6,1975

IN THE PRIVY COUNCIL No. 14 of 1973

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

BETWEEN:

YAT TUNG INVESTMENT COMPANY LIMITED Appellants

- and -

DAO HENG BANK LIMITED

- and -

CHOI KEE LIMITED Respondents

RECORD OF PROCEEDINGS

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, EC2V 6BS

Appellants' Solicitors

ALLEN & OVERY,
9, Cheapside,
London, EC2V 6AD

Respondents' Solicitors

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

IN THE PRIVY COUNCIL No. 14 of 1973

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION

BETWEEN :

YAT TUNG INVESTMENT COMPANY LIMITED Appellants

- and -

DAO HENG BANK LIMITED and
CHOI KEE LIMITED Respondents

RECORD OF PROCEEDINGS

In the Supreme Court of Hong Kong

No. 1

Writ of Summons

3rd March 1972

No. 1

E. R.

1972 No. 534

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION

BETWEEN:
YAT TUNG INVESTMENT CO., LIMITED Plaintiff

and

DAO HENG BANK LIMITED 1st Defendant

CHOI KEE, LIMITED 2nd Defendant

Assistant Registrar
1/5/1972

ELIZABETH THE SECOND, BY THE GRACE OF GOD, OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN

In the Supreme Court of Hong Kong

No. 1

Writ of Summons

3rd March 1972

(cont.)

IRELAND AND OF OUR OTHER REALMS AND TERRITORIES QUEEN HEAD OF THE COMMONWEALTH, DEFENDER OF THE FAITH:

To 1st Defendant Dao Heng Bank Limited whose registered office is situate at No. 11 Bonham Strand East, Victoria, Hong Kong and

2nd Defendant Choi Kee, Limited whose registered office is situate at Room 108, No. 9 Ice House Street, 1st floor, Victoria, Hong Kong.

WE command you that within 8 days after the service of this writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of Yat Tung Investment Co., Limited whose registered office is situate at Nos. 195-197 Johnston Road, 2nd floor, in the Colony of Hong Kong and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS the Honourable SIR IVO RIGBY Chief Justice of Our said Court, the 3rd day of March, 1972.

J.R. OLIVER
Registrar

Note:- This writ may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The defendant may enter an appearance in person or by a solicitor either (1) by handing in the appropriate forms, duly completed, at the Registry of the Supreme Court in Victoria, Hong Kong, or (2) by sending them to the Registry by post.

INDORSEMENT OF CLAIM

The Plaintiff claims:

1. A Declaration that the purported auction sale of the property known as All Those 41 equal undivided 45th parts or shares of and in All That piece or parcel of ground registered in the Land Office as Section I of Inland Lot No.2802 and of and in the messuages erections and buildings thereon known at the date hereof as Nos. 195 and 197 Johnston Road and No. 114 Thomson Road Together

with the exclusive right to hold use occupy and enjoy All That Shop "A" on the Ground floor of the said building (being Ground floor of No. 195 Johnston Road) and All Those the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth floors of the said building including flat roof (if any) adjacent to the said Sixth and Tenth Floors held on Wednesday the 26th day of November 1969 at 3 p.m. at De Sousa's Auction Rooms Limited at 75-77, Wyndham Street, Mohan's House, Basement, Victoria in the Colony of Hong Kong in which the 2nd Defendant was the purported successful bidder, should be set aside as fraudulent and/or in breach of the 1st Defendant's duty as Mortgagee and/or was otherwise improper.

2. A Declaration that the said sale is void.

3. Alternately, an Order setting aside the said sale.

4. An Order for the delivery up of the Assignment of the said property registered by Memorial No. 719719 with the Land Office to be cancelled.

5. An Order that the said Memorial should be vacated from the register of the Land Office.

6. A Declaration that the Plaintiff is still the Mortgagor of the property and the owner of the equity of redemption.

7. An injunction to restrain the 1st and 2nd Defendants and/or their servants or agents to enter upon the said property and/or to do things or caused to be done things which are inconsistent with the rights of the Plaintiff to the said property.

8. Supplementary and/or Auxiliary Declarations and/or Orders and such further or other relief as this Honourable Court thinks just and equitable.

9. Costs of this action.

SAMUEL S.K. LEUNG

Counsel for the Plaintiff

This writ was issued by Messrs. D'ALMADA REMEDIOS & CO., of Room Nos. 511-516, Marina House, 5th floor, Victoria, Hong Kong, Solicitors for the Plaintiff, whose registered office is situate at Nos. 195 and 197 Johnston Road, 2nd floor, Hong Kong.

In the Supreme Court of Hong Kong

No. 2

Amended Statement of Claim

21st March 1972

No. 2

AMENDED STATEMENT OF CLAIM

1972 No. 534

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD.	Plaintiff
and	
DAO HENG BANK LIMITED	1st Defendant
CHOI KEE, LIMITED	2nd Defendant

STATEMENT OF CLAIM

Writ of Summons issued on 3rd day of March 1972

1. The Plaintiff is a limited Company incorporated in Hong Kong with its registered office at Nos. 195-197, Johnston Road, 2nd floor, Victoria in the Colony of Hong Kong and was at all material times a regular customer of the 1st Defendant.

2. The 1st Defendant is a limited Company incorporated in Hong Kong whose business is banking and its registered office is at Nos. 7-9, Bonham Strand, East, Victoria, aforesaid.

3. The 2nd Defendant is a limited Company incorporated in Hong Kong with its registered office at Room 108, No. 9, Ice House Street, 1st floor, Victoria aforesaid.

4. The 2nd Defendant is a subsidiary of or affiliated or associated with the 1st Defendant.

PARTICULARS

1. The 2nd Defendant Company has only 2 shares issued of the total value of $200.00 out of a nominal capital of 2,000 shares.

2. One of the aforesaid shares is issued

to Tung Wei Lin of 30 Kennedy Road who is the 2nd largest individual shareholder and a Director of the 1st Defendant, although in the 1st Defendant he is described as a 'banker' but in the 2nd Defendant as a 'merchant'.

3. The largest individual shareholder of the 1st Defendant is Tung Hsi Hui, a close relative of the said Tung Wei Lin, and who also resides at 30 Kennedy Road on the floor below the said Tung Wei Lin.

4. The other of the aforesaid shares is issued to Chung Kwok Yan, who is another shareholder of the 1st Defendant.

5. The assignment and the memorial pleaded in paragraph 13 below were signed on behalf of the 1st Defendant by the said Tung Wei Lin and another, and on behalf of the 2nd Defