumstances ask you to get on with preparing the mortgage structuring, isn't it more than likely the mortgagor would think you were acting for him unless you expressly told him?
- A. He might, yes.
- Q. Now let me take the situation a little further. In this case after Danny Yiu had sent the document over, your Miss Leung rang Mr. Danny Yiu to discuss restructuring and other matters. In the course of it she gets a very firm impression that Danny Yiu would want to be able to earn the full fees for himself in this transaction. 40
- A. Yes.
- Q. In other words, you get the impression Danny Yiu doesn't want another solicitor to act for Bovill. Do you follow me so far? That's what's conveyed in the telephone conversation, a very firm impression, he wants to earn the full costs of the sale and purchase transaction himself.
- A. Yes.
- Q. He would earn the full costs if he acted for the vendor and the purchaser was

unrepresented, would he not?

- A. No.
- Q. That's what everybody else has told us, Mr. McElney.
- A. If the purchaser was unrepresented?
- Q. Yes, the vendor's solicitors would get the full-scale costs and not half costs.
- A. Depends entirely on the agreement.
- Q. No, no.
- A. I do disagree. If he is only acting for the vendor he gets half-scale costs under the Law Society scale unless there is something in the agreement which specifically permits him to get the full-scale costs. 10
- Q. If there is something in the sale and purchase agreement?
- A. Yes, then it is possible he might be entitled to the full-scale costs. But he is not entitled to it. It's the vendor's solicitor – vendor who is entitled to it, so he gets it. There is of course no contractual relationship between him and the purchaser if in that specific scenario that you have painted.
- Q. So that would depend on the express terms of the sale and purchase agreement, if it's so provided, the vendor would get the full-scale costs for his solicitors?
- A. That's correct, yes, but in the absence of that provision –
- Q. If the purchaser was unrepresented? 20
- A. Yes – well, whether you consider he is unrepresented or represented by somebody else –
- Q. No, unrepresented altogether by any solicitor – that's right, isn't it? That's the evidence that has been given to us.
- A. Yes, I think so.
- Q. He would also get full-scale costs if he acted both for vendor and purchaser, would he not?
- A. Correct, yes.
- Q. In this case it was provided that Danny Yiu would prepare a sale and purchase agreement between Lucky Time and Bovill, is that not right? Page 35 of Bundle 2. 30
- A. Yes.
- Q. And he could, if he wished, or if he were instructed by Lucky Time, prepare an agreement whereby Lucky Time would be able to get the full-scale costs for him, Danny Yiu, is that not right?
- A. Could do, yes.
- Q. And if nobody represented Bovill at all, if Danny Yiu did not represent Bovill, but provided in such an agreement that he, Danny Yiu, would get the full-scale costs, Mr. Yiu would probably choose not to represent Bovill, would he not?
- A. Why?
- Q. The reason would be, he would have no responsibility to Bovill; he would have another solicitor getting into his hair and he would be able to get full-scale costs, would he not? 40
- A. I don't know what the agreement did provide, but all I can say is that if he got full scale, if he was paid full scale for these transactions, he drew the agreement and Bovill apparently signed in his presence. I think it would be very difficult for Danny Yiu to say that he was not representing Bovill in any of these transactions, very difficult indeed.
- Q. He would say, "All he did was to come and pay me the stamp duty and my disbursements of costs and sign the agreement. I never acted for him. I was acting

- under Lucky Time, Mr. HO Sau-ki's instructions.”
- A. He wouldn't get away with that. Why should he collect the stamp duty if that's the position?
- Q. He would collect it?
- A. Why should he collect it? I mean if he was not acting for Bovill why should he be collecting the stamp duty?
- Q. He would be acting for Lucky Time and HO Sau-ki.
- A. But they are not the people responsible for the stamp duty. Bovill is responsible for stamp duty. 10
- Q. With respect, all parties to a document are responsible for the duty under the Stamp Duty Ordinance, are they not?
- A. That's correct, but under the agreement it would be Bovill who is responsible to pay.
- Q. It depends on what Mr. Yiu chooses to put in that agreement?
- A. It is possible, of course, that stamp duty might be payable by somebody else by arrangement in the agreement, but I don't think that is the position here. It would be most unusual again. Purchaser normally pays in Hongkong.
- Q. You say that Johnson Stokes would not act for the mortgagor?
- A. Correct.
- Q. Presumably you wouldn't also act for the mortgagor in his capacity as purchaser? 20
- A. If we had done we would have sent him a bill for acting.
- Q. Would you in this transaction, would you have not acted for him in this capacity as mortgagor but act for him in his capacity as purchaser?
- A. We might have been prepared to do so, but in fact we didn't in this instance.
- Q. That is the question which this court is trying. Your belief is you didn't?
- A. I am certain we didn't.
- Q. But anyway let us assume that in principle you would not act for a mortgagor as you have said so?
- A. Not in respect of the mortgage, but there is no reason why we shouldn't act for him in the purchase. It might be an entirely different kettle of fish. 30
- Q. You might consider acting for him –
- A. In respect of his purchase, yes. I mean we have on many occasions.
- Q. And if he has not asked you specifically to represent him in the sale and purchase transaction and the solicitor for the vendor indicated great keenness in earning the full-scale costs, would you allow him to have his way and do nothing to take away his customer by acting for the purchaser?
- A. It is very unusual for a purchaser to instruct another firm of solicitors to act separate from the solicitor acting for the vendor because this effectively means he has to pay one-and-a-half times the costs, at least one-and-a-half, and possibly twice the costs that are payable. 40
- Q. It would of course depend on the terms of the sale and purchase agreement?
- A. Yes, but the terms of the sale and purchase agreement are almost invariably that the vendor expects the purchaser to pay whether it is half scale or full scale is another matter. But it does mean that effectively the purchaser is paying at least 50 percent more than he need pay and therefore most purchasers are not prepared to do that.
- Q. But assume one thing further that you haven't found out that in fact Danny Yiu was acting for Bovill, he expresses a very keen desire to be able to earn full-scale costs. I am just asking you is there any danger in those circumstances, seeing that

- Danny Yiu was to prepare the sale and purchase agreement, the cancellation agreement, whatever it is, was there not at least a possible danger that the purchaser would be unrepresented, unadvised in the sale and purchase transaction?
- A. I don't agree because if the purchaser is paying the fee then the solicitors acting could not possibly say that they weren't acting for this man, for Bovill.
- Q. It depends on the wording of the agreement for the sale and purchase, doesn't it?
- A. I am sorry, but I don't think it really depends upon the sale and purchase agreement at all. If they both went along, signed documents in that particular solicitor's office and the purchaser paid the fees, how could the solicitor say that he was not acting for that particular purchaser? 10
- Q. Do you mean to tell me the mere fact that the purchaser goes along to Danny Yiu to sign the agreement would show that Danny Yiu was acting for the purchaser – sign and pay?
- A. Sign and pay the fee, yes, I do.
- Q. Would the fact that he merely signed the agreement in the presence of Danny Yiu, would that show fairly conclusively he acted for the purchaser?
- A. It wouldn't be conclusive, but it would be getting on to conclusive. I mean I can think of certain instances – a bit difficult – that it might not be so.
- Q. Solicitors don't normally attest execution of a document? 20
- A. Unless they are acting for that client.
- Q. Unless they are acting for that client?
- A. That is absolutely right.
- Q. In this case your Miss Leung attested the execution of the debenture?
- A. Yes – well, mortgage is rather a different kettle of fish.
- Q. And the guarantee, she attested the signatures of the three directors of Bovill. Doesn't that show that she was acting for them in that matter?
- A. It is part of the mortgage transaction, and I have never seen – well, almost never seen a mortgage document going out to be signed before another firm of solicitors in a mortgage transaction. And the mortgage transaction, the guarantee is all one part and parcel the same transaction. 30
- Q. Now turning to another subject – the method of sending purchase money to another solicitor on their undertaking to have documents executed. That certainly is very convenient for solicitors?
- A. Obviously. It is the invariable practice and has been for decades.
- Q. Time saving?
- A. It saves time of the client as well.
- Q. It saves the solicitor's time?
- A. It also saves time for the client.
- Q. Yes, but does it save the solicitor's time? That is my question. 40
- A. Self-evident.
- Q. Would enable the solicitor to devote himself to work which is productive of costs rather than travelling from Hong Kong to Kowloon to attend a formal completion of the document?
- A. Yes.
- Q. And frequently the vendor's solicitor, as in this case, has a number of days?
- A. Pardon?
- Q. The vendor's solicitor –
- A. Has a number of days, yes.

- Q. – has a number of days in which to arrange for the execution of the document to comply with the undertaking?
- A. Yes.
- Q. Meantime he is undertaking not to release the money to the client until the documents have been executed?
- A. Yes.
- Q. The money would be paid into his client's account?
- A. Yes.
- Q. And some solicitors, do they not, make arrangements with their bankers so that interest is earned on that client's behalf? 10
- A. The money may be paid into a designated client's account to earn interest for that client, and should be if the money is to remain in the solicitor's hands for a period.
- Q. No, no, just say this is an ordinary transaction which may take ten days for the documents to be completed. Now supposing you were acting for the vendor in this case, the money would be put in your firm's client account?
- A. Client account.
- Q. Is it a current account or is it a deposit account?
- A. It is a current account.
- Q. But you have arrangement with your bank that you maintain a certain minimum daily balance which would be put in a deposit account which would earn interest, would it not? 20
- A. I don't think it is a deposit account. We do have some arrangements so that the money is –
- Q. I don't want to learn the details of your method, Mr. McElney.
- A. But again it would be unusual for the money to remain in the account for more than 24 hours frankly when we are dealing with a purchase of any sort of size because the vendor would be anxious to get his money as quickly as possible.
- Q. Yes, but in some cases it could be as long as a week or ten days?
- A. Unusual, and then it would probably be put into a designated client's account if there was a problem like that. 30
- Q. It may be three days; nothing unusual with a transaction taking three days, was it?
- A. No, I suppose three days would occasionally happen and it might remain there for three days.
- Q. And you have arrangements with your bankers whereby money in that account, client's account, earns interest for the benefit of your firm, that is my point.
- A. Some moneys are placed on deposits, yes.
- Q. And it earns interest –
- A. And it earns interest. 40
- Q. – which is for the account of Johnson Stokes?
- A. Not necessarily.
- Q. Some of it?
- A. Some of it, yes.
- Q. You would imagine that other solicitors of substantial size would have similar arrangements with their banks?
- A. Yes.
- Q. And the law is money earned in that client's account, unless there is express agreement to the contrary, belongs to the solicitor?

A. I don't think that is the law.

MR. PRICE: It is definitely not the case in England. There is a case called Brown's case apparently on appeal from Scotland to the House of Lords in which it was expressly held that money earned in the solicitor client's account, money earned as interest, is not the property of the solicitor.

MR. TANG: Indeed, such money, I understand, goes into the solicitor's indemnity fund, which is absent in Hongkong.

MR. PRICE: In England such interest is apportionable between clients. And after Brown's case the practice divided with some firms continuing the practice they previously had having exclusively a client's current account to receive money unless and only designated deposit accounts, and other firms accepting the suggestion of the Law Society that if the money was in for a very short time indeed then it could earn interest – then that account could earn interest for the solicitor, but if it was to be for an appreciable time, and that meant, I think, a very, very short time indeed, it would be proper for the money to go into a designated account. 10

Q. But in Hongkong the express agreement with your client apart, the money earned, interest money, in your firm's client's account belongs to your firm?

A. It would be a bit unusual for moneys to remain for any length of time and if, they were to be in a designated account earning interest for the client. But there are moneys in our bank account, client account, for instance, money on account of costs and such like which obviously make up the minimum balance in the account and those are put on deposits and do earn interest for the firm, money paid on account of costs and such like, and other moneys. Obviously I mean I don't know what our bank account is at any one time, but one doesn't leave money idle. 20

Q. I think you agree with me this, that in your firm's client account some moneys can be deposited for a short time, 2 or 3 days, it would earn interest for the account of your firm by arrangement with your bankers?

A. The account fluctuates, can be anything, a hundred million one day, five million the next day. So obviously there is always a minimum balance that one could deal with and put on deposit and earn interests, yes, and that is done, of course it's done, and I think every other firm in Hongkong does it. 30

Q. And the Hongkong system of conveyancing would entail money remaining in a solicitor's client account for maybe 24 hours, maybe 2 days, maybe 3 days, maybe even a week, is that right?

A. Could do, yes.

Q. And presumably other firms of solicitors make arrangements with their bankers for minimum balances etc. to earn interests for the benefit of their own firm?

A. I should imagine so.

Q. I suggest therefore – 40

A. This keeps down the costs, of course.

Q. It keeps your costs down, yes, increases the profit?

A. It keeps the costs of – to be outside members of the public account – clients.

Q. Because you make profit this way?

A. The sums are not that great. I mean –

Q. But nevertheless you make profit and you said that profit keeps costs down?

A. Yes.

Q. I suggest to you that it is being maintained, that the Hongkong system of conveyancing of sending money over against an undertaking is being maintained so that solicitors firm would be able to earn interests, save time and save trouble?

A. I disagree with that. One of the great points about Hongkong is everything goes at a faster rate than, say, for instance, in the United Kingdom where it takes anything up to about 3 or 4 months to do a simple purchase transaction of a house. Now in Hongkong the time scale is probably less than a week in many cases, and if you are going to deal with things in the English way with what – so-called English completion, even if that was possible for other reasons you slow down transactions to a snail's pace and this would not benefit the people who own the property, the people who want to purchase the property and the whole of the property trade in Hongkong, and also I say that it would – you have logistical problems with getting re-assignments out of banks which make the English style conveyancing again almost impossible. Some banks seal documents once a week and some banks seal documents, I was told, once a month, but I haven't come across that. So how do you get a re-assignment for formal English style completion? And there is a reluctance also, for instance, when you got a mortgage on a large building and you are selling off little flats everywhere in the building, there is a reluctance on the part of the mortgagees to reassign odd little bits in the building. They would probably wait till they got all the money in and reassign them.

Q. Now you have said something about the public interests. Let me put this to you. You certainly agree with me that it is to the solicitor's convenience, saving of time?

A. Yes, it is also for the client's convenience.

Q. Please leave out the client for a moment. It is to the solicitor's convenience, to the solicitor's profit to have this system of conveyancing? I understand – I may be wrong, if so, correct me – but I understand that it is never explained to a client that “we are sending money over to the other party's solicitors in return for another undertaking”, that is something which you just don't tell the clients or don't explain to your clients, is that not correct?

A. I think that is probably right. After all he doesn't want to get involved in the mechanics sort of thing. This is the way it is done and most clients, most people know what happens.

Q. Most of the big people may know, Mr. McElney, not necessarily lots of purchasers of small flats. A lot of people do not know. Shall we agree on that?

A. (No audible reply.)

Q. That being the position, do you consider when you send the money over that it is at your risk or at your client's risk if something should miscarry, some little solicitor is tempted to run away with a million dollars; would you consider it is at your risk or would you consider it is at the client's risk? I am talking of the little man who buys a flat, not your multi-million-dollar corporations.

MR. PRICE: My Lord, I don't object to the question, but I do point out that that is the very issue that your Lordship is trying in this case.

MR. CHEUNG: Mr. Edmund Cheung was asked that question.

COURT: Yes.

Q. Would you like to answer that question?

A. I think it is really the client's risk.

Q. But wouldn't it be in the public interests that the solicitor who does hundreds of these transactions in a month should, maybe for a little extra charge, insure against loss, spread the risk –

MR. PRICE: My Lord, I have said I don't object, but there are limits to this and I ought to protect my client who is in the witness box. This is the question that your Lordship's asked. I haven't objected to his venturing his view on the question that your Lordship may decide one way or the other, but it isn't right, in my submission, that he should be pursued further to try and get him to change that view or express a different view. After all, this is a matter for argument to your Lordship rather than to the witness in the box. 10

MR. CHEUNG: In my respectful submission, it is a perfectly proper question and arises directly out of the assertion made by my learned friend both in cross-examination and in examination of Mr. McElney that it is in the public interests that this system should be maintained so that costs are kept down. My question is that it is in the public interests that the risks should be spread by the solicitors taking out insurance cover rather than let one poor individual client suffer. My Lord, I ask you to rule on it. 20

COURT: If the witness said it is in his opinion the client's risk I can see that you could legitimately ask him, "Well, should he not be informed of the risk and perhaps advised?" and if he said it is the client's risk then why should the solicitor spread it out?

MR. CHEUNG: My Lord, in my respectful submission – I will come to the other point – I am directing my question to the issue of public interests which has been raised by my learned friend, Mr. Price. He has said in cross-examination and in examination-in-chief it is in the public interest to keep costs down. If you got a formal completion it would send the costs up, so as Mr. McElney said. 30

MR. PRICE: My Lord, I do point out in support of my continuing objection that I have not called Mr. McElney as an expert witness. Accordingly what the questions I have put to an expert witness are not a guide to the questions that should be put to Mr. McElney who, as will be appreciated, from the questions I directed to him I directed questions to him that were not of an expert witness kind but were factual, related to the position of his firm in this case.

COURT: But after all, he was a member of the committee of the Law Society?

MR. PRICE: My Lord, that was because it could have been – that was really the primary and, indeed, the only true reason for calling him – it might have been submitted to your Lordship that as Mr. Edmund Cheung, an expert, had in fact said that as a member of the committee he had heard of Danny Yiu's reputation and that 40

Mr. McElney was a member of the committee, it might have been submitted to your Lordship that the factual inference from that was that Mr. McElney, senior partner in my client, therefore knew.

MR. CHEUNG: The character which Mr. McElney bore is, in my submission, irrelevant. Mr. McElney is a solicitor who has been in practice for many years. He is a senior partner of a large firm. The question of public interest has been raised and in my respectful submission it is a perfectly proper question.

COURT: I think it is, Mr. Cheung, but I think you must rest content with his answer that in his opinion it is the client's risk, not the firm's risk. 10

MR. CHEUNG: Yes . . . but the subject of my present question is: Isn't it in the public interest that the risks should be spread rather than that the risks should fall on the individual client in a particular case. That is my question.

MR. PRICE: That is the question to which I object.

COURT: I think it is a proper question.

A. Now what is the question? Sorry, after all that.

Q. Is it not in the public interest that solicitors should cover the risks involved in the Hongkong system of completion by taking out insurance cover so that they would be indemnified in part or in whole by insurers, spread the risk over thousands of transactions rather than let one individual client suffer if in your view the risk falls on the client? 20

A. The only difficulty on that is that query whether it would be possible ever to insure if that was the case. One is dealing with vast quantities of transactions in huge sums of money. This, I think, Danny Yiu, was the first case so far in all my time in Hongkong that anything has ever gone wrong. I think even going back 50 or 60 years everything was being done in the same way that has been here. It wouldn't have mattered whether it had gone to Johnson Stokes and Master or any other firm and the same would result, would have happened as has happened in this case.

Q. Do I take your answer to mean: assuming insurance cover can be obtained, not necessarily for thousands of millions of dollars, but for, say 10 or 20 million, would you agree with me that it will be in the public interest to spread the risk rather than let one individual client suffer? 30

A. I don't think I agree with that.

Q. It is perfectly possible, is it not, to obtain limited cover of up to 10 or 20 million against a solicitor not complying with his undertaking, is it not?

MR. PRICE: I think the question really ought to be clarified because is my learned friend asking whether the solicitor accepting the undertaking should effect that policy or whether the solicitor giving the undertaking should effect the policy eventually. The fact that I get up and ask the question does indicate that this is improper.

MR. CHEUNG: I've made it perfectly clear that it is the solicitor accepting the undertaking, as in this case Johnson Stokes accepting an undertaking from Danny Yiu. 40

COURT: Why should he insure? Why should the solicitor insure if it is not his risk?

MR. CHEUNG: My Lord, I am saying it is in the public interest provided you can get a cover, for the solicitor to spread the risks by getting an insurance company to cover the risks of some other solicitor being dishonest rather than that one individual client should suffer. The witness has disagreed with me, but I pressed on with my next question: Is it perfectly possible to obtain insurance cover against the solicitor from whom you got an undertaking did not comply and defaulting with money.

- A. What you are really asking is could you have a bond of some kind or another bonding that particular solicitor or any particular solicitor in the Colony? 10
- Q. No –
- A. The only insurance one could get at present, whether it would be possible to get it in future depends on the result of this case probably, but let's assume the only cover one could get is a cover preventing you from – which is a negligence cover that if you have been negligent in a particular transaction then the insurance company will pay and the entirety, the entire point – until you establish that fact of negligence you can't be covered.
- Q. Are you saying that it is not possible to get an insurance policy whereby you would be indemnified if you accepted an undertaking from another solicitor and he defaulted on it? 20
- A. I have never applied to such an insurance, so I really wouldn't be in a position to answer that question. I mean I would be speculating, I think, if I answer it really.
- Q. Would you perhaps answer the question my Lord himself inspired. You considered after thinking quite a while in the witness-box that it was the client's risks?
- A. Yes.
- Q. So thinking, would you think it only fair to warn the client that by using this method of completion he ran a risk of losing his money?
- A. It wouldn't occur to me to have done so.
- Q. But it would be a fair thing to do, wouldn't it, seeing that some widow might lose half a million dollars, warn her that, "I am doing this, sending the money over at your risk." Would you not consider that that is the only fair thing to do? 30
- A. I am not entirely sure whom you are asking this for. If you are asking for Edward Wong he is the person who –
- Q. I am not asking for Edward Wong.
- A. – was involved in thousands of transactions. He knew perfectly well what the position was.
- Q. I am not asking for Edward Wong. In the case of a client, who is a widow, coming to you to buy a flat for half a million dollars, do you consider, you would send her money over to the vendor's solicitors at her risk, the only fair thing to do would be expressly to warn her, "It is being done at your risk. You have the choice of doing it some other way"? 40
- A. Putting it that way, I agree with you that would be the fair thing to do. But if you explain all this to the person concerned, they would think you have gone mental in Hongkong. They would think, "What's all this fuss? All we want is to get on with it the usual way." That's the sort of – that would be the attitude they take.
- Q. They would just simply say, "Get on with it" without using the words "the usual way"?
- A. Well, they would say, "Just get on with it," in other words, "proceed".

- Q. In other words, you say they would think you have gone round the bend?
- A. Even telling them these things that you are suggesting to tell them.
- Q. You think they would regard you as having gone slightly mental?
- A. Yes -- well, I don't know whether they would say this. It's not the sort of thing that they worry about.
- Q. It's not the sort of thing, in other words, you would warn them about, and in your experience you haven't done so?
- A. In my experience I wouldn't be concerned about telling them the mechanics in the transaction. 10
- Q. Mr. McElney, you said my client, Mr. Edward Wong, knew all about it. He has denied in the witness-box that he knew that there were such risks or that he would have continued to permit you to act the way you did if he had been warned of those risks. Why did you give that answer to a question I did not ask that Edward Wong knew all about it?
- A. He had at least been involved with several tens of transactions involving conveyancing in the position of purchaser, vendor, mortgagee or what have you over a period of several years. Now I can't seriously believe that he did not know how conveyancing transactions were done having acted on various sizes of transactions through a very long period, either be in the position of vendor with the money being sent over to him, either be in the position of purchaser going the other way. 20
- Q. But you would have no reason to think than was ever explained to you that he was running the risks, would you? You assume he knew what the drill was. Do you have any reason to think he was actually expressly warned that there would be a risk?
- A. I really wouldn't know.
- Q. You haven't done it yourself?
- A. No, I have never acted for him personally.
- Q. You have never acted for him? 30
- A. Not personally, no.
- Q. So your knowledge of what he knows or does not know, you infer from the fact many transactions had passed through your firm, is that a fair answer?
- A. That's right, yes.

XXN. BY MR. TANG:

- Q. Mr. McElney, I would want to ask you a few questions on the question of who keeps the interests in a Hongkong completion. The Hongkong completion involves the sending of money over against the undertaking of a solicitor to do certain things. You would agree with me, would you not, the solicitor who gives the undertaking would be holding the money as a stakeholder? 40
- A. Yes.
- Q. And do you know that as a matter of law a solicitor acting as a stakeholder is entitled to keep the interests which he earns on such money? I can show you the authority but I would want you to say, first of all, whether or not you are aware of that?
- A. Yes.
- Q. Such money, I suppose, would be put not into a client's account, would it not

- be put into a stakeholder's account?
- A. A stakeholder's account must, under the solicitors' accounts rules, be a client account.
- Q. It is just a matter of description, but it would in its very nature be a stakeholder's account?
- A. We don't separate the two things.
- Q. Now would you like now to look at the case of Burt v. Claud Cousins & Co., 1971 2 Queen's Bench.

COURT: What does it deal with?

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MR. TANG: It deals with the question of solicitor being entitled to keep the interest which he receives as a stakeholder. But I don't know if your Lordship considers the question of public interest as a matter of relevance in this matter. If your Lordship considers that it is a matter of irrelevance in this matter, of course I would not pursue the point. But if it is a matter of some importance in this matter then I would want to suggest to the witness that it is not because it is for the public that this Hongkong completion has been adopted by solicitors in Hongkong.

COURT: Well, that has already been put. He has given an answer.

MR. TANG: What has been put, my Lord?

COURT: That the Hongkong completion practice saves solicitors' time and trouble and earns them interest. 20

MR. TANG: But the witness did not seem to agree that it would earn them interest.

COURT: He said to some extent.

MR. TANG: Yes, what I am going to suggest is that it would earn them substantial interest.

A. That depends on the amounts involved.

Q. Now take the case of Johnson Stokes, for instance, the Hongkong Bank are your regular clients?

COURT: Can't you simply put: Does it earn you substantial interest?

Q. Does it earn you substantial interest?

A. It can do. It depends upon the balances.

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Q. Say, over the years, had it earned you substantial interest?

A. If the money is there for any length of time it would be on a designated account anyway and won't earn any interest.

Q. That is not quite my question. My question is: Had it earned you any interest, not interest on behalf of your client, but interest for your firm?

A. It can do and, of course, the figures can be substantial, of course.

Q. Take last year, for instance, was it substantial?

A. What does one mean by substantial? 100,000? 200,000?

- Q. In what sort of figures – 6 figures, 7 figures, 8 figures?
- A. Now it is a problem here because I do know some figures, but of course it includes our own money and I am not quite certain what portion is our own and what portion is this particular thing, but certainly it would be in excess of 6 figures.
- Q. It would be in excess of 6 figures – interest earned as a result of Hongkong completion, is that so?
- A. You see, I don't think they are earned as a result of Hongkong completion. This is the problem because it is interest that is being earned on the balance on client's account. Now the vast majority of the moneys in client's account would be represented by moneys received as stakeholder under sales and purchase agreements in uncompleted buildings and not the normal money that comes in on completion of the transaction which goes out the following day which is the money that you are talking about. 10
- Q. Now when you act for a mortgagee you receive money on behalf of the mortgagee on an undertaking not to release the money until the mortgagee has executed the re-assignment. Let us take the average bank in Hongkong and according to your evidence an average bank will seal documents once a week. That was your evidence, was it not?
- A. Yes. 10
- Q. In that case you would be holding the money for at least one week as a stakeholder, would you not?
- A. The banks normally want to be paid off immediately.
- Q. But you would not pay them until they have exercised – executed a re-assignment because you have received the money on an undertaking not to release the money to the mortgagee until after they have executed a re-assignment?
- A. Yes, but when you are dealing with banks money normally gets over to the bank immediately with the re-assignment, and the re-assignment comes back when it comes back.
- Q. I see, you mean notwithstanding the undertaking you would release the money to the bank? 30
- A. Correct.
- Q. And you would wait for the re-assignment to come in due course?
- A. Correct.
- Q. When you deal with a private mortgagee, in that I mean a mortgagee other than the bank, would you do so?
- A. No.
- Q. In that case would the moneys stay in your client's account as stake money until he had –
- A. Until it actually came in. But you see, people don't leave money lying around in solicitors' accounts. As soon as the money was received and the cheque cleared by us the mortgagee, the private mortgagee, would already have been informed and he would come hotfoot round to your office to execute the document and to get his money because he wants to put it on deposits somewhere. It simply doesn't happen that way that it stays there. 40
- Q. You see, what I don't understand is this, Mr. McElney, Mr. Danny Yiu received the money on the 27th January?
- A. Yes.
- Q. He absconded, he left Hongkong on the 12th February taking the money with him.

If what you say represents the reality as it were, wouldn't the mortgagee and the person who would be getting a cut of the purchase price have gone hotfooted to his office and obtained payment? Why was it then possible for him to have kept the money for 15 days?

A. Probably because he didn't inform them that he had got it, much more likely.

Q. I see. So that's your explanation for that?

A. Yes, but any proper solicitor dealing with the matter would immediately inform the client that the money has arrived, please come and sign. It simply doesn't stay in the client's account for long.

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Q. Let us deal with the question of time saving and it is the other aspect of public interest – to save time, to save clients' time. Now in a case of –

A. A client can get into his flat. He doesn't have to wait 3 or 4 months like England to get into his flat.

Q. One way of getting round to that is for the client to pay the money to a stakeholder, is it not –

A. Yes.

Q. – say, a bank as a stakeholder, and the money would then be released by the bank to the vendor of the property when the documents are all duly executed. On that kind of arrangement, could not the purchaser then be let into possession? That would be an alternative to the Hongkong completion, would it not, which is just as time saving?

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A. I don't really think that the profession has thought out any alternative yet, and we are all waiting on the decision in this case before we can –

Q. But if you were to think about it would you not agree with me that that is a way out?

A. To place the money in an escrow account, effectively in a bank?

Q. Yes, let's say, the safest bank in Hongkong?

A. But then how much is the bank going to charge for all these services?

Q. The bank may charge -

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COURT: I really. . . (inaudible)

Q. Let us deal with your list which you said you compiled, and you say a clerk in a case where a firm on the list is involved would consult a partner to see whether or not a cheque should be drawn in favour of that firm?

A. Yes.

Q. Then you say that partner would have to exercise a reasonable judgment in the matter?

A. Yes.

Q. Let us assume you were a partner, what sort of matters would you take into consideration?

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A. Well, I'd first see the firm that we are dealing with, because I am a member of the Committee of the Law Society I would know whether people have made complaints about it before. Therefore, that would be something in my mind. I would see the amount involved. Obviously this is relevant. And taking all those things into consideration – must remember that if somebody does breach the undertaking that's the end of him from the professional point of view.

Q. So you would take the amount into consideration whether or not you have heard of any complaint about him?

- A. Yes, the problem, for instance, is the mortgage which would mean we should never have an English style completion, we should never be able to get a re-assignment out of banking time. Whether you could minimise the risk by splitting the cheques; whether – for instance, you could draw a cheque in favour – we are talking about a big sum of money, say, it's a million dollar transaction, or something, or 2 million dollar transaction. You might feel slightly uneasy about that particular firm because it's a one-man band, it hasn't got too good a reputation. I mean, let's face it, there are one-man firms who have not only got tremendous reputations, they are persons of very considerable wealth. It doesn't necessarily mean that because you are a one-man band you are suspect or anything like that. And if the amount was a sizable amount, you might say, "All right, now I wonder how we can get the risk down here." And it has been – and I certainly have done it on occasions – to ring up the solicitor on the other side and say, "Look here, can we split the cheques here: one in favour of your clients and one in favour of the mortgagee and one in favour of yourself for the costs, etc." and the solicitor concerned does normally agree. It is not a fool-proof method as of course he could have his own account in that particular bank, so he could put the cheque into his own account instead of into – for the bank's own benefit. 10
- Q. If the cheque was issued – made out in the name of his client, then it would be an additional protection in the sense that unless there is complicity between him and his client he would not be able to touch the money, that would be correct, would it not? 20
- A. Yes, it wouldn't go into the solicitor's account. It would go to his client. So his client could never say that he hadn't received the money.
- Q. So whatever should happen eventually you would be able to force his client to complete the transaction having received the money?
- A. Correct.
- Q. You know of course that it would be contrary to the etiquette of solicitors to refuse to agree to an English completion? 30
- A. Yes, I do.
- Q. It would follow from that that it would be contrary to the etiquette of solicitors to refuse to agree to your safer method of completion, splitting the cheques in the names of his client, himself and the mortgagee?
- A. There has never been a ruling on that.
- Q. But it would follow from that, would it not?
- A. I haven't thought of that, but it might, yes.
- Q. But in principle there is no reason why that should not be contrary to the etiquette of a solicitor?
- A. Certainly, if it was raised by the Committee of the Law Society they probably would say it would be contrary to the etiquette. 40
- Q. The risk inherent in a Hongkong completion was known to the profession even before Danny Yiu was contacted?
- A. I suppose it is self-evident.
- Q. It is in the nature of the transaction itself that it must be risky?
- A. How can one say it's risky when 50 years this has been done, nothing has ever –
- Q. 50 years ago, Mr. McElney, Hongkong was a very small place?
- A. Yes, but it has not been a small place the last 10 or 15 years, still nothing has gone wrong.

- Q. Now, Mr. McElney, you have known of cases of solicitors being dishonest, haven't you?
- A. I have known of cases of solicitors being dishonest, but I have never heard them breaching their undertaking on this.
- Q. No, but Mr. McElney, would you not agree with me that the risk is not in the solicitor breaching his undertaking, the risk is based on the possibility that a solicitor who was given the undertaking may be dishonest? Do you mean to say a solicitor who is dishonest enough to embezzle his client's money may have qualms about breaching the undertaking that he gives to a fellow solicitor? 10
- A. I don't think so.
- Q. So really what one has to guard against is the dishonesty in a solicitor. So if solicitors in the past 15 years have been known to be dishonest then the possibility of adopting a transaction which may result in completion in the English sense being miscarried is auto-evident, is it not?
- A. The risks are always inherent in the transactions.
- Q. Would you agree with me that the Danny Yiu affair simply impresses upon one most forcibly the risks which are inherent in the Hongkong completion?
- A. Yes.
- Q. And it is as a result of this forceful example that you have now compounded this list? 20
- A. I think it was as a result of the Danny Yiu affair.
- Q. But a gentler reminder of the risks in the form of a circular from the Law Society in 1965 did not have that effect upon you. Maybe I can refer you to the circular. It's volume 5, starting at page 20, and I think you should look at page 22 first. I think Mr. Nigel of your firm at the time was a member of this Committee which prepared this report. Page 22 – maybe you should look at page 20 first. This is circular No. 17 of 1965 given on the 21st April, 1965, circulated to all members.
- A. Yes.
- Q. I think the relevant page is at page 22. You see "Completions of conveyancing transactions", do you see that? 30
- A. Yes.
- Q. And you can read it for yourself. It is quite simple. And then if you look at page 23, III, it says, "Solicitors must further be aware that the practice of accepting other solicitors' cheques does not relieve them from being responsible to their clients and possibly others for the actual cash which those cheques are supposed to represent and that to rely upon a certified cheque or banker's draft is not a complete safe-guard," but the important – and then at V: "The Committee has considered the present practice of sending the consideration money or executed document against the undertaking of the solicitor on the other side to send the executed document or the consideration money, as the case may be, in due course. It is of the opinion, that such a practice is one of courtesy and convenience only" and therefore one may insist on the English completion. 40
- A. Yes, one of the –
- Q. And at page 22, going back to page 22–
- A. – One of the things that gave rise to this circular was that somebody had in one case insisted upon a formal completion and he made a complaint that this is an insult –
- Q. Yes, but if you were to look at page 21 you will see that that might have been one

of the causes, but what the Committee was asked to consider in paragraph one is whether and what changes should be made in the conveyancing practice prevailing in the Colony, and particularly to consider and make recommendations for the prevention of fraud and for safe-guarding the interest of members of the public and of society in conveyancing matters. So that might have been one of the reasons for it, but would you not agree with me this is the principal reason?

- A. This is the principal reason, and the question of the –
- Q. But you would agree with me, would you not, that in 1965 –
- A. – and the question of the scale of charges which was also – 10
- Q. – in 1965 this came as a gentle reminder to members. The gentle reminder was repeated again, I suppose to your knowledge, page 46, in 1966 March which repeats the memorandum which starts at page 47. You would agree with me, would you not, that nothing has changed because of the Danny Yiu affairs; the Danny Yiu affairs simply demonstrates to one when things go wrong how serious it could be if one were to follow the Hongkong completion?
- A. Nothing has changed since the Danny Yiu affairs. Practically all completions still go on as before.
- Q. You are more careful now?
- A. In respect of the firms to whom you are dealing, yes, and persons involved. 20

- Q. Quite. Now, you say in 99.99 per cent of the transactions, even after the Danny Yiu affair, the Hong Kong completion would still be adopted?
- A. Yes.
- Q. And I think you also said that with doubtful firms, firms who are on your list, there are almost by definition very few transactions with them?
- A. Some firms you have many more transactions than others.
- Q. Quite.
- A. Because even some of the smaller firms have a reasonable conveyancing practice.
- Q. But with those smaller firms, firms which are doubtful, nowadays you would still adopt the Hong Kong completion after taking into consideration the various matters that you have already stated? 10
- A. Yes.
- Q. And if they passed all those tests you would then go on with the Hong Kong completion?
- A. Yes.
- Q. If they did not?
- A. If you would minimise it with separate cheques then you would probably do so. If you can't, well, you would probably still go on with the Hong Kong completion – with the Hong Kong style of completion. 20
- Q. Notwithstanding your account with that firm's . . .
- A. . . . Again . . .
- Q. . . . how would it, Mr. McElney, how would it slow down – Hong Kong –?
- A. No, I must answer the previous question because it depends – the main thing in these – dealing with these small firms is do you know at that particular instance you are drawing a cheque that something, you know, this firm is going a bit peculiar or have you heard something that – that things could go wrong with this particular firm.
- Q. Quite.
- A. That would be the sort of main thing that you would seem to be looking for. 30
- Q. But if at the end of taking all those factors into consideration you consider that it might be unsafe, are you saying that you would still have gone on with the Hong Kong completion, if there is no way that you can split the cheques?
- A. If I knew something to that firm's detriment, I might conceivably, if the transaction was sufficiently big, deal with it in a . . .

COURT REPORTER: I am sorry?

- A. But, as I say, we are talking about a few transactions as it were.
- Q. But if it were a small one, notwithstanding the fact that you would consider it to be unsafe, you would still have adopted the Hong Kong method?
- A. It is a question of degrees, like if we are talking about a hundred thousand dollars I might say, well, let's pass it. 40
- Q. If it should involve, say, \$1.5 million, you would say – what would you say – I will pass it and therefore let's have a Hong Kong completion?
- A. I doubt it – it is a bit too big, that is too big.
- Q. That is too big?
- A. Much too big.
- Q. I see, so in the case of those firms who do not pass your test, you would insist

on a Hong Kong completion, even though \$1.5 million is involved?

COURT: You would insist on?

- Q. Even though, on an English completion, even though \$1.5 million was involved?
A. I probably would, yes.
Q. Yes. Would you say the same about a million dollars?
A. Yes. I think so.
Q. But below a million?
A. I might let it, if one had about three lacs, pass by but when one is getting beyond that . . . (inaudible)

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COURT REPORTER: I'm sorry?

- Q. About three lacs.
A. Yes.
Q. Are there a lot of solicitors firms on your list?
A. Not that many, no.
Q. A dozen or more than a dozen?
A. I haven't counted them: it could be a dozen.
Q. But you wouldn't think that it may be many dozens?
A. Not many dozens – there might be fifteen, sixteen or something like that but.
Q. And is it possible that some firms who are not already on the list but if a particularly large transaction should come around, you would still take all those relevant factors into consideration and ask yourself. "Is this firm to be trusted with \$10 million?" so the fact that a firm is not on the list does not mean that it could be trusted up to, say, \$10 million?
A. The fact that a firm is not on the list wouldn't necessarily mean that we can draw a cheque for a hundred million or something to the order of that firm.
Q. I am not dealing with that kind of figures, what about ten million, within the realms of reality, a possibility, is it not, now?
A. I think one would expand the list, when we are talking about a \$10 million one.
Q. There would be an expanded list and I suppose with \$5 million it would be a shorter or still expand the list?
A. We would be looking perhaps for a few more firms but I don't think – there isn't a list as such but when you are drawing cheques of that sort of an amount the partner who actually signs the cheques would sort of say, Hey, what's this?
Q. Would it be correct to say that those people who are on your list probably most of them would probably be firms who had been in practice since before Danny YIU?
A. Since before?
Q. Yes, since before 1976.
A. No.
Q. Do you mean of those fifteen people or maybe . . .
A. . . . Not all of them.
Q. Most of them?
A. But you said most of them before Danny YIU, well, I think that the people – the firms that get on to the list are the sort of one-man bands with very little

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experience and therefore if they had been on the list four or five years already they would be ready. You know, if they were in practice before Danny YIU, they already had five or six years' practice, so one knows from dealing with them how, you know, trustworthy they are probably.

Q. But some of them would have been from pre-Danny YIU times?

A. One or two, yes, certainly.

Q. Now, dealing with those one or two before Danny YIU, would you have, as it were, done a Hong Kong completion with them blind?

A. Probably, yes.

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Q. I see. After Danny YIU you have adopted this precaution, I suppose presumably on the basis that if it could happen once it could happen again?

A. Yes.

Q. Now, Hong Kong -- apart from Hong Kong solicitors in England have been known to be dishonest and embezzle their clients' money, haven't they? Solicitors all over the world have been known to be dishonest?

A. Of course, yes.

Q. I do not mean only solicitors but lawyers, barristers, a lot of them have been sent to prison?

A. Yes.

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Q. Would you not agree with me there is no reason to think Hong Kong in the last twenty years that the solicitors here are necessarily more honest than solicitors in England?

A. I think this has proved to be the case though.

Q. You mean because a less smaller percentage of them get into trouble?

A. That is correct.

Q. Would one of the reasons for this is the less -- is the fact that clients in Hong Kong are less aware of their rights and therefore less likely to make a complaint?

COURT: Less aware of their?

MR. TANG: Of their rights.

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Q. (Cont.) Because from your evidence it would seem that clients in Hong Kong would put everything into the hands of their solicitors and would not ask any questions: so if things should go wrong they may not realise it, solicitors may be -- then patch it up?

A. I think clients know their rights generally speaking.

Q. But you would not say the reason why we have Hong Kong completion in Hong Kong and in England they have English completion is because Hong Kong solicitors are more honest than English solicitors and therefore what may be necessary . . .

A. . . . This has proved to be the case. I think there are less people being struck off and sent to gaol in Hong Kong rather than, for instance, in Britain a place of comparable size in the UK.

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Q. But we have got a list of solicitors who are struck off. You would agree with me, would you not, let's say twenty years ago, a solicitor would probably come from a reasonably well-off family?

A. Yes, I think that is correct.

Q. That may well be still the case fifteen years ago?

- A. Yes.
- Q. But in the last ten years solicitors from all sorts of background emerged?
- A. Yes.
- Q. And when it comes to money matters, would you not agree with me that a solicitor who is personally wealthy is less likely to commit crimes which are detected easily like giving an undertaking and not honour it; the greed may be there but – ?
- A. Yes.
- Q. So could the fact that solicitors in the last twenty years or last fifty years have been proved to be more honest be due more to the fact that they came on average from a better background? 10
- A. It could be so but we are speculating.
- Q. But we are not really speculating because what you are saying is in Hong Kong less solicitors get into trouble; then one has to examine why are they more honest; when you say they are more honest it may well be an equal speculation.
(To Court) My Lord, I will now go into a different topic which will take quite some time.

COURT: What topic?

MR. TANG: That deals with the question of completion, my Lord, who was acting for whom. 20

COURT: Oh, I see.

MR. TANG: That will take some time.

COURT: What evidence has Mr. McElney given us?

MR. TANG: I am afraid he gave quite a lot in cross-examination.

(Court and counsel discuss the length of this witness's evidence.)

5.05 p.m. Court adjourns

1st August, 1980

10:05 a.m. Court resumes Appearances as before.

D. W. 6 Brian Shane McELNEY OFO

XXN. BY MR. TANG (Cont.)

- Q. Mr. McElney, I just have a few more questions for you and before I come to the questions I will just remind you briefly of what you said yesterday as a lead up to them: yesterday you told my Lord that there are about fifteen or sixteen firms on your list and that . . .
- A. . . . Whether that figure is accurate – I said round about . . . 10
- Q. . . . Round about.
- A. It could be twenty; it could be ten; I am not positively sure.
- Q. And you told my learned friend MR. Price in chief that by definition they are almost relatively small firms or people who have not been qualified for that long?
- A. Yes.
- Q. And when you deal with those firms you would agree to have a Hong Kong completion if the sum involved is, say, \$300,000 or under?
- A. Again that wouldn't invariably be the case; that would depend on the firm in question.
- Q. But some firms you would not have a Hong Kong completion with them if the sum involved is more than \$300,000? 20
- A. Yes.
- Q. And you said the list would expand as the amount of money involved increases?
- A. Yes.
- Q. You also told my Lord that this list came into existence after the Danny Yiu affair?
- A. Yes.
- Q. You have told my learned friend Mr. Price that you did not know yourself what Danny Yiu himself looked like?
- A. Yes.
- Q. And you say you have not heard anything to his discredit so far as his reputation is concerned; would it be correct to say that in 1976 Danny Yiu was – the name Danny Yiu was not really familiar to you? 30
- A. I know that such a firm existed.
- Q. Apart from that – that would have been the extent of your knowledge?
- A. I might have known that it existed for several years; whether that is correct I am not sure.
- Q. But that would be all that you knew . . .
- A. . . . Yes.
- Q. . . . of that firm?
- Now, if you had prepared a list before 1976 – let's assume that before 1976 another solicitor had absconded with money as a result of a Hong Kong completion, would you not agree with me that Danny Yiu & Co. would have been just the type of firm whose name would be on your list? 40
- A. Probably, yes.
- Q. Now, you said that – you told my Lord what factors you would have taken into

consideration before making a reasoned judgment as to how much a firm is to be trusted or whether or not you should do a Hong Kong completion with them or whether or not you should adopt other precautions you told my Lord the sort of matters you would take into consideration. Would it be correct to say that one factor which you never took into consideration was whether or not your client could afford to lose that amount of money if something should go wrong?

- A. I'm sorry . . .
- Q. . . . Now you have told my Lord . . .
- A. . . . I think that – it wouldn't register – it wouldn't be a factor that you would consciously take into account but that particular factor would colour your attitude to the rest of the factors. 10
- Q. Do you mean to say that you would consciously or subconsciously?
- A. Subconsciously I think you would take into account.
- Q. Whether or not your client can afford to lose that amount of money?
- A. Subconsciously.
- Q. I see, but you would not have made any or so your decision on the matter would vary according to the wealth of your client?
- A. It is hard to . . .
- Q. . . . If he is a wealthy man I suppose he may be able to afford to lose more than if he were not a wealthy man? 20
- A. Subconsciously perhaps.
- Q. But certainly not consciously?
- A. No, not consciously.
- Q. Notwithstanding that you were under the impression, and you are still under the impression; that when money is sent over in accordance with Hong Kong completion you are doing it at the risk of your client?
- A. Yes, that is correct.
- Q. Now, money received by a solicitor from his client is considered as trust money in a wider sense, is it not? 30
- A. Yes.
- Q. Do you consider yourself as under an obligation not to take avoidable risks with your clients' money?
- A. It's given you in circumstances that we know about here to complete a conveyancing transaction, it's given you in circumstances where that transaction should be completed in accordance with Hong Kong style of conveyancing; and that is it; you go ahead and complete the transaction.
- Q. You have already . . .
- A. . . . You take all what I call the normal precautions in Hong Kong and these precautions were taken in this case. 40
- Q. Like – you told my Lord that it was not your practice to tell your clients what completion in Hong Kong entailed.
- A. Yes.
- Q. You told my client (my Lord?) that if you were to try to explain to them they may think that you are round the bend?
- A. Yes.
- Q. Would it be a correct inference from your evidence that your clients would not be – it would not be readily comprehensible to your client what completion in the Hong Kong sense would entail?

- A. Correct, they are probably not interested; all they are interested in is getting their flat or getting their money if they are the vendor— getting into possession – in the fastest possible time.
- Q. Yes, would it not be the important consideration, according to you, from your clients' point of view that their money should be safe?
- A. But this presupposes that the solicitor with whom you are dealing with is prepared to put his whole professional reputation – his whole future – on the line.
- Q. That is not such a rare occurrence as not to be with examples – as to be unavailable within living memory? 10
- A. One case in fifty years.
- Q. Dishonesty?
- A. No, I don't mean dishonesty.
- Q. You remember you agreed with me yesterday that there is no difference in a solicitor who was dishonest in embezzling his clients' money or who was dishonest in vouching on an undertaking; now, you haven't yet – you see, your answer to my question as to whether or not you consider yourself under a duty not to take avoidable risk was that when clients entrust you with completion, Hong Kong completion would take place; your answer would only be correct if your supposition is correct and that is your client in full possession of the facts assented to the risk? 20
- A. It wouldn't have mattered which firm he had gone to; the same result would occur.
- Q. What do you mean by this – you mean they would still have adopted the Hong Kong completion?
- A. Of course.
- Q. Now, Mr. McElney, assuming that the court should rule that when you send over money on – in accordance with Hong Kong completion, the risk is on the solicitors?
- A. Yes.
- Q. Would you still continue with the Hong Kong practice?
- A. I think that supposes far too much.
- Q. With respect it doesn't. 30
- A. For the simple reason that if that was the rule obviously all firms in the Colony would have to uphold the procedure.
- Q. Now, Mr. McElney, my question is a very simple one and is your answer this: if it should be that contrary to your belief when you send money over in accordance with Hong Kong completion the risk falls on the solicitor . . .
- A. . . . Yes.
- Q. . . . You would see if there are other ways which are safer from the solicitors' point of view?
- A. Yes.
- Q. You would look for alternatives? 40
- A. One would have to look for alternatives or try to but whether it would be possible without the most colossal upheaval in Hong Kong is questionable.
- Q. Yes, so it would be correct to say that the effect of your evidence is this that on the belief – in the belief that a risk falls on your client you are quite happy to go on with Hong Kong completion as it is practised now, but if such risk should fall on the solicitor then you would see if there are alternatives open to the profession?
- A. The whole profession would see whether there are alternatives open.

MR. CHEUNG: Can I have that answer?

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Brian Shane
McElney
cross-
examination

- A. The whole profession would have to see if there is an alternative.
- Q. "The whole profession would see if there are alternatives." Now, leaving aside the context of completion, you would agree with me as a general proposition, would you not, that you should not take any avoidable risks with your clients' money?
- A. Put it that way the answer would be "yes" . . .
- Q. . . . Right.
- A. . . . I do agree, but what we are – one of the questions that has to be decided is whether my firm adopted negligent practices in Hong Kong since . . . 10
- Q. . . . I appreciate your point, in fact that would be, I think, very . . .
- A. . . . It is completely different.
- Q. Yes, there is going to be a very interesting debate on it later on today.
- A. Yes, correct.
- Q. Yes, but that is not quite my question; so you agree with my question, as a general proposition, that you should not take any avoidable risks with your clients' money. Now, you appreciate, do you not, that a solicitor who has got clients' money and put it in a bank account that is an unavoidable risk in common – in modern days?
- A. If the bank goes busted.
- Q. Yes; and if the bank should go bust and notwithstanding that it was an unavoidable risk, the solicitor is responsible, is it not? 20
- A. On the contrary, and in fact I do not believe that the solicitor is responsible in those circumstances.
- Q. But that would be on the basis that the risk is unavoidable because in modern days people put money in the bank?
- A. Correct.
- Q. Yes.
- A. On the other hand, there has to be some judgment used as to which bank to put it in.
- Q. Yes, and that is why you are not allowed, for instance, to put money in a depositing company? 30
- A. Well, that would be a breach of the solicitors' accounts rules anyway . . .
- Q. . . . Quite . . .
- A. . . . Unless it was with the clients' specific consent.
- Q. Yes, and the rules are drawn with that – with the protection of the clients in mind?
- A. Yes.
- Q. And I think this is a common practice – the same as the bank. Now, this practice of Hong Kong completion, according to the Law Society circular, grew up as a matter of convenience and courtesy; you would agree with that, would you not?
- A. I think that is probably an over-simplification position because you must remember that the vendor is interested in getting his purchase money as fast as possible, the purchaser wishes to get into possession as fast as possible, and they don't want to wait around for three months like they do in England. 40
- Q. I will come to that later about the practice in England.
- A. Well, the practice in England is going over to Hong Kong practice now.
- Q. Before I go to that, maybe I will ask you to restrict yourself now to answering my question: according to the Law Society circular, it grew up as a matter of convenience and courtesy when – I think in the words of the draftsman of that circular – "when Hong Kong was a much smaller place", you would agree with

- that, would you not, as a general proposition?
- A. I say it is an over-simplification situation but it is correct.
- Q. Hong Kong fifty years ago I suppose things moved at a leisurely pace?
- A. We were only about thirty solicitors in those days.
- Q. And in those days everybody knew everybody else?
- A. Yes.
- Q. And it is quite understandable why in that kind of situation this practice should first come to be adopted?
- A. Yes. 10
- Q. You are not suggesting to my Lord that when this practice was first adopted in Hong Kong solicitors in Hong Kong come – came to the conclusion that it would be in the public interest to introduce this practice; that might have been one of the results of the practice but at the time when it was introduced it was certainly not introduced for that purpose, would you not agree?
- A. I do not know why it was introduced.
- Q. But it would be improbable, would you not agree with me?
- A. I think we are speculating personally.
- Q. But fifty years ago most solicitors would have been English solicitors, would they not? 20
- A. Yes, they would have been.
- Q. They would have grown up and be trained in England?
- A. Yes.
- Q. And they would have been trained in English completion?
- A. Yes.
- Q. They come over to Hong Kong?
- A. Yes.
- Q. Fifty years ago Hong Kong was a sleepy little place?
- A. Yes.
- Q. No comparison between Hong Kong and London, for instance, fifty years ago? 30
- A. Well, I think even in those days things moved somewhat faster than in the UK . . . in the business world.
- Q. You are not seriously suggesting that those solicitors fifty years ago said to themselves: “Let us change the practice in Hong Kong because it would be good for the community” and not to say to themselves “We know one another, we are a small community of solicitors and we know who is trustworthy and who is not and therefore let us . . .” . . .
- A. . . . I don't know; I mean this is your interpretation that you put on it; it is probably correct but I wouldn't like to say . . .
- Q. . . . You see, the suggestion that I want to make to you is this: the practice was first introduced in Hong Kong as a convenience to the solicitors and as a matter of courtesy? 40
- A. Yes.
- Q. It continued on that basis; there was no conscious deliberation on the part of the solicitors' profession, after Hong Kong had ceased to become a sleepy little town, to continue this practice on the basis of public interest; it was continued because it had insensibly grown into the system?
- A. I believe it was continued because it was found to be much more efficient from the public's point of view.

- Q. Was it ever so stated in the Law Society's circular?
- A. It isn't, no, it is not . . .
- Q. Are you not surprised that people who were charged with the duty by the Law Society to look into the matter never proffered that as one of the reasons?
- A. They were propagating the reasons at least ten years after Hong Kong had ceased to be a sleepy place.
- Q. Yes, but there was no suggestion that "Let's continue with it because it is good in the interests of the public", was there?
- A. I haven't said that with due respect. 10
- Q. So you are merely expressing your personal view; and would it be correct to say that your personal view is formed – not consciously formed before 1976 but it's a view which you would express now to justify the practice?
- A. Ever since my arrival here I have always considered that the – when I –after I became acquainted with Hong Kong conveyancing and the practice of it how much more efficient it was than in the UK.
- Q. Now, let's deal with . . .
- A. . . . And it is very interesting to see that the UK is now going over to postal completions which have many of the same aspects as Hong Kong completions today. 20
- Q. Has the question of at whose risk that was done decided?
- A. No, it has not been decided but in the same sort of . . .
- Q. . . . But in England . . .
- A. . . . In postal completions they do now send moeny over by post.
- Q. And you do not know if they do it under insurance cover or not?
- A. I really don't know that but I do know that it was – the practice was looked at by the Law Society, and I believe approved, but there have been no judicial decisions as to where the risk lies.
- Q. But in England of course there is an indemnity funds, is there not, for foreign solicitors? 30
- A. Yes, there is, a small one, a relatively small one.
- Q. You are not suggesting that postal completion would be adopted for large transactions?
- A. I believe it could be; I don't think there has ever been a suggestion that there should be a limit.
- Q. One can understand if one were to do it with the equivalent of Johnson, Stokes in London but you are not suggesting that he would do it with the equivalent of a Danny Yiu in England?
- A. Most postal completions, as I understand it, as I say, I have no experience of this, are with country firms to avoid everybody travelling around from – and spending now – what is now substantial sums of money travelling backwards and forwards to a town in the country. 40
- Q. Yes, with country property one can understand it, when you would be buying an estate in Gloucestershire.
- A. No, no, it is not in connection with estate; it is buying a house somewhere in London. Your solicitor is in London but the vendor solicitor is in, say, Peterborough; you've got to go up to Peterborough . . .
- Q. . . . In other words, buying a property . . .
- A. . . . So this is done through the post.

- Q. Outside Peterborough for five thousand pounds it would hardly justify the expenses of everybody travelling there for completion even . . .
- A. . . . I doubt if there is a house in England for five thousand pounds.
- Q. Maybe now ten thousand pounds.
- A. I think the minimum now is about twenty.
- Q. But one can understand that a few years ago one could buy a cottage there for several thousand pounds.
- A. That hasn't been so for a long time.
- Q. Now, you mentioned the question of English completion and you said yesterday it would take three to four months; you are not seriously suggesting to my Lord that three to four months – let's assume that it takes three or four months in England . . . 10
- A. . . . Yes.
- Q. That period of time is really – is solely attributable to the fact that they have English completion rather than Hong Kong completion?
- A. No, I am not, I think that would be wrong; you've got to make separate land title separately . . .
- Q. . . . You would agree with me in England that a title is much more complicated?
- A. Actually on the contrary, I think in many ways it is much simpler because we have got registered land and everything is there in one register. 20
- Q. Don't we have a Land Registration Office in Hong Kong?
- A. We do.
- Q. Yes, but in England you don't normally just . . .
- A. . . . But it is not a land registration; it is a deeds registration in Hong Kong.
- Q. But it would have the same effect?
- A. No, it doesn't, because in England a land registry is a government guaranteed title.
- Q. But, Mr. McElney, in Hong Kong a solicitor does no more enquiring than searching the land register, does he?
- A. Not absolutely correct because it might – it depends on your transaction but – supposing you were buying a piece of property for redevelopment, for instance . . . 30
- Q. . . . Would that make a difference?
- A. It would make a difference if you hadn't searched the town plan . . .
- Q. . . . But if you were to buy a flatted factory premises in Kwun Tong you would not go there to see whether or not there are any rights of common, for instance?
- A. No, that is correct.
- Q. But title there, would you not agree with me that in England it is usual to file a requisition of title in transactions?
- A. Registered land.
- Q. But not, of course, all, as my learned friend Mr. CHEUNG has reminded me, not all land are registered land in England. 40
- A. I should think – I do not know what the percentage is but it has been going up and up and up; I think it is probably seventy to eighty per cent unregistered.
- Q. Do you agree with me that in England there would be requisition of title?
- A. For unregistered land the answer would be "yes", almost certainly . . .
- Q. . . . And you would also agree with me . . .
- A. . . . For registered land -- as I say, I haven't done conveyancing for twenty-five years but my recollection is that it was not so normal.
- Q. But in the purchase of a leasehold in England it would be much more complicated

- because the head lease would be more complicated than the usual Crown lease in Hong Kong.
- A. It might be less standard.
- Q. Pardon?
- A. It might be less standard.
- Q. Certainly less standard?
- A. Yes.
- Q. And do you not agree with me that part of the reason for these three or four months is simply because people do things at a more leisurely pace there, not because of English completion but because they do things in a more leisurely pace? 10
- A. I think they probably do; they won't turn up to it.
- Q. No. In Hong Kong you would agree with me, would you not, most transactions – conveyancing transactions – are sale and purchase of flats?
- A. Yes.
- Q. Factories or domestic?
- A. Yes.
- Q. And you would agree with me, would you not, that the usual time stipulated for completion is one month?
- A. I don't think this is the usual time but in many transactions certainly they want completion straight away; one week is quite common. 20
- Q. But you would say – would you not agree more transactions are completed . . .
- A. . . . One month . . .
- Q. . . . One month?
- A. I should say about 50 per cent. When you are dealing with flats in completed buildings as opposed to uncompleted . . .
- Q. . . . With uncompleted buildings that would take years.
- A. Then, of course, they have got to take years to complete the building.
- Q. So a lot of the sales are sales of flats in uncompleted buildings?
- A. Yes. 30
- Q. A lot of the sales are sales on completed buildings?
- A. Yes.
- Q. And those for the completed buildings the normal time is one month for completion?
- A. That is the normal stipulated time.
- Q. Yes. You would agree with me, would you not, that one offhand has everything prepared within a month even for an English completion in Hong Kong?
- A. Yes, it depends on the cooperation of the banks more than anything else.
- Q. But you say normally they take one week; they seal documents once a week?
- A. Yes, banks will not seal documents until they have actually received the money; that's the trouble. 40
- Q. Now, I can understand, Mr. McElney, solicitors being reluctant to press their clients or banks for fear of losing their customers.
- A. No, it is not a question of that – the banks will not seal the documents first until after they have received the money; that's the point.
- Q. You agree with me, do you not, that they have no right to insist on that; they are – one is entitled to a reassignment upon payment of the mortgage money?
- A. That is correct, yes, they have got to receive the money first.
- Q. So all that one has to do is to say "I am redeeming and I will give you . . ." . . .

- A. . . . Yes, but the English completion – the bank seals the reassignment and goes along to the – the solicitors for the – acting for the mortgagee bank will be present at the completion; they will hand over the sealed assignment against money; but if the banks won't give you the sealed document until they have received the money . . .
- Q. . . . Yes, but Mr. McElney . . .
- A. . . . Afterall it's your own . . .
- Q. . . . When you say they won't do you mean they are entitled to refuse?
- A. I think they are because they haven't got the money. 10
- Q. But in England they do not refuse, is that what you are saying?
- A. That's correct.
- Q. So there is just a difference in attitude between English banks and Hong Kong banks: in England they do not refuse although they are entitled to; in Hong Kong they do refuse because, according to you, they are entitled to refuse?
- A. They are entitled to refuse because they haven't got the money.
- Q. Now, Mr. McElney, under a mortgage is not the mortgagee entitled to say "I do not pay you until – except upon your reassigning it to me because why should I trust you?"?
- A. Correct. 20
- Q. So the mortgagor is entitled to say to the mortgagee "Why should I pay you money before you give me a reassignment?"?
- A. Yes, the two contemporaneous . . .
- Q. . . . So the two contemporaneously . . .
- A. . . . Of course, they would have to.
- Q. So in that case it is not a matter of the bank saying "I will not seal until after I have received the money"; the bank may say it; the mortgagor is quite entitled to say "You say it – I have noted what you've said but you are not entitled to say something like that. I am entitled to say "Give me a reassignment upon my handing over the money to you." 30
- A. I think that is possible, correct, yes.
- Q. Well, that being correct in Hong Kong, apart from this tenderness with which banks are treated, is one not entitled – is it not reasonable to say that one can have an English completion within a month?
- A. Well, if you can get everybody to sign up without having received the money.
- Q. Well, they do sign up in Hong Kong without receiving money now, except banks it would seem; and then I will come to that later.
- A. So long as everybody is prepared to sign and then come along on the appropriate day to shuffle the cheques and bankers' orders around, that is fine.
- Q. Now, Mr. McElney, is any of them entitled to refuse to do so? 40
- A. The Law Society says . . .
- Q. Quite, so you would agree with me, would you not, in Hong Kong one can have an English completion within a month?
- A. Of course.
- Q. So the average time for a large number of transactions for completion is a month and you can get an English completion within a month?
- A. Yes, but you have got practical problems; you have got people who are terribly busy – you are going to ask the sort of directors of Jardines to come along or directors of the HK Bank or something to come along and sign at the appropriate

date . . .

Q. . . . I appreciate, Mr. McElney . . .

A. . . . And spend their whole time rushing around from office to office.

Q. Quite, the solicitors acting for Jardines certainly would want to accommodate him as much as possible but the solicitors acting for the other parties couldn't care less; would you not agree?

A. Until he is on the other foot.

Q. Until he is on the other foot; so it is a matter of you scratching my back and I'll scratch yours, isn't it; you agree, do you not? 10

A. Well, look, the volume of transactions in Hong Kong is so much faster than in the UK. It is just – I think it personally is impossible.

Q. That is why it is so much more lucrative, isn't it, because of the higher volume?

A. It is not a question of – no, it isn't. Look, first of all, costs are about half than what they are in the UK.

Q. Because of the volume, Mr. McElney.

A. Not necessarily because of the volume but because of the . . .

COURT: . . . I think we are drifting far, far away . . .

MR. TANG: My Lord, actually I was just going to another topic but for the fact that Mr. McElney seemed to want to say something more. 20

Q. I mean, have you quite done with your answer or do you want to say something more on this topic?

A. No, I don't think it . . .

COURT: . . . Well, it was you who introduced the topic.

MR. TANG: Yes, I know, but if he has anything that he wishes to say I do not want it to be cut short.

Q. Now, Mr. McElney, in Hong Kong it is common for a solicitor to act for both vendor and purchaser, is it not?

A. Yes.

Q. It was common in 1976? 30

A. Yes.

Q. In Hong Kong, leaving aside yourself, it was common for solicitors to act for mortgagor and mortgagee, is it not?

A. I don't think that is correct.

Q. But there is evidence that my Lord has heard from Mr. Edmund CHEUNG that he would act for both the mortgagor and the mortgagee.

A. Well, that surprises me.

Q. Now, it is also common now and it was common in 1976, was it not, for solicitors to act for both landlord and tenant?

A. Yes, reasonably common; perhaps not so common as vendor and purchaser. 40

Q. Not so common as vendor and purchaser?

A. Yes.

Q. But you would say it was uncommon for a solicitor to act both mortgagor and

- mortgagee?
- A. Yes.
- Q. The reason you gave my Lord for that yesterday was that would be impossible, "how can I possibly act for the mortgagor?"; do you remember that?
- A. Yes.
- Q. You said that "we would be put in an impossible position"; you also told my Lord that you have only acted for a mortgagor in your career five or six times, mortgagor separately, as it were?
- A. Yes, that is correct. 10
- Q. Would it be a correct inference from your evidence . . .
- A. . . . Well, perhaps a few more times than that.
- Q. But very seldom?
- A. But very rare.
- Q. Would it be a correct inference from your evidence that so far as you are concerned you do not feel that it is really necessary for the mortgagor to be separately – to be represented?
- A. I – that is correct, I think most mortgagees present the mortgagors with a standard document typed for signing and the mortgagees are not going to change their requirements. 20
- Q. No.
- A. It is a take-it or leave-it situation.
- Q. Quite, in fact what you said to my Lord was they would give the terms and all you are doing is to structure a deal according to those terms?
- A. That is correct, yes, and making sure the title is correct.
- Q. So you do not consider it necessary for him to be separately represented – to be represented; would it be correct to say that you do not consider it desirable that he should be represented; I suppose that would follow?
- A. I have never said that.
- Q. No, but would it follow from your evidence? 30
- A. Desirable – I think in certain cases it could be desirable.
- Q. In cases of real magnitude, "yes"?
- A. There are economic reasons here. If you are going off – if the mortgagor is going off to somebody else and he is not going to get one single word in the document changed, because that is what the mortgagee wants, why should he go to another firm of solicitors and pay another set of costs and perhaps to be told that this deal is not necessarily a good one or a bad deal or that the words should change, and then nothing happens because the words are not changed, he is just wasting his money I think.
- Q. I see. Now, when you say you would be put in an impossible position if you were to act for both the vendor and the purchaser, what is the reason for that? 40
- A. A vendor and purchaser?
- Q. Oh, I'm sorry, for both the mortgagor and the mortgagee, what is the reason for that, I mean, what is your impossible position – why?
- A. There is the most clearest possible conflict, isn't there?
- Q. Do you mean to say . . .
- A. . . . Oh dear! Supposing the mortgagee puts in that this facility is repayable on demand . . .
- Q. . . . Yes, and then the mortgagor would say – ?

- A. And the mortgagor would say "Oh, no, that is not what was agreed at all".
- Q. Yes, and then the mortgagee would say –?
- A. And then the mortgagee would say "All right, we won't lend you the money".
- Q. Quite, so . . .
- A. . . . But how could you advise the mortgagee – a mortgagor on that? Surely you would be raising . . .
- Q. . . . "Do you want the money on those terms? Either you agree to those terms or you don't get the money". Would that be a simple matter?
- A. Well, from that point of view, I mean, the document is translated to the mortgagor; he either says he agrees with the terms or he doesn't agree with the terms and I did say that, of course, if the mortgagor ever wanted some terms explained to him those terms were explained to him. 10
- Q. Quite, you see, the impression that I have gained from your evidence is far from it being impossible – for your being put in an impossible position, you are put in the most enviable position of there not being – of there not being anything really that you can do for the mortgagor and therefore there can be no conflict?
- A. Yes, but there might be; one doesn't know, does he?
- Q. Now, in the case of . . . 20
- A. . . . You can't put it – a solicitor does not spend his whole time getting into situations where conflicts arise . . .
- Q. . . . No.
- A. . . . He tries to avoid the conflicts ever happening in the first place. Well, that is perfectly correct.
- Q. Now, in the case of a vendor and purchaser, do you not agree with me that there are potential areas of conflict between them?
- A. Yes, I do.
- Q. In fact they are not potentials; sometimes they are quite real?
- A. Can be. 30
- Q. In those cases you would quite happily act for both – you would act for both? Leave out the word "happily"; you would act for both?
- A. Well, now, you see, you are saying – you are putting it into my mouth that I would act or would be quite happy to act but if I saw a potential area of conflict then I would not be happy to act.
- Q. But is it not inherent in a transaction of a sale and purchase that there might be areas of conflict?
- A. Generally speaking, parties come along to us and say "We want to transfer this piece of property from A to B and that's the purchase price" and that's it.
- Q. Yes. 40
- A. So you can see the chances of conflict are not that great. These are the terms we would structure it and that's it.
- Q. So in the case of a sale and purchase you would be given the terms and you would structure the deal according to the terms that you are given?
- A. Which have been agreed by both of them.
- Q. Now, going back to the question of a mortgage, you would agree with me, would you not, in Hong Kong most mortgages are by way of assignment; I should say almost all the mortgages here.
- A. Yes, I was going to say almost all, yes.

- Q. But – and let’s forget about the present case because of its complication – because it was a debenture.
- A. Yes.
- Q. And only mortgage on a house.
- A. Yes.
- Q. The purchaser would have agreed with the mortgagee to borrow, say, half a million dollars repayable over seven years by instalments.
- A. Yes.
- Q. And the terms would be assignment of the property by the purchaser – by the mortgagor to the mortgagee, the mortgagor paying instalments over seven years. In default of payment of any of those instalments the mortgagee is entitled to call in the law, exercise power of sale, but assuming that the mortgagor pays all the instalments, redemption at the end of it, now, in that kind of case would you not agree with me that it would not put you in an impossible position to act for both the mortgagor and the mortgagee; no question of repayment on demand in that kind of cases? 10
- A. Yes, but you would probably find that there is a clause in it imposing a penalty on an earlier repayment in that case.
- Q. But do they do it with the Hong Kong Bank, one month’s interest; I think that is normal in the trade, is it not? 20
- A. Some banks it is three months.
- Q. Then it would be really a question of the mortgagor shopping around to see the best – whether or not he has got the best terms?
- A. Right, but it wouldn’t be for the solicitors to say “Look here, you haven’t got the best terms.”
- Q. No.
- A. I mean, here, supposing that happened, the bank has instructed us to give three months and we were having to act for the mortgagor . . .
- Q. . . . But assuming . . . 30
- A. . . . we could say, “Look here, you can get one month from that bank”, so you are diddling your client . . .
- Q. But assuming they have agreed before coming to you with all the terms, you do not suggest that the bank would not tell their customers all the terms, all the important terms, for instance, “If you want an earlier repayment, I am afraid it would cost you some money.”; “How much, sir?”; and the answer would be “Three months interest”; “All right, I like the Hong Kong Bank. I agree with three months.”. In that kind of situation there is no conflict, is there?
- A. Presumably that is why they don’t bother to go to other firms of solicitors.
- Q. Now, Mr. McElney, when, as you have told my Lord, if you act for the vendor alone, you, as my Lord had been told rather, if one acts for the vendor alone one gets half costs? 40
- A. Yes.
- Q. If one acts for both the vendor and purchaser?

COURT: Just a minute, if you act for the vendor then you get half costs from the vendor?

MR. TANG: No, from the purchaser – in Hong Kong.

- A. Now, you get half costs from your client who would be the vendor unless there is an agreement to the contrary between the vendor and the purchaser which would shift the liability payment over.
- Q. But in Hong Kong it is invariably – almost invariably – that it is the purchaser who pays it?
- A. I think that is an over simplification because it is not invariable.
- Q. 80 per cent of the cases?

COURT: Big developers selling off their flats . . .

- Q. . . . They would get 100 per cent? 10
- A. Yes, I was going to say if you are talking about uncompleted flats then I would . . . almost – say – invariable. If you are talking about the sale of just one flat completed unit, it is not invariable.
- Q. But more often than not?
- A. I should think the answer is it is more often the other way in fact, the vendor picks up his own . . .

COURT: The sale of property between two ordinary members of the public?

- A. Just one completed flat, it is normal that the vendor pays his own costs and the purchaser – at half scale and the purchaser pays the full scale.
- Q. But if you also act for the purchaser you earn full costs? 20
- A. You always when acting for the purchaser earn full costs.
- Q. Yes, but if you act for both of them you would not get one and a half?
- A. That is correct.
- Q. But if one acts for both one gets the full costs?
- A. Yes.
- Q. So it is obviously desirable, monetarily speaking, for a solicitor who has the vendor as a client also to act for the purchaser, from the monetary point of view, because he would then get an extra half costs?
- A. Yes.

COURT: Just a minute, if you act for both you get the full scale costs. From whom? 30

- A. If you act for both you get full scale costs from the purchaser.

COURT: The vendor doesn't pay anything?

- A. That's correct.
- Q. But that would also be subject to agreement, wouldn't it, because if the vendor and the purchaser agree that they should pay half of the costs of completion then it would still mean that if they employ the same solicitor each of them would pay half?
- A. Yes, and that does happen sometimes.
- Q. Yes, that does happen sometimes . . .
- A. . . . Oh, yes, I should think in . . . 40
- Q. . . . So it is . . .

- A. . . . at least 5 per cent of cases where you are dealing with one flat completed unit, they both agree to pay half.
- Q. So it is really a matter of agreement; but whatever their agreement may be from the solicitors' point of view you don't earn more than one full costs?
- A. Correct.
- Q. In the case of mortgages, if you act for the mortgagee you would get full costs, would you not?
- A. Yes.
- Q. Forgetting who is paying, you would get full costs? 10
- A. Yes.
- Q. It is a matter of arrangement between as to who should pay?
- A. Yes.
- Q. If you act for the mortgagor alone you would get half costs?
- A. Half costs.
- Q. If you act for the mortgagee and the mortgagor you would get one full costs?
- A. I suppose so, yes, but I have never seen the bill.
- Q. What – you have never seen the bill?
- A. The bill would be made out to the mortgagee . . .
- Q. . . . No . . . 20
- A. . . . Payable by the mortgagor, that is the normal –.
- Q. It may be not, it may be not, Mr. McElney, but I am not really concerned with the nicety as to how bills are made out by your firm; I am talking about how much money one can make. So looking at it cynically one can say there is no money in it for a solicitor who has the mortgagee as a client to also act for the mortgagor; there is money in it for the solicitor who has the vendor as a client to also act for the purchaser; that would be a cynical but a correct way of looking at it, would it not?
- A. Cynical, yes, it suppose it is correct.
- Q. Now, so really if you were to say to a mortgagor, "How can I act for you? We are acting for the mortgagee.", it would be more correct to say, would it not, "Why should we act for you because we are getting the full costs anyway", not a matter of can't but won't, because once you remove the question of – concerning conflict of interests' and reduce it to its basest element, that would be the correct way of putting it, would it not? 30
- A. How can you remove a conflict of interests situation?
- Q. But you see – I see, no difficulty in the case of a vendor and purchaser – not too much difficulty in the case of a landlord and tenant.
- A. That's true.
- Q. I have only got one last point, Mr. McElney: 40
you told my Lord that if you were to explain how completions are done clients would not be able to understand it, or would not be interested in understanding it. Now, you would agree with me, would you not, that it is common for professional people to think that their art is so esoteric that laymen would not be able to understand it; it flatters professional men to think so.
- A. I suppose they might.
- Q. Yes, but a lot of times it is quite unfair to the laymen?
- A. Sometimes, yes.
- Q. Now, let me put this hypothetical case to you:

I am a mortgagor who comes to you – I am a mortgagee or a mortgagor coming to you with this kind of transaction, and if you were to explain to them in Hong Kong for convenience sake and possibly as a matter of – for public interest too where before this practice of sending money against undertaking . . .

- A. . . . Yes.
- Q. . . . but in the nature of things that entails some risks; if things should go wrong the solicitor who has done wrong would have either got to leave Hong Kong or go to prison but your money may be lost, and if it is lost it is at your risk. However, there is an alternative open to you: it would mean inconvenience to me; it may even in the long run, according to you, be bad as a matter of public interest but it would be frugal in the sense that you would be able get good title for your money; would you not agree with me that if an average intelligent man-in-the-street would say to you, “Mr. McElney, I am concerned with my own money, I am not concerned with public interest. Please do the second alternative for me.”, wouldn’t you have said that if that had been said to you? Put yourself in the position of client. 10
- A. I might have done but, as I say, I think one has got to look at practicalities and so on.
- Q. Quite; leaving aside the practicalities of it, you would agree with me, Mr: McElney, would you not, that this is not the type of thing which an ordinary man would not be interested in; he would not be interested in as to who has to sign what, what documents have to pass whose hand, but when it comes to a dollar I think an ordinary man is just as careful as a lawyer, would you not agree? 20
- A. I still think that all he is interested in is getting his transaction through . . .
- Q. . . . Safely and at no risk to himself. No doubt that is what I would be interested in too if I were that person, but knowing what the risks involved would – like this, as you have said, I probably would say to my solicitor, “I insist on an English completion or send the money at your risk. What – ?”
- A. I think he could stand to lose the risk of losing the deal completely if he did that because he would probably find the vendor would say, “This is impossible. Can’t do it.”. 30
- Q. But you don’t have to tell the vendor?
- A. Yes, but you’d have to do it . . .
- Q. . . . Yes, by then . . .
- A. . . . The vendor has to cooperate . . .
- Q. . . . Yes.
- A. . . . completion . . .
- Q. . . . But by that time the sale and purchase agreement would have been signed; how can he then say “I don’t sell to you because you want English completion”? 40
- A. I can’t see . . .
- Q. . . . You would have him tied hand and foot?
- A. If you had told him beforehand you probably wouldn’t . . .
- Q. . . . But there is no point in saying this to him, you would agree, would you not?
- A. I suppose so.
- Q. I’m sorry, it is a very minor point.
Have you ever heard of a practice where a solicitor acting for the mortgagee asks the mortgagor to pay the balance of the purchase price to him and whatever costs or stamp duty which is payable on completion so that that solicitor can then forward the whole lump sum of money plus costs and disbursements over to the solicitor

acting for the vendor; have you ever heard of that practice?

A. No.

Q. Do you know whether or not that is the practice which might sometimes be adopted by members of your firm?

A. It shouldn't be because we are not acting – if we are not acting for the purchaser and only acting for the mortgagee we should not be concerned with it.

Q. But according to Miss LEUNG she said at one time in this transaction she wanted to know how much was payable on completion because it was her practice – one of her practices, I think she said, her normal practice – to ask the manager to pay over the balance of the purchase price to her plus whatever costs and disbursements payable to complete the deal. 10

MR. PRICE: I don't remember that.

MR. TANG: Your lordship will remember that she said that in the context of Volume 2.

COURT: No, it might be . . .

MR. TANG: . . . No, the point that I was making to Miss LEUNG was a slightly different one. Maybe if your lordship can look at Volume 2, page 23, your lordship will remember this letter to Danny YIU in the last paragraph saying "a note of the amount required for completion together with a note of your charges". She had said earlier on in her evidence that it was a matter of indifference to her whether or not stamp duty and charges were paid. So I asked her "When you wrote that were you writing as solicitor for the mortgagee or the mortgagor?"; she said "For the mortgagee". I said, "Why it had ceased to be a matter of indifference?", she said it was not a matter of indifference because one of her practices – and at that time she was acting in accordance to her practice – was to ask the mortgagor to pay the full balance of purchase price plus costs and disbursements over to her so that she could pay the whole lump sum of money to Danny Yiu. 20

Q. But you personally are not aware of such a practice?

A. I wouldn't normally have done that myself.

MR. TANG: No. Thank you. 30

BY COURT:

Q. Just before you – , Mr. Price, just two points, Mr. McElney: the undertaking in this case was to have the completed documents available within ten days; that is the normal period, ten days?

A. I think probably fourteen is more normal but . . .

Q. . . . Now, do I understand it then that . . .

A. . . . sometimes it is seven.

Q. Apart from this difficulty which you've said with the banks, apart from that, within ten or fourteen days the documents would be available and you could then, in theory at any rate, have an English style completion? 40

A. If money has already gone over there is no difficulty for the vendor, there shouldn't

- be any difficulty for the vendor to have every single one of those documents ready and signed and to have sent the documents back to the solicitors – to ourselves in other words.
- Q. The problem is, as I understand it from you . . .
- A. . . . But you can't have – you have already paid the money so you haven't in fact – there is no necessity for an English style completion. An English style completion involves . . .
- Q. . . . No, no, what I am saying is if . . .
- A. . . . contemporaneous handing over . . . 10
- Q. . . . if all the documents had been executed and the money was available within ten days, then you could have an English style completion?
- A. But you have already sent the money over. An English style completion involves the contemporaneous handing over of bankers' drafts against documents but if the bankers' draft has already gone over how can you then have an English style completion; it's gone.
- Q. Well, no, perhaps – it is not quite right. What I am saying is this: in this case the documents were to be executed and made available within ten days.
- A. Yes.
- Q. If your firm hadn't retained the money but simply said "Right, we want to complete . . . 20
- A. . . . We have got the money . . .
- Q. . . . "We are not going to let you have the money. Can we have the documents and would you please let us have an appointment ten days from here, we will hand you the money, you will hand us all these completed documents"?
- A. Yes.
- Q. Now, as I understand it from you, the main problem with that is that they would not be able to get a release or a discharge from the bank because they could not give the bank its money.
- A. I think that is correct because in this case, as I understand it, the bank were 30
collecting from two sources; we were only dealing with one source, so you had another problem in that you had to get the money from somewhere else. So in theory if you wanted an English style completion you would have to complete it – both the transactions at the same time because otherwise the mechanics and logistics wouldn't work out.
- Q. And indeed in many conveyancing transactions I imagine you have a chain of events, A is selling to B . . .
- A. . . . Selling to C . . .
- Q. . . . Selling to C . . .
- A. . . . Absolutely, absolutely . . . 40
- Q. . . . And then you've got everybody at the same time . . .
- A. . . . Right, not the easiest of things.
- Q. Now, I am just turning to another aspect of this matter: you said that having seen the file you were satisfied that your firm was not acting for the purchaser because you did not send him a bill?
- A. In conveyancing transactions the bill is handed over or ninety-nine times out of a hundred anyway it's handed over when the guy comes in to sign whatever document it is.
- Q. Now, in this case your firm did act for the purchaser in the preparation of the sale

- of this shelf company?
- A. Oh, yes, that is correct.
- Q. Now, was that not an integral part of the purchase; he was buying a shelf company purely for the reason of purchasing this property?
- A. No, I don't think it was.
- Q. You don't think it was?
- A. No, an entirely separate transaction.
- Q. If it was, assuming for the moment that it was, don't you think that to a layman there was a distinct possibility that he thought that you were acting for him in the purchase because you had sold him the shelf company? 10
- A. So far as the layman is concerned, if you are not charging him you are not acting for him, and certainly if we had been charging – if we had been acting for him it would have been a breach of the Solicitors Rules regarding scale costs. We didn't charge him but – and we would also have collected the stamp duty on the transaction. We neither collected the stamp duty nor billed him, we weren't acting for him. You see – Can I make this point because I think it is important?
- Q. Yes.
- A. My firm had acted for a tremendous number of mortgagees in the Colony and I know it is the practice of some firms when they are acting for the mortgagees to ask the mortgagor and say, "Look here, you instruct us on the purchase of the flat as well", because they make money that way, so they would be able to charge costs. Now, if that is done effectively, the mortgagor is paying at least half as much again because he will have to pick up half of the vendor's costs and if we did adopt this practice we would have half the conveyancing practice in the Colony because we act for mortgagees far more than we do for purchasers and if we tell the mortgagors, "Look here, come along and bring us your purchase as well, apart from touting, which would have to be . . . our name would be mud in the Colony because we are effectively we would be ensuring that the mortgagor has paid more money and we would be pinching a great deal of practice from other firms of solicitors and we have never adopted that practice and I hope we never do. 20 30
- Q. Now, I think you said also that if a purchaser has his own solicitor acting for him in a sale, it does cost him more money?
- A. Yes, a separate solicitor acting for him, that is correct.
- Q. Now, if a client of yours, somebody you had done work for, came to you and said, "I am buying a property. Now, what is your advice to me?" would you normally say, "Well, we think you should be represented separately", or do you say, "Well, it is a fairly straight forward transaction. I would save you money if the vendor solicitor also acted for you."?
- A. I would certainly tell or it depends upon the client relationship. Most clients that we are dealing with know the score on this so I wouldn't be telling one of my big clients what he already knows but if he is an ordinary man-in-the-street and he comes in and says, "Could you act for me on the purchase of this particular flat?", I might say, "Yes, we would be delighted to act; it would cost you so much. If you go to – if you went to the vendor solicitors it might cost you nothing." I would probably tell him that. I'd almost certainly tell him that. 40

MR. CHEUNG: May I ask your lordship to clear up one point from Mr. McElney . . .

COURT: . . . Yes.

MR. CHEUNG: . . . which is this: if the purchaser instructs his own solicitor to act for him he pays his own solicitor half the costs?

A. No.

COURT: "No".

A. The purchaser always pays the full scale to whoever he instructs.

MR. CHEUNG: And, in addition, he has to pay half the costs to the vendor solicitors if the agreement so provides, is that it?

A. Yes, that's right.

Q. In the absence of agreement he would pay his solicitors full scale . . .

A. . . And the vendor would pay half.

10

COURT: Yes.

REXN. BY MR. PRICE:

Q. About the vendor's costs in the circumstances you have described, you said in answer to my friend Mr. TANG – you said again now in answer to his lordship – that if the vendor solicitor is acting for the vendor alone he gets from his client half scale – half the scale costs?

A. Yes.

Q. And you went on to say "Unless agreement – the agreement is for payment by the purchaser in which case the purchaser will pay those costs".

A. Yes.

Q. Now, the agreement you are referring to there – this is right, is it? – is the sale agreement between the vendor and the purchaser?

A. Yes, it is.

Q. That is an agreement using rotten old Latin terms which, as far as the vendor solicitor is concerned, is *res inter alios acta*?

A. Correct.

Q. It doesn't give – Does it give the vendor solicitor any right as against the purchaser?

A. Well, it couldn't do, because he is not even a party to the agreement.

Q. It couldn't do; the vendor solicitor is still entitled, is he?

A. He is still entitled as between himself and the vendor to receive costs from the vendor but it is a matter of contract that the vendor has indemnity if you like to put it that way.

Q. Yes, so that the – although the costs may loosely be said to be payable by the purchaser and although the purchaser may in fact pay those costs direct to the vendor solicitor, the purchaser is doing that pursuant to an obligation owed to whom?

A. Owed to the vendor.

Q. Yes. You were asked or I think it arose in your interchange of question and answer

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with his lordship that here in the circumstances of this case there had to be, in order to clear off the prior mortgage, there might have had to be co-ordination of the sale of the upper floors as well?

A. Yes, I think that's right.

Q. When – So far as a mortgagee/a mortgagor relationship is concerned, an existing mortgagee/mortgagor relationship, is it within your experience that the contract of mortgage includes ever a provision requiring the mortgagee at redemption to attend a synchronising meeting so as to facilitate a completion of a sale of the mortgage property?

10

A. No, there is no such provision. The mortgagee has to re-assign once he has got the money; that is the only provision that there is to it.

Q. Yes; and is there then any legal right upon a vendor – in a vendor, in your experience, whose property is subject to a mortgage to call on the mortgagee to so organise matters at redemption that they are synchronised with the purchase?

A. I have never had that experience; I shouldn't have thought so.

Q. It is something. . .

A. . . . I don't think large banks in Hong Kong would take too kindly to being shoved around by a relatively small mortgagor.

Q. Mr. Edmund CHEUNG having had put to him, considering the situation here, said that true English style completion is virtually impossible to achieve in the circumstances. . .

20

MR. TANG: . . . My Lord, with respect, that is what he said but he qualified it by saying that he meant it would take two weeks more, not impossible in the sense that it would take two weeks more.

MR. PRICE: Yes.

Q. Well, you see, true English style – you have already acknowledged, I think, Mr. McElney, that with the mortgage arrangements here the usual position is that the legal title is in the mortgagee.

A. That is correct, generally.

30

Q. And redemption transfers that legal title . . .

A. . . . Back to the mortgagor.

Q. To the mortgagor. When that is done, the mortgagor, if he is a vendor, is in a position to complete?

A. Correct.

Q. And not before?

A. Legally, that is correct.

Q. Let me ask you about the – you see, the position that was put to you and it is a hypothetical one: the mortgagee for whom you are doing business is proposing to lend money on mortgage to a proposed mortgagor and the mortgagor asks you to act for him, now, if you agree to act for the mortgagor and this question arose, the mortgagor asks you, "Are these terms that this mortgagee offers me the best available terms?", in your experience as a solicitor would you be able to answer that question?

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A. It would place me in an impossible position because we have received instructions from the mortgagee.

- Q. So to answer the question – to answer the question might involve a breach of duty to your mortgagee client?
- A. It almost certainly would.
- Q. And not to answer it might involve a breach of duty to your now mortgagor client?
- A. Correct.
- Q. Is that the sort of conflict of interests that might deter a sensible solicitor, in your view, from acting – from agreeing to act for both parties?
- A. Yes.
- Q. You were – It was suggested to you that if you had prepared before . . . 10
- A. . . . Could I also make – add one point to that?
- Q. Yes.
- A. If we were acting for the mortgagor as well and we didn't tell our client mortgagee and he found out afterwards, we would have held to pay.
- Q. There would be recriminations – “We would have held to pay”, you said.

MR. CHEUNG: It depends on whether the mortgagee got the mortgage or not.

- A. Yes, that's the case.
- Q. Now, you were asked about the hypothetical situation if you had been preparing before 1976 the sort of informal list of solicitors.
- A. Yes. 20
- Q. About whose cheques you have an earmarked note in your mind; would you have put Danny Yiu on the list – would it have affected your – would it have affected your answer to that question if there had been added in the hypothesis the fact that your firm, Miss LEUNG, had previously done a number of conveyancing transactions with Danny Yiu's firm?
- A. The fact that we had done transactions. . .
- Q. . . . Previously . . .
- A. . . . transactions with that firm and gone through the normal way might have influenced one in the attitude that one took but I don't think the fact that he – that those transactions that we had done would necessarily have meant that his name would not have been on the list. 30
- Q. No, and just to clarify the position: even today, the fact that a firm figures in the list, does that mean that transactions Hong Kong style are not completed or does it mean that the question of adopting a modified procedure arises?
- A. The effect of being on the list is that a partner looks at it and he may say “OK, let us proceed Hong Kong style”, or he may say “Can we arrange in this case to draw cheques, several cheques, payable to the vendor bank” etc.; and if the latter situation is the case then the solicitor on the other side would be rung up to ask whether “Can we do this?”, will he give his undertaking against those separate cheques, but even that way is not too good, of course. One must bear in mind that . . . 40
- Q. . . . Mr. McElney, let me ask one question – in fact just a guide line – maybe an English lawyer's ignorance of possible local – Is a solicitor in Hong Kong, as in England, an officer of the Court?
- A. Yes.
- Q. When on being asked – You were asked about the risk involved in a solicitor's going off with money handed over to his firm.

- A. Yes.
- Q. In a Hong Kong transaction, of course, the risk has two dimensions, hasn't it: first, the possibility of the risk materialising to a reality?
- A. Yes.
- Q. And, secondly, the consequences?
- A. Yes.
- Q. The consequences. Before Danny Yiu's misdeed, if a client had asked you what is the chance of the risk materialising into a reality, has it happened, what would your answer to those questions – ? 10
- A. I would have told him that in my entire experience in Hong Kong it has not happened and I don't know how many millions of transactions that would have been.
- Q. And if he had asked you, "And what would be the consequences for the solicitor of yielding to the temptation to convert the risk into a reality?", What would you have said?
- A. I would have said that his entire career was at an end.
- Q. His entire career?
- A. Yes.
- Q. At an end; and would you have said that he would be committing, of course, a crime? 20
- A. Certainly, yes.

MR. PRICE: Yes, thank you very much.

COURT: Yes, thank you.

MR. PRICE: My Lord, I would be happy to have a short adjournment.

11:26 a.m. Court adjourns

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.

Signed 30
(Shirley KING)

Signed
(Heather TEOH)

Signed
(Ann Mary LAU)

Signed
(Brenda TSAO)

In the
Supreme
Court of
Hong Kong
High Court
Defendant's
evidence
No. 12
Brian Shane
McElney re-
examination

Signed
(Agnes LIU)

Signed
(Lily HO)

Signed
(Miranda SHUI)

Dated the 26th day of January, 1981.

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 13
Notice of
Appeal of
5th
Defendants,
and Third
Party
25th Nov.
1980.

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN:

JOHNSON STOKES & MASTER (a firm)

Appellants
(5th Defendants
and Third Party)

and

EDWARD WONG FINANCE CO. LTD.

1st Respondents 10
(Plaintiffs)

POMAY INVESTMENTS LIMITED
(formerly known as
BOVILL INVESTMENTS LIMITED)

2nd Respondents
(1st Defendant)

DAVID MA POK SHUM

3rd Respondent
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent 20
(4th Defendant)

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 Appellants (5th Defendants and Third Party in the Court below) on appeal from the judgment herein of the Honourable Mr. Justice Penlington given on the trial of this action on the 13th day of August 1980 whereby it was adjudged that the Appellants do pay to the 1st Respondent (Plaintiff in the Court below) damages in the sum of \$1,295,000.00 together with compound interest thereon at the rate of 1% per month from the 27th day of January 1976 to the 13th day of August 1980 and further that the 2nd, 3rd, 4th and 5th Respondents (1st, 2nd, 3rd and 4th Defendants in the Court below) were entitled to be indemnified by the Appellant in respect of the said sum adjudged to be due also from the 2nd, 3rd, 4th and 5th Respondents to the 1st Respondent and costs to be taxed for an Order that the said judgment may be set aside and that judgment be entered in the above mentioned Action for the Appellant with costs.

30

AND FOR an Order that the Respondents do pay to the Appellant the costs of this Appeal to be taxed.

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 13
Notice of
Appeal of
5th
Defendants,
and Third
Party
25th Nov.
1980.

GROUNDS OF APPEAL

1. The Learned Judge was wrong in finding that Miss Leung Wai Ling of the Appellants acted either negligently or in breach of duty to the 1st Respondent in causing the completion monies to be sent to Messrs. Danny Yiu & Co. in accordance with accepted Hong Kong conveyancing practice.
2. The Learned Judge was wrong in holding that Miss Leung was either negligent or in breach of duty in failing to:—
 - (1) warn either Edward Wong or the 4th Respondent of the “risks” involved in sending the completion monies to Danny Yiu.
 - (2) advise either Edward Wong or the 4th Respondent that there were other modes of conveyancing procedure available for completion such as the “English style completion”. 10
3. The Learned Judge was wrong in holding that the circumstances as known to Miss Leung were such as to call for an “English style completion”.
4. The Learned Judge failed to give any or any adequate consideration to the fact that the mode of completion adopted by Miss Leung was:—
 - (1) at all material times a method approved expressly or by necessary implication by the Committee of the Law Society.
 - (2) the mode of completion used in 99.99% of Hong Kong conveyancing transactions. 20
 - (3) a mode of completion which had never previously in Hong Kong led to any loss to the client.
5. The Learned Judge should have held that Miss Leung in causing the completion monies to be sent to Danny Yiu against his undertaking acted in accordance with accepted conveyancing practice in Hong Kong and accordingly the Learned Judge should have found that Miss Leung acted neither negligently nor in breach of duty.
6. The Learned Judge should have found:—
 - (1) that Danny Yiu was acting for the 2nd, 3rd, 4th and 5th Respondents in the purchase and mortgage of the property.
 - (2) that the 3rd, 4th and 5th Respondents were specifically told by Miss Leung to go to the office of Messrs. Danny Yiu & Co. prior to 27th January 1976. 30
 - (3) by necessary inference that the 3rd, 4th and 5th Respondents were specifically informed by David Leung that the Appellants were not acting for them in the matter of the purchase or the mortgage.
7. The Learned Judge was wrong in holding that the Appellants owed any duty to

the 2nd, 3rd, 4th or 5th Respondents in tort or otherwise to advise them or any of them in respect of the proposed purchase of the said property or the mortgage thereof by the 2nd Respondent to the 1st Respondent.

8. The Learned Judge should have held that:—
- (1) the Appellants were not acting for and owed no duty to the 2nd, 3rd, 4th or 5th Respondents or any of them in respect of the proposed purchase of the property or mortgage thereof to the 1st Respondent and that
 - (2) the 3rd, 4th and 5th Respondents knew or ought to have known that the Appellants were acting only as solicitors to the mortgagees in the transaction (i.e. the 1st Respondents) and that
 - (3) the Appellants could not have acted for the 2nd, 3rd, 4th or 5th Respondents in the transactions of purchase or mortgage since this would involve a clear conflict of interest with the duties owned by the Appellants to the 1st Respondent as mortgagee.
9. The Learned Judge should in any event have found that both Edward Wong acting on behalf of the 1st Respondents as mortgagees and the 4th Respondent Shum Ka Ching acting on his own behalf and on behalf of the 2nd, 3rd and 5th Respondents:—
- (1) knew or ought to have known of the “risks” involved in paying the completion monies over to Danny Yiu, and
 - (2) with such knowledge, consented to the monies being paid over.
10. In the premises any award of damages made in favour of either the 1st Respondents or any of the Respondents for negligence, breach of duty on the part of the Appellants should have been for nominal damages only.

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AND FURTHER TAKE NOTICE that the above named Appellants propose to apply to set down this appeal in the Appeals List.

Dated the 25th day of November 1980.

Slaughter and May,
Solicitors for the Appellants,
1518 Connaught Centre, Hong Kong.

To: Messrs. Deacons,
Solicitors for the 1st Respondents
(Plaintiffs); and
Messrs. Philip K. H. Wong & Co.,
Solicitors for the 2nd, 3rd, 4th and 5th Respondents
(1st, 2nd, 3rd and 4th Defendants).

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In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 14
1st
Respondents
Notice
12th Dec.
1980.

Civil Appeal No. 184 of 1980

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN

JOHNSON STOKES & MASTER (a firm)

Appellants
(5th Defendants and
Third Party)

and

EDWARD WONG FINANCE CO. LTD.

1st Respondents 10
(Plaintiffs)

POMAY INVESTMENT LIMITED
(formerly known as BOVILL INVESTMENTS
LIMITED)

2nd Respondents
(1st Defendant)

DAVID MA POK SHUM

3rd Respondent
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent 20
(4th Defendant)

RESPONDENT'S NOTICE OF THE 1ST RESPONDENTS

TAKE NOTICE that the 1st Respondents, while seeking to uphold the verdicts given and judgments entered for the 1st Respondents against the Defendants upon the trial of this action on the grounds on which such verdicts were in fact given and judgments in fact entered, desire to contend on the appeal that the said verdicts and judgments should be affirmed on the following other or additional grounds, namely:

1. That the learned Judge (at pages 5 and 6 of the Judgment) in dealing with the "restructuring" of the transaction as agreed between Miss Leung (described as "Miss Yeung" in the Judgment) and Danny Yiu should not have limited himself in saying that "the only issue to which it is relevant here is that it supports the view that Miss Yeung was doing work which would normally be done by the purchaser's, not the mortgagee's solicitor" but should have gone on to find that such "restructuring" involved an understatement of the true consideration which constituted at least an irregularity under the Stamp Ordinance Chapter 117, that such "restructuring" would have affected the interest in the property to be mortgaged to the 1st Respondents and that Miss Leung in agreeing to such "restructuring" was in breach of her duty towards the 1st Respondents to exercise due care skill and judgment in effecting the transaction.

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In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 14
1st
Respondents
Notice
12th Dec.
1980.

2. That the learned Judge should have found that “the Hong Kong style of completion” was devised for the benefit of solicitors much more than for the benefit of the public (page 12 of the Judgment).

AND FURTHER TAKE NOTICE that the 1st Respondents may seek to rely on further or other grounds after the transcript of proceedings has become available.

AND FURTHER TAKE NOTICE that the 1st Respondents will apply to the Court of Appeal for an Order that the Appellants do pay to the 1st Respondents the costs of and occasioned by this notice to be taxed.

MESSRS. DEACONS
Solicitors for the 1st Respondents

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Dated the 12th day of December 1980.

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 15
Notice of
Appeal of
1st to 4th
Defendants
24th Dec.
1980.

Civil Appeal No. 197 of 1980.

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN

POMAY INVESTMENTS LIMITED (formerly
known as BOVILL INVESTMENTS LIMITED)
DAVID MA POK SHUM

SHUM KA CHING

TSIANG HUNG WEN

1st Appellant
(1st Defendant)
2nd Appellant
(2nd Defendant)
3rd Appellant 10
(3rd Defendant)
4th Appellant
(4th Defendant)

and

EDWARD WONG FINANCE COMPANY LIMITED

JOHNSON STOKES AND MASTER (a firm)

Respondents
(Plaintiffs)
5th Defendants
and Third Party

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 Appellants (the 1st, 2nd, 3rd and 4th Defendants in the Court below) on appeal from so much of the judgment herein of the Honourable Mr. Justice Penlington given on the trial of this action on the 13th day of August 1980 whereby it was adjudged that the Appellants do pay to the Respondent (Plaintiff in the Court below) the sum of \$1,295,000.00 together with compound interest thereon at the rate of 1% per month from the 27th day of January 1976 to the 13th day of August 1980 and costs to be taxed for an Order that the said Judgment may be set aside and that judgment be entered in the above mentioned Action for the Appellant with costs. 20

AND FOR an Order that the Respondent do pay the Appellant the costs of this Appeal to be taxed. 30

GROUND OF APPEAL

1. The Learned Judge was wrong in finding that the mortgage payment of \$1,295,000 had been paid by the Respondents to Danny Yiu and Company in payment of the balance of the purchase price as directed by the letter dated 27th January 1976 addressed by the 1st Appellant to the Respondents.

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 15
Notice of
Appeal of
1st to 4th
Defendants
24th Dec.
1980.

Dated this 24th day of December, 1980.

Robert C. Tang
Counsel for the Appellants

Sd. Philip K. H. Wong & Co.
Solicitors for the Appellants.

To: Messrs. Deacons,
Solicitors for the Respondents,

and

Messrs. Slaughter & May,
Solicitors for the Third Party

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In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 16
Judgment
of the
Court of
Appeal
4th June
1981

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN:

JOHNSON STOKES & MASTER (a firm)

Appellants
(5th Defendants
and Third Party)

and

EDWARD WONG FINANCE CO. LTD.

1st Respondents 10
(Plaintiffs)

POMAY INVESTMENTS LIMITED
(formerly known as
BOVILL INVESTMENTS LIMITED)

2nd Respondents
(1st Defendant)

DAVID MA POK SHUM

3rd Respondent
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent 20
(4th Defendant)

BEFORE THE HONOURABLE SIR DENYS ROBERTS, CHIEF JUSTICE,
THE HONOURABLE MR. JUSTICE LI AND THE HONOURABLE MR. JUSTICE SILKE
IN THE COURT OF APPEAL

ORDER

UPON MOTION by way of appeal from the judgment of the Honourable Mr. Justice Penlington given on the 13th day of August, 1980 made unto this Court by Counsel for the Appellants (5th Defendants and Third Party)

AND UPON HEARING Counsel for the Appellants (5th Defendants and Third Party) Counsel for the 1st Respondents (Plaintiffs) and Counsel for the 2nd, 3rd, 4th and 5th Respondents (1st, 2nd, 3rd and 4th Defendants).

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AND UPON READING the said judgment dated the 13th day of August, 1980.

THIS COURT DID ORDER that the said Appeal should stand for judgment

AND the said Appeal standing this day for judgment in the presence of Counsel for the Appellants (5th Defendants and Third Party) Counsel for the 1st Respondents (Plaintiffs) and Counsel for the 2nd, 3rd, 4th and 5th Respondents (1st, 2nd, 3rd and 4th Defendants)

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 16
Judgment
of the
Court of
Appeal
4th June
1981

THIS COURT DOTH ORDER that this appeal be allowed and that the judgment of the Honourable Mr. Justice Penlington dated the 13th day of August, 1980 in so far as it relates to the Appellants (5th Defendants and Third Party) be reversed

AND IT IS ORDERED that the 1st Respondents (Plaintiffs) do within 14 days from the date hereof repay to the Appellants (5th Defendants and Third Party) the amount of judgment and interest paid over on the 27th day of October, 1980 with interest at the rate of 15% per annum from the 28th day of October, 1980 to the 31st day of December, 1980 and at the rate of 12½% per annum thereafter until the date of repayment

AND IT IS ORDERED that the 1st Respondents (Plaintiffs) do within 14 days from the date hereof repay the amount of taxed costs paid by the Appellants (5th Defendants and Third Party) on the 2nd day of March, 1981 with interest at the rate of 12½% per annum from the 3rd day of March, 1981 until the date of repayment 10

AND IT IS ORDERED that the Appellants (5th Defendants and Third Party) do have costs of the appeal and the costs in the Court below such costs to be taxed

Dated this the 4th day of June, 1981.

N.J. Barnett
Registrar

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 16
Judgment
of the
Court of
Appeal
4th June
1981

Civil Appeal No. 184 of 1980

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN:

JOHNSON STOKES & MASTER (a firm)

Appellants
(5th Defendants
and Third Party)

and

EDWARD WONG FINANCE CO. LTD.

1st Respondents
(Plaintiffs) 10

POMAY INVESTMENTS LIMITED (formerly known
as BOVILL INVESTMENTS LIMITED)

2nd Respondents
(1st Defendant)

DAVID MA POK SHUM

3rd Respondent
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent
(4th Defendant)

ORDER

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Filed the 18th day of June 1981.

Slaughter and May,
1518 Connaught Centre,
Hong Kong.

Solicitors for the Appellants.

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 16
Judgment
of the
Court of
Appeal
4th June
1981

No. 184 of 1980 (Civil)

IN THE COURT OF APPEAL

BETWEEN:

JOHNSON STOKES & MASTER (a firm)

Appellants
(5th Defendants
and Third Party)

and

EDWARD WONG FINANCE CO. LTD.

1st Respondents
(Plaintiffs)

POMAY INVESTMENTS LIMITED (formerly known
as BOVILL INVESTMENTS LIMITED)

2nd Respondents 10
(1st Defendant)

DAVID MA POK SHUM

3rd Respondent
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent
(4th Defendant)

No. 197 of 1980 (Civil)

IN THE COURT OF APPEAL

BETWEEN:

20

POMAY INVESTMENTS LIMITED (formerly known
as BOVILL INVESTMENTS LIMITED)

1st Appellant
(1st Defendant)

DAVID MA POK SHUM

2nd Appellant
(2nd Defendant)

SHUM KA CHING

3rd Appellant
(3rd Defendant)

TSIANG HUNG WEN

4th Appellant
(4th Defendant)

and

EDWARD WONG FINANCE COMPANY LIMITED

Respondents 30
(Plaintiffs)

JOHNSON STOKES AND MASTER (a firm)

5th Defendants
and Third Party

Coram: Roberts, C.J.,
Li, J.A. and Silke, J.

Date: 4th June, 1981.

JUDGMENT

[Standard of care owed by solicitor to client.]

BACKGROUND

This is an appeal by the five defendants in the court below against a judgment of Penlington, J. who awarded \$1,295,000 plus compound interest, to the Plaintiff against them. He also ruled that the five defendants were entitled to be indemnified by the third party (also D.5) a firm of solicitors, Johnson, Stokes and Master, against his award.

It is not necessary, for the purposes of this appeal, to deal with the previous transactions which had affected the property concerned, the ground floor of a factory building at 76 Hung To Road, Kwun Tong ('the premises').

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It is sufficient to say that Mr. Shum Ka Ching (D.3) had agreed in January 1976 to purchase the ground floor of this building from its previous owners, Lucky Time, on behalf of Po Fung, a company of which he was a director. The ground floor was to be transferred to a new company of which Mr. Shum, Mr. David Ma Pok Shun (D.2) and Mr. TSANG Hing Wan (D.4) were to be directors.

This new company, which was a shelf company formed by Miss Leung, an assistant solicitor in the firm of Johnson, Stokes & Master (J.S.M.) (D.5) was called Bovill Investments Limited (Bovill), though its name was later changed to Pomay Investments Limited (D.1).

FINANCING OF PURCHASE

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D.3 paid deposits of \$185,000 on behalf of Po Fung towards the purchase price of \$1,850,000, leaving a balance due from Bovill of \$1,665,000. To raise this money, D.3 approached the plaintiff, Mr. Edward Wong, a licensed money-lender, who carried on business as Edward Wong Finance Company Limited.

Mr. Wong agreed to finance the purchase. He and Mr. Shum (D.3) went to see Miss Leung on 21st January, 1976. At this meeting, Miss Leung was told that D.3. had agreed to purchase the premises and that arrangements had been made between D.3 and the plaintiff for the mortgage of the property to the plaintiff, who would lend sufficient money to D.3's new company to finance its purchase of the premises. Miss Leung was asked to complete the legal formalities for them, being informed that the solicitor acting for the vendors was Danny Yiu and Company, a one-man firm.

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Miss Leung was told, at that meeting, that security for the loan should be effected by a legal mortgage of the property, secured by a debenture charged on the assets of the new company and by personal guarantees to be given by D.2, D.3 and D.4. Miss Leung later advised the plaintiff that the debenture should be charged on the premises to be purchased, rather than on all the assets of Bovill, and her advice was accepted. She was told that the amount to be lent would be about \$1.3 Million, but that she would be advised later of the exact sum.

Miss Leung wrote to Danny Yiu, the vendor's solicitor, asking for the necessary

deeds to be sent to her so that the mortgage could be prepared. In reply, she received a letter from him enclosing copies of various documents. It was arranged between her and Danny Yiu that completion should take place on the 27th January, 1976, in what is generally known as the "Hong Kong style".

In a letter dated 27th January, addressed to Danny Yiu, Miss Leung stated that she would ask the plaintiff, her client, to put her in funds to the amount of \$1,355,000 and would forward a cheque for that amount to Danny Yiu, on his undertaking to send to her within 10 days all the relevant documents duly executed, including the assignment of the premises to D.1, and to arrange for the registration of other documents, including the reassignment of the premises to the vendor by the Hang Seng Bank, the previous mortgagees, so that she could register the assignment to Bovill (D.1) and the debenture to be drawn in favour of Mr. Wong (plaintiff). She added that, if Danny Yiu was not in a position to send the documents within that time, he was not to release the money to his clients.

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On the same day, Miss Leung drafted a letter, which was to be signed by D.1 and sent to the plaintiff, asking the plaintiff, on the execution of the necessary debenture, to forward \$1,355,000 to Danny Yiu. D.1 signed the letter which was sent to the plaintiff. She also wrote to the latter herself, reporting that the mortgage of the premises had been duly secured (D.2, D.3 and D.4 having come to her office and executed the debenture and guarantee) and asked the plaintiff to let her have a cheque for \$1,355,000, payable to Danny Yiu, to be used in payment of the purchase price.

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Miss Leung, after telephoning Danny Yiu to confirm the amount due, sent another letter to him, enclosing \$1,665,000 in the form of three cashier's orders payable to Danny Yiu, on the same day. This larger sum was sent, because Mr. Wong had given last minute information to Miss Leung to the effect that he had agreed with Mr. Shum (D.3) to lend the latter a further \$310,000 on the security of some post-dated cheques and had brought the cashier orders for the enhanced total to her office.

It is not in dispute that, a few days' later, Danny Yiu fled from Hong Kong, without honouring the undertaking which he had given and taking with him a large amount of money, among which was the sum which he had received from the plaintiff, in respect of the purchase of the premises.

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The plaintiff claimed that D.1-D.4 were liable to repay the outstanding amount of the loan (\$1,295,000) and that D.5 as the solicitor for the plaintiff, was liable for negligence. D.1-D.4 resisted the claim, on the ground that they did not owe the plaintiff anything because he had not paid the purchase price of the premises on their behalf to the vendor.

HONG KONG STYLE OF COMPLETION

There were two main points argued in the appeal before us. The first was concerned with the duty which a solicitor owes to his client; this has involved a scrutiny of the methods by which conveyances of property take place in Hong Kong. The second was whether or not D.5 was acting as solicitor for D.1-D.4 in the purchase and mortgage of the premises.

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According to the evidence of Mr. Edmund Cheung, who was at that time President of the Hong Kong Law Society and was called by the plaintiff as an expert witness, and of Mr. McElney, the senior partner in D.5, virtually every conveyance and mortgage completed in Hong Kong within living memory has been effected by what has become known as the “Hong Kong style” of completion; I shall refer to it as such.

The essence of the Hong Kong style is that the solicitor who is acting for the purchaser/mortgagor forwards the purchase price to the vendor’s solicitors (whether by cash, cashier’s order, certified cheque or ordinary cheque) in return for an undertaking by the latter to forward the necessary documents of title, duly executed, to the purchaser’s solicitor within a stated period.

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The evidence, which was not disputed, was that this was the first occasion on which the use of the Hong Kong style had ever resulted in loss to a purchaser, by reason of the dishonesty of a solicitor acting for the vendor.

In England, by contrast, the customary method of completion of a conveyance has required a simultaneous handing over by the purchaser’s solicitors of the purchase price, in return for the receipt from the vendor’s solicitors of the necessary documents of title. (Though this practice has itself recently been modified by the recognition by the English Law Society of the propriety of a system of postal completion).

The existence of a Hong Kong style and its widespread use are not challenged. The substance of it and the degree of risk involved in it are. It will thus be necessary to consider the following questions –

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- (a) Is the duty of care owed by a solicitor to his client sufficiently discharged if he follows a general, approved practice?
- (b) Would an ordinary, reasonable, competent solicitor (“the prudent solicitor”) have followed the Hong Kong style in January 1976 (“1976”)?
- (c) Should a “prudent solicitor” have followed the Hong Kong style in 1976?
- (d) What is the true “Hong Kong style”? Does it contain any preconditions?

DISCHARGE OF DUTY OF CARE OWED BY A SOLICITOR

The main principle is that a solicitor must display the standard of care and skill of a reasonably competent and diligent solicitor. Thus his duty to his client is discharged if he does what a prudent member of his profession would do in the circumstances.

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It was argued for the appellant that it must therefore follow that, if there is an established general practice within the profession applicable to the appropriate function, a solicitor performs his duty by applying that practice in every case, though it was conceded that where there are special factors (“warning bells”) such as ought to put the prudent solicitor on his guard, he must, before adopting the general practice, consider whether these involve special risks such as should dispose him not to follow it.

In *Vancouver General Hospital v. McDaniel*⁽¹⁾ it was ruled, in an action for

(1) (1935) 152 L.T. 56.

In the
Supreme
Court of
Hong Kong
Court of
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No. 16
Judgment
of the
Court of
Appeal
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1981

negligence against a hospital, that it was a good defence to show that the defendants had acted in accordance with a general practice. Lord Alness observed, at p.57 –

“A defendant charged with negligence can clear [himself] if he shows that he has acted in accord with a general and approved practice.”

This passage would seem to suggest, as indeed was Mr. Price’s main submission, that a professional man who follows such a practice is invulnerable to claims for negligence.

Their Lordships, however, did not in terms consider whether a professional man is entitled to follow a general practice blindly, if such a practice holds either a substantial degree of general risk or if it would be dangerous to adopt it if there are warning bells.

The following passage from Charlesworth on Negligence (6th Ed. para. 202) seems to me to summarize accurately the law which governs a professional man who adheres to a general practice – 10

“Compliance with common practice is evidence that reasonable care has been used, but is not conclusive since ‘no one can claim to be excused for want of care because others are as careless as himself.’ (See *Blenkiron v. Great Central Gas Consumer Co.* (1860) 2 F. & F. 437, per Cockburn, C.J.)

It follows that it is open to the court to hold that common practice does not make proper provision for a known risk – See *Morris v. W. Hartlepool S.N. Co.* (1956 A.C. 552).”

Thus, compliance by a member of a profession with a general practice of his profession is strong evidence that he has exercised reasonable care, but it is not conclusive. A solicitor cannot excuse a failure to take an obvious precaution, or to avoid a substantial risk, merely by showing that other solicitors would act, and almost always did act, in the same way. 20

To take a simple example, it may be the general practice to treat a disease with a certain drug. If, however, it is known that a patient suffers an acute reaction to it, it would be unwise to administer it to him. If a solicitor, to whom another solicitor proposes to hand cash, is known by the latter to be heavily in debt and about to leave Hong Kong, this would amount to warning bells, to which a prudent man must listen.

Thus, as a matter of law and of common-sense, it remains open to a court to hold that a general practice is imprudent, or makes inadequate provision for a known risk, and that a prudent solicitor should not have followed it, even if all solicitors have done so for a long time. 30

WOULD A PRUDENT SOLICITOR HAVE FOLLOWED THE HONG KONG STYLE IN 1976?

It is important to remind ourselves that we must not judge the reasonableness of the use of the Hong Kong style in 1976 with knowledge of Danny Yiu’s defalcations. We

must consider whether a prudent solicitor would have followed such a practice in 1976.

Miss Leung did what virtually every Hong Kong solicitor then did and had done within living memory. Her action was unquestionably supported by common practice and by what was, at the very least, the implicit approval of the Law Society, contained in a circular dated 30th March, 1966.

This circular draws the attention of the members of the Hong Kong Law Society to the practice of sending a cheque, or executed deed, to another solicitor, against the latter's undertaking, and informs them that it is unethical to refuse to complete in the English manner if another solicitor requires this "for reasons of greater security".

It reminds members that "the present practice of sending the consideration money against an undertaking is a practice of courtesy and convenience only." 10

The terms of this circular appear to me to imply that the Law Society takes no objection to "the present practice" (which was the Hong Kong style) though it draws attention to the fact that the English practice is safer.

It should be noted, in passing, that it was the 1966 circular which is relevant. The 1965 Law Society circular was no more than a working paper circulated for comment. The 1966 circular contains the considered views of the Society.

It is to be expected that a professional man will normally follow the directions or advice of his governing professional body. Indeed, a failure to comply will often involve the risk of disciplinary proceedings being launched against him. 20

I have no doubt that a prudent Hong Kong solicitor would, in 1976, have regarded the circular as authorising him to use the Hong Kong style; that he knew it to be in general use; and that he would have adopted it unless there were warning bells.

There were no warning bells here. Miss Leung knew of nothing to Danny Yiu's detriment and had conducted similar transactions with him before, without mishap. I thus see no factors which should have warned Miss Leung that such degree of risk as was always present in the Hong Kong style was enhanced in this instance.

SHOULD A PRUDENT SOLICITOR HAVE FOLLOWED THE HONG KONG STYLE IN JANUARY 1976?

As I have already said, it is strong evidence that a solicitor has acted with prudence if he is able to show that he followed a general practice; all the more so if this practice had received the seal of approval of the governing body of his profession. 30

But this is not sufficient to relieve him of liability for negligence, if that practice involves a substantial risk and ought not to have been adopted by a prudent solicitor in 1976. This involves an assessment of the foreseeability at that time of disaster flowing from the adopting of the practice.

Many procedures adopted by solicitors, and members of other professions, depend to some degree on mutual trust between them and their colleagues and are capable of fraudulent manipulation.

Under the Hong Kong style, the vendor's solicitor can pocket the purchase price and disappear. Under the English style of completion, involving the simultaneous exchange of cash for documents, there remains a risk (lesser though it may be) of forgery of documents by the vendor's solicitor.

So I do not regard the possibility of abuse of a practice as showing that it is improvident of a solicitor to follow it, unless the practice involves a substantial degree of risk in theory or has been shown to be dangerous in practice.

Although the Hong Kong style depends upon the honesty of the solicitor for the vendor, and of his willingness to honour an undertaking, I do not find it unreasonable, in general terms, for a solicitor to assume that a fellow solicitor will honour his promise, bearing in mind the certainty that the latter's failure to do so will mean the end of his professional career. 10

If a prudent solicitor had been asked, in 1976, whether he thought that it was unwise to adopt the Hong Kong style, he would surely have replied that its adoption carried more of a risk than the English style, that the risk was of negligible size, that it had never been known to go wrong and that he, and all his colleagues, had no hesitation in following it. I take the same view and find that there was no reason why a prudent solicitor should not have adopted the Hong Kong style in 1976.

With the benefit of hindsight, however, the risks appear more real than they did before Danny Yiu left Hong Kong in a hurry. 20

While I have concluded that D.5 was not negligent in 1976, this does not mean that I would reach the same result if a similar misfortune befell another purchaser to-day.

I suggest that the Law Society should readress itself to the possibility of surrounding the Hong Kong style, if it is thought advisable to continue to use it, with precautions which will reduce or negative the chances of misappropriation by a dishonest solicitor acting for a vendor, rare though such a man will, I hope, always be.

WHAT IS THE TRUE HONG KONG STYLE? DOES IT CONTAIN PRECONDITIONS?

The trial judge did not in terms rule as to whether or not it is a sufficient defence to a claim against him for negligence, for a solicitor to show merely that he adopted a general practice. However, the implication that this was his view must be derived from his ruling that, although it was a general practice to follow the Hong Kong style, Miss Leung did not do so; and that because she failed to do so, and damage to the plaintiff ensued, D.5, her employers, should be held liable in negligence. 30

His conclusion that Miss Leung failed to apply the true Hong Kong style is based on his conclusion that that style requires more than blind adherence to a system under which there is an exchange of cash in return for an undertaking. In his opinion, the purchaser's solicitor must show, before he follows the system, that he has taken certain precautions, which are part of the Hong Kong style and a precondition to the adoption of the cash for undertaking procedure.

As the judge puts it, while in the great majority of cases an undertaking could be 40

accepted, a solicitor "should be aware of the dangers and must give thought to the factors involved". He decides that Miss Leung failed to be so aware or to give such thought and that she was therefore guilty of negligence by virtue of the breach of the duty of care which she owed to D.1-D.4.

The judge bases his conclusion that the Hong Kong style contains its own built-in preconditions mainly on the evidence of Mr. Edmund Cheung, who testified that he would have taken special precautions in this instance, because the sum involved was large, the mortgage was considerable in relation to the purchase price and the purchaser was a shelf company. Mr. Cheung also said that he kept a list of some solicitors with whom he thought it prudent to take special precautions.

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The respondents have argued that the Hong Kong style requires that a prudent purchaser's solicitor must ask himself a number of questions. For example "How many partners are there in the vendor's solicitor's firm?" "How much money is involved?" "Can my clients afford to lose what is involved?", "Have I heard anything to suggest that the vendor's solicitor is dishonest?", "Does my client agree to the Hong Kong style being adopted?" (This last question will be considered separately).

Mr. Cheung said, in 1980, that he would have adopted some such procedure even in 1976, though he was unable to give any instance in which he had himself not adopted the English style. Even if Mr. Cheung was not affected by hindsight, there is no evidence that the precautions which he thought desirable were adopted by any other solicitors in 1976. They were not by D.5, one of the largest firms in Hong Kong, as might have been expected if they were then a matter of general practice.

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The Law Society circular of 1966 refers to the possibility that the adoption of the Hong Kong style may leave solicitors more vulnerable than the English practice. Nowhere does it suggest that it would not be prudent for the local form to be followed, nor that, before it is adopted, the solicitor for the purchaser should take steps to enquire as to the honesty and reliability of the vendor's solicitor.

Accepting that Mr. Cheung would have asked himself the questions which the judge finds D.5 should have posed, I can find no evidence that Mr. Cheung was typical of the prudent Hong Kong solicitor of 1976. I think he was more careful than the latter would have been and that the latter would have followed the guidance of his own society, which did not superimpose on the Hong Kong style the preconditions which Mr. Cheung says he then required of himself.

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It was further argued by the respondents, though not so found by the judge, that, as one of the preconditions to the adoption of the Hong Kong style, it was incumbent upon a solicitor to explain to his client the risks which were involved in the Hong Kong style.

If a client asks for an explanation of the procedure to be followed and of the risks which may be involved in it, a duty lies upon the solicitor to give it; but unless the client so asks, I do not think that any such duty arises. To impose a positive duty of this nature, would in most cases serve no useful purpose, since the client would generally follow whatever advice his solicitor gave him.

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In the circumstances under review, I have no doubt that, if the plaintiff had sought an explanation from Miss Leung, he would have been told that the practice which she proposed to follow had been adopted in virtually every Hong Kong conveyance within living memory; that no purchaser had ever lost as a result of it; and that she had had similar dealings with Danny Yiu without mishap.

In the face of such an explanation, it is highly improbable that the plaintiff would nevertheless have insisted on an alternative form of procedure being adopted.

I am satisfied that the Hong Kong style of completion does not contain any automatic general precondition though, as I have already said, if there are warning bells a prudent solicitor must listen to them and take special precautions before adopting it. In this case, there were no warning bells, and consequently no obligation upon Miss Leung to take such precautions. 10

It is worth observing, to avoid misunderstanding, that if there is no general practice, in relation to some aspect of a solicitor's work, different considerations arise. It is then incumbent upon a solicitor to consider all the factors and to decide what is the prudent course to take in the circumstances before him.

CONCLUSION

I therefore reach the conclusion that:—

- (a) a prudent solicitor would have followed the Hong Kong style in 1976, as Miss Leung did; 20
- (b) that the Hong Kong style did not oblige the prudent solicitor to take any precautions, unless there were "warning bells";
- (c) that there were no warning bells in this instance;
- (d) the plaintiff has failed to establish negligence on the part of D.5.

These findings make it unnecessary to rule on the question of whether or not the judge was correct in finding that, although there was no contractual relationship of solicitor and client between D.1-D.4 and D.5, D.5 was nevertheless liable in tort to them.

Counsel for D.1, D.2, D.3 and D.4 abandoned their appeals against that part of the judgment which ordered those defendants to pay the sum of \$1,295,000. This part of the judgment therefore stands. 30

In the result, the appeal of D.5 succeeds, both as D.5 and as Third Party. The judgment stands as against D.1, D.2, D.3 and D.4, but their right to be indemnified by D.5 disappears.

Mr. L. Price, Q.C., Mr. R. Mills-Owens, Q.C. (Slaughter & May) for Johnson, Stokes & Master.

Mr. O.V. Cheung, Q.C., Mr. Patrick Fung (Deacons) for Edward Wong Finance Co., Ltd.
Mr. Robert Tang (Philip K.H. Wong) for Pomay Investment Co. Ltd. and Others.

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Supreme
Court of
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1981

Li, J.A.:

My lord the President has set out the facts and general background so succinctly that a further attempt on my part will be redundant. I shall use also the same description of the parties as he does so. However, I have the misfortune of having to differ from his conclusion vis-a-vis the appeal by the D5 (the 3rd party).

The first question is whether D5, by following the general practice in Hong Kong i.e. to part with the purchase money for an undertaking by solicitors for the vendor, was negligent. It is contended on behalf of D5 that once Miss Leung followed the general practice in Hong Kong she had a complete answer, (or clear feet) from negligent provided that this practice had no special features to call for caution: *Bolam v. Friern Hospital Management Committee* (1957) 1 W.L.R. 582; *Vancouver General Hospital v. McDaniel and another* (1935) 152 L.T. 56 and *Simmons v. Pennington* (1955) 1 W.L.R. 183. Counsel for the plaintiff and the other defendants, however, contend that the test goes much further. They argue that the test is that of a reasonable, diligent and competent solicitor namely, an objective test – 28 Halsbury's 3rd edition para. 9 p. 12. They suggest that a mechanical following of the general practice is not a conclusive answer.

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Having considered the authorities cited, I am of the opinion that the test is an objective test namely that of a reasonable, diligent and competent solicitor. In *Bolam's case* the question was whether a doctor giving what was called the ECT treatment in unmodified form to a mental patient was negligent. The evidence before the Court was that there were at least two schools of thought. However, whatever forms of modification applied would in themselves attract certain risks to the patient albeit in different ways. Unmodified forms of treatment entailed certain risks. Such risks were no higher than any other modified treatment. Directing the jury McNair, J. said at p.586:—

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“In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man.”

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The consideration in that case was whether the doctor discharge his duty with a reasonable skill of his profession. There were two schools of thought. He followed one of them.

In *Vancouver General Hospital's case* the question was whether the appellant hospital, acting on advice of medical experts in maintaining a mixed ward for infectious diseases, was negligent when one of its patients admitted for diphtheria contracted smallpox. Personal negligence of the doctor and nurses attending to this patient was not in issue. That again was a question of professional technique. The old school of thought was one of isolation wards for smallpox patients. The new school was that of sterilisation in substitution for isolation. In his judgment Lord Alness said at p.57:—

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“That being the state of the evidence, it seems to their Lordships difficult

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to affirm that, in a matter relating solely to medical technique, the appellants were proved to be guilty of negligence.”

Later he said:—

“That, however, is not all. Not only do these medical men approve in terms of the appellants’ technique, but they affirm, as will be observed from the passages cited sup., that the technique challenged by the respondent is in accord with general if not with universal practice to-day in Canada and the United States. If that be so, it is, in their Lordships’ opinion, again difficult to affirm that negligence on the part of the appellants is proved. A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice.

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Having regard to the favourable opinion expressed by all the appellants’ medical witnesses regarding the technique followed in the Vancouver Hospital, and to the accepted practice in regard to that technique appearing from the same evidence, their Lordships are constrained to hold that the charge of negligence brought by the respondent against the appellants in this case is not established.”

And lastly he said at p.58:—

“It is proper to add that none of the learned judges in the court below whose views were hostile to the appellants, with the possible exception of Macdonald, J., appear to have addressed their minds to the question of sterilisation, which is affirmed by the medical witnesses for the appellants satisfactorily to replace the old system of isolation, or to the approved practice in regard to the technique adopted by the appellants, as to which the evidence tendered by the appellants was so strong.”

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In view of the aforesaid my understanding of the ratio is that the appellant was vindicated by a preponderance of medical opinion who felt that sterilisation was sufficient safeguard in lieu of isolation. Again it was a question of professional technique or skill which was put to test rather than the conduct of a reasonable person. Even if human prudence indicated that one form of the safety factor was isolation the same safety factor, in medical opinion, could be achieved by sterilisation.

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In *Simmons v. Pennington & Son* where a solicitor’s clerk was absolved from negligence when he gave a “stock form” answer to a “stock requisition” the foreseeability test was applied – not the compliance with the general practice test. At p.186 Denning, L.J. as he then was, said:—

“but by ill luck the courts have held that the words which the solicitors used, instead of protecting their client, amounted to a repudiation of the contract. That was, in my view, not their fault: it was not a thing which could reasonably have been anticipated to flow from the answer to the requisition. The solicitors acted in accordance with the general practice of conveyances. No ill consequences had ever been known to flow from an answer in this form.”

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The emphasis was in the phrase “could reasonably have been anticipated to flow from the answer to the requisition”. What made it even clearer is in the judgment of Hodson, L.J., who said at p.188:—

“Both the counsel referred to, Mr. Milner Holland and Mr. Dunbar, gave evidence in this case and they thought the opinion expressed by Romer, J. that this inconsistency defeated the plaintiff, was wrong. They advised an appeal and a division of this court took a different view. In those circumstances, it would be a remarkable thing if a solicitor’s managing clerk who had produced that result, which was ultimately found to be wrong, should be held to be negligent within the ordinary principles of the law of negligence.”

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If two prominent counsel of the Chancery Bar could not foresee the ill result of the “stock answer” until judgment of the Court of Appeal had been delivered it was indeed too much to expect a solicitor’s clerk, however experienced, to foresee the same.

On the other hand in Charlesworth on Negligence para. 202 at p.137 the author wrote:—

“Compliance with common practice is evidence that reasonable care has been used, but is not conclusive since ‘no one can claim to be excused for want of care because others are as careless as himself’

Accordingly there are cases where the general practice may not conform at all to the standard of care required, in which event the defence would fail that the defendant had acted in accordance with the general practice. Hence a neglect of duty does not cease to be such merely because of its repetition time and time again.”

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It is said in 28 Halsbury’s Law 3rd edition para. 9 page 12:—

“What is habitually done in the same or similar circumstances usually furnishes a test of reasonable care (1); but a person cannot excuse an obvious failure to make some inquiry or take some precaution merely by showing that his failure to do so is in accordance with the established practice in a particular business (m).”

The test for negligence or otherwise in this case means whether a reasonable, diligent and competent solicitor could foresee in January 1976 that damage could result by adopting the Hong Kong practice of completion. What, then, is a reasonable, diligent and competent solicitor in the present case? The answer, in my opinion, is that he is a reasonable man of ordinary prudence coupled with the basic skill and knowledge in the law of conveyancing. It is the same as a reasonable, competent and diligent doctor. He is a man of ordinary prudence coupled with knowledge and skill in medicine or surgery. But possession of legal knowledge and exercise of legal skill alone would not absolve a solicitor from the requirement of acting with prudence of an ordinary man.

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Applying this test to the present case I find Miss Leung, as a solicitor when adopting the Hong Kong practice for completion in January, 1976, she complied with the general practice which had been practised for years without ill result of the form of damage as in this case flowing from it. That goes a long way to show that she was not negligent.

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However, that is not conclusive. The further question to be asked is: could she foresee the risk or ill result at the material time as an ordinary, reasonable prudent person? I am afraid the answer must be in the affirmative.

As a solicitor, even in January, 1976 she should know that her client, the plaintiff would not obtain what it lent its money for unless and until the vendor had executed the assignment and delivered the title deeds. If she part with the money without such delivery she did not receive what her client had paid for apart from an undertaking or a promise by a fellow member of her profession. As a reasonable person of ordinary prudence she should or ought to have foreseen the risk of parting with the money before obtaining the property one bought in any ordinary transaction. It was not her skill that was put to test. It was her common sense, her prudence of any ordinary person that is put to test. The so called Hong Kong practice has an inherent risk in the ordinary sense. The fact that practically all her fellow solicitors adopted this practice is not conclusive evidence that it is prudent. If two wrongs do not make one right then a million similar practice of imprudence adopted for a long time without ill result do not make such practice an act or prudence. Parting with money before obtaining what one pays for has an inherent risk. Acting in accordance with the general practice she took a foreseeable risk for her client while there was no necessity to do so. The fact that other solicitor did the same did not make the risk less apparent or unreal.

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What she did, in effect, was to put her trust on a fellow member of her profession by taking a risk for which no professional skill could find a remedy. This is different from sterilisation being substituted for isolation or impossibility of foreseeing that ill result flowing from a "stock answer".

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The risk taken involved not only that of a dishonest solicitor. The solicitor might have a dishonest accounting clerk who defrauded him and he might not have the means to compensate for failing to honour his undertaking.

Furthermore dishonest solicitors, fortunately very few in Hong Kong, did come to the surface from time to time even before 1976 albeit in a different form. It is true that up to the Danny Yiu episode dishonesty of solicitors manifested in the form of defrauding their own clients only. Danny Yiu simply took advantage of the Hong Kong practice by inducing a fellow solicitor to part with the purchase money against his own undertaking without having to induce his own client to execute any document. Whatever form of dishonesty practised the risk of a dishonest solicitor was there prior to 1976 or after. To foresee that is not beyond the ordinary prudence of an ordinary person. That is not being wise after the events.

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Miss Leung should know or ought to have known the contents of the Circular issued by the Law Society in 1966. That Circular told her that the so called Hong Kong practice was for the convenience and courtesy of lawyers. It might incidentally be convenient for the banks. This Circular told her that for greater security if she requested for an English completion on behalf of her client it would be unethical for another solicitor to refuse her. But what baffles me is that one passage in this Circular which read: –

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“The Committee also observe that in recent months a number of local firms have adopted among themselves the practice of completion on the basis of delivery of executed deeds against payment in cash or by banker’s draft or

certified cheque. The Committee watch with interest the progress of such a 'pilot scheme', and as soon as its practical results can be ascertained, the Committee will issue further directive on the practice to be adopted for completion of conveyancing transactions.'

I would think that when the English legal system was applied to the Colony in the 1840's all the solicitors in Hong Kong had been trained, qualified and practised in England where the English practice of completion was then the universal practice as it is still practised today. Why the English practice should be labelled with the term 'pilot scheme' is quite beyond my comprehension. After all, an English oak even planted in Hong Kong is not called a new species of "China fir".

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For these reasons I am of the opinion that, despite the general practice in Hong Kong, the adoption of such practice entails an inherent risk. To adopt such practice amounts to failing to exercise due care and the ordinary prudence of a reasonable man. It means giving a fellow solicitor more trust than is necessary with the money of one's own client.

Mr. Edmond Cheung who gave evidence said that mentally he would have a white list. He would trust those whom he thought he could trust not because he was a solicitor but because by previous experience he found a particular solicitor to be trustworthy. In any event he gave the impression that he would accept the risk as one of his own rather than that he could pass on to his client. Once he is prepared to accept the risk no question need be asked. If the risk is to be passed on to his client I feel that a solicitor must assume a higher duty of care and be less trusting. For these reasons I find that D5, in their particular conduct in this case, were negligent.

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What then is the extent of D5's liability to the plaintiff. It is argued for D5 that this was a technical breach. It is contended that even if Miss Leung were to warn herself she would have proceeded the same way because she had previous dealings with Danny Yiu without ill result. It is further contended that even if Mr. Edward Wong of the plaintiff were told of the Hong Kong practice to be adopted he would have authorised Miss Leung to proceed the same way. As such the plaintiff is not entitled to more than nominal damage – *Sykes v. Midland Bank Executor Co.* (1971) 1 Q.B. 113. That was the case where the trial judge, despite a very good try, never obtained from the plaintiff an answer that he (the plaintiff) would instruct his solicitor to act otherwise had he known the full details. In the present case, after a lengthy cross-examination by counsel for D5 and a few questions from the Bench, the gist of Edward Wong's evidence can be summarised as follows:

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- (a) He knew that when money was paid over to the vendor's solicitor he had not received his full entitlement;
- (b) There had been previous transactions conducted in the same way without ill result or loss to him.
- (c) Prior to February, 1976 he knew nothing adverse to Danny Yiu. It is however interesting to repeat his answers to certain questions in cross-examination as follows: –

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"Q. So that isn't it being wise after the event but looking at the position only with information that was available on the 27th of January only, only

that information, isn't it highly probable that if the picture had been fully painted to you on the 27th of January, 1976, you would have said, 'Proceed with this transaction in accordance with the ordinary procedure.'

- A. If she had told me that she had some doubts concerning Danny Yiu, then I would not have proceeded.
- Q. No, but the picture that I am painting is without the benefit of the knowledge of February that Danny Yiu was, in fact, dishonest, without that information.
- A. If she told me that there is nothing special, then I would have proceeded with the matter.”

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To this he later add:

“A. I would like to add that I would proceed on the trust that if there is anything improper on the other side, then my money would be returned to me.”

At no time did Mr. Wong say that he knew of a safer method of completion – the English practice. What happened if he knew of this practice is a matter of conjecture. To impute such knowledge to him would mean putting him in the position of being in possession of legal knowledge as his solicitor. He accepted the Hong Kong practice as a matter of course. He did not know he had a choice. In short he took a risk without knowing that there was any other procedure whereby he could avoid it or at least minimise it. For these reasons I am of the opinion that he is entitled to a full measure of compensatory damage as awarded by the trial judge and not nominal damage.

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I now come to the other defendants namely: D1 – D4. In this connection I assume that there was no contractual relationship between D5 and these other defendants apart from that of purchasing a shelf company. According to Miss Leung, D5 did not act for these other defendants in respect of the mortgage between them and the plaintiff or for the purchase of the property. However, in the course of her acting in respect of the mortgage for the plaintiff, Miss Leung drafted a series of documents. One of these was a letter she drafted for Mr. Shum (the 3rd defendant) and his fellow directors to sign on behalf of D1 and addressed to the plaintiff. Another was her own letter addressed to Danny Yiu. In the letter she drafted on behalf of the 1st defendant to be signed by its directors she used the following terms:

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“We would inform you that the Mortgage of the above premises securing Credit Facilities to be granted to Bovill Investments Limited has been duly executed and will be forwarded to you for your retention together with all the relevant title deeds and documents when the stamping and registration thereof have been completed.

Please let us have your cheque in favour of Danny Yiu & Co. for the sum of \$1,355,000.00 towards payment of the purchase price of these premises and we enclose herewith the Authorisation dated 27th January 1976.

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Please attend to the necessary insurance cover of these premises in due course.”

This meant a direction and authorisation that the plaintiff should forward the money to Danny Yiu on their behalf. In another letter which Miss Leung addressed to Danny Yiu she adopted the following terms:

“Referring to our letter of to-day’s date, we enclose herewith our clients’ 3 cheques in your favour for the total sum of \$1,665,000.00 towards payment of the balance of the purchase price of the above premises.

Please note that the said sum of \$1,665,000.00 is sent to you subject to the terms referred to in the second paragraph of our letter referred to above.” 10

Having regard to the terms of these documents I am of the opinion that in the course of discharging her duty to the plaintiff (the new mortgagee) she adopted an advisory role vis-vis D1 – D4 in the purchase of the property. D2 – D4 would be justified to rely on her advice. She knew that D1 – D4 had to act in accordance with her suggestions in signing that letter to the plaintiff in order to obtain the loan from the plaintiff. She had not ascertained that Danny Yiu was acting as solicitor of the D1 – D4 in respect of the purchase. The other defendants acted in accordance with her advice to their detriment. Miss Leung knew and ought to have known that by suggesting such a course of action to the other defendants they (the other defendants) would be involved in a similar risk that was taken by the plaintiff. That is sufficient, in my opinion, to attract to her the tortious liability towards D1 – D4. If one adopts the proximity test as applied in *Hedley Byrne v. Heller* (1964) A.C. 465 D1 – D4 must be regarded as persons to whom Miss Leung owed a duty of care in her practice as a solicitor. As I am of the opinion that D5 is liable to the plaintiff, D5 is similarly liable to D1 – D4 for negligence. For these reasons I am of the opinion that the appeal ought to be dismissed and the judgment of the Court below confirmed. 20

(Simon F.S. Li)
Justice of Appeal

Silke J.

I have had the benefit of reading in draft the judgment of My Lord President and with deference agree with its conclusions and for the reason therein given.

The “Hong Kong Style” of conveyancing emerged many years ago when Hong Kong was a “sleepy place” with a small number of practising solicitors each known one to the other.

It has obvious practicalities in the present day in the light of the property dealings current in this city. A large number of conveyances relate to multi-story buildings or involve a number of confirmors intervening as between the original vendor and the ultimate purchaser. The gathering together of all the parties general to the English style completion is difficult; though I note that the advanced style of completion used here is being introduced, though the post box so to speak, in England today. 10

In 1975 and early 1976 whatever risk there may have been in the use of the “Hong Kong Style” was so remote as to be virtually non-existent. It was a practice sanctioned by usage, and by the governing body of the profession, over a considerable period of time. It had been used by the appellants in completions with Danny Yiu & Co. on prior occasion. It had never miscarried through default upon an undertaking.

It was not shown to be an imprudent practice and, on the evidence there were no “warning bells” – *G + K Ladenbau Ltd. v. Crawley & DeReya* [1978] 1 W.L.R. 266 – sounding their tocsin generally to the profession in respect of further similar dealings with Danny Yiu. For a solicitor to dishonour his undertaking would mean the end of his professional life. It is difficult in the extreme to erect two, or even three, classes of solicitor within the profession, wherein its members are Officers of the Court, and one member is, in the absence of any warning bell, entitled in my view to rely on the integrity of another. 20

However the “Hong Kong Style” basically remains a matter of “courtesy and convenience” – that is courtesy as between brother solicitors and convenience as between those solicitors, the banks who are frequently prior mortgagees and the public. Solicitors in the post Yiu Era are and should be aware that the unthinkable has happened and can happen again. Solicitors in practice today in Hong Kong are no longer known each to the other and the real interests of clients should not be allowed to be overridden by other factors. I would agree with My Lord President that the time has come for the Law Society to reassess the practice with somewhat greater emphasis upon the possibility, rare though it may be, of risk to the client’s money. No one, in my view, can be said to afford to lose part of his assets however large those assets may be. 30

As these dealings are solicitor to solicitor, and a dishonest solicitor is a fellow member of the profession and it is he who causes the loss, I would have thought it highly desirable that all solicitors as between themselves should create a fund of ample proportions to absorb any loss created by default of one of their own. And it is to be hoped that consideration of the issues raised here will take a somewhat shorter time than did the Circular issued in 1966 on the Hong Kong style, the matter first being raised in 1959. 40

It was argued that Johnson Stokes & Master, in failing to ascertain the amount of

the prior mortgage before it arranged the mortgage here by Mr. Wong to the other defendants in order to facilitate the purchase of the premises and before they paid over the money thus raised to Danny Yiu, were negligent and that their negligence resulted in the loss which gives rise to this claim.

While it is the duty of the vendor to give good title I would have thought it prudent for the new mortgagees solicitor, in the interest of seeing that his client would get good title, to ascertain the amount due under that prior mortgage and whether or not, as in this instance, the prior mortgagee would be prepared to discharge its interest on the ground floor portion of the building whatever its view might have as to the remaining portions. But, be that as it may, I do not think such enquiry or any action arising from it would, other than by a side wind, have guarded against the dishonesty of Danny Yiu. 10

While I agree with My Lord President that the issue as to whether or not Johnson Stokes & Master were acting for Mr. Shum and his group of defendants including Pomay, on the mortgage and the actual purchase does not now fall for decision in the light of the conclusions reached, for my part I would incline to uphold of the judgment of the judge on this point. I accept that there was no contractual relationship – no retainer no direct instructions received – but nevertheless I have no doubt that Mr. Shum, and through him the other defendants in that group, was under the firm impression engendered in his mind by the instructions given to him by Miss Leung that Johnson Stokes & Master were so acting. And that, acting upon that impression, he placed such reliance upon Johnson Stokes & Master so to give rise to the possibility of tortious liability. 20

But that having been said I too would allow the appeal.

Mr. Price Q.C. & Mr. Mills Owens Q.C. (Slaughter & May) for Johnson Stokes & Master Appellant

Mr. O.V. Cheung Q.C. & Mr. Patrick Fung (Deacons) for Edward Wong Finance Co. Ltd. 1st Respondents

Mr. Robert Tang (Philip K.K. Wong & Co.) for Pomay Investments Ltd. (formerly known as Bovill Investments Ltd.) 2nd Respondents, David Ma Pok Shum 3rd Respondent, Shum Ka Ching 4th Respondent and Tsiang Hung Wen 5th Respondent.

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 17
Order of
the Court of
Appeal
granting
conditional
leave to
appeal to
Privy
Council
24th June
1981

Civil Appeal No. 184 of 1980

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN

JOHNSON STOKES & MASTER (a firm)

Appellants
(5th Defendants
and Third Party)

and

EDWARD WONG FINANCE CO. LIMITED

1st Respondents 10
(Plaintiffs)

POMAY INVESTMENTS LIMITED

(formerly known as BOVILL
INVESTMENTS LIMITED)

DAVID MA POK SHUM

2nd Respondents
(1st Defendants)

3rd Respondents
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent 20
(4th Defendant)

BEFORE THE HONOURABLE MR. JUSTICE CONS, THE HONOURABLE
MR. JUSTICE O'CONNOR AND THE HONOURABLE MR. JUSTICE SILKE

ORDER

UPON reading the Notice of Motion herein dated 11th day of June, 1981 on behalf of the above-named Plaintiffs/1st Respondents for conditional leave to appeal to Her Majesty in Council from the Judgment of the Court of Appeal given on the 4th day of June, 1981.

AND UPON reading the said Judgment.

AND UPON hearing Counsel for the Plaintiffs/1st Respondents and Counsel for the 5th Defendants and Third Party/Appellants.

IT IS ORDERED that leave be granted to the Plaintiffs/1st Respondents to appeal to Her Majesty in Council from the Judgment of the Court of Appeal given on the 4th day of June 1981 on conditions that:— 30

1. The Plaintiffs/1st Respondents do within 28 days from the date hereof give security for costs in the sum of \$100,000.00 in a form to the satisfaction of the Court;

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 17
Order of
the Court of
Appeal
granting
conditional
leave to
appeal to
Privy
Council
24th June
1981

2. The record of appeal be prepared and despatched within three (3) months from the date hereof.

AND IT IS ORDERED that the costs of this application be costs in the Appeal.

Dated the 24th day of June 1981.

J.G. ROY
Acting Registrar

In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 18
Order of
the Court
of Appeal
granting
extension
of time
15th Sept.
1981.

Civil Appeal No. 184 of 1980

IN THE SUPREME COURT OF HONG KONG

COURT OF APPEAL

(ON APPEAL FROM HIGH COURT ACTION NO. 2401 OF 1976)

BETWEEN

JOHNSON, STOKES & MASTER (a firm)

Appellants
(5th Defendants
and Third Party)

and

EDWARD WONG FINANCE CO. LIMITED

1st Respondents
(Plaintiffs)

10

POMAY INVESTMENTS LIMITED
(formerly known as BOVILL
INVESTMENTS LIMITED)

2nd Respondents
(1st Defendants)

DAVID MA POK SHUM

3rd Respondent
(2nd Defendant)

SHUM KA CHING

4th Respondent
(3rd Defendant)

TSIANG HUNG WEN

5th Respondent
(4th Defendant)

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**BEFORE THE HONOURABLE MR. JUSTICE LEONARD, THE HONOURABLE
MR. JUSTICE CONS AND THE HONOURABLE MR. JUSTICE ZIMMERN**

ORDER

UPON reading the Notice of Motion dated the 24th day of August 1981 on behalf of the 1st Respondents (Plaintiff) that they may be granted an extension of time for preparation and despatch of the record of appeal.

AND upon reading the Affidavit of Annie Ion Tong Wong filed herein on the 10th day of December 1981.

AND upon hearing Counsel for the 1st Respondents (Plaintiffs) and Counsel for the Appellants (5th Defendants).

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IT IS ORDERED that the time for preparation and despatch of the record of appeal under the Order dated the 24th day of June 1981 herein be extended until the 15th day of December 1981.

**In the
Supreme
Court of
Hong Kong
Court of
Appeal
No. 18
Order of
the Court
of Appeal
granting
extension
of time
15th Sept.
1981.**

**IT IS FURTHER ORDERED that the costs of this application be to the Appellants
(5th Defendants and Third Party).**

Dated the 15th day of September 1981.

Registrar.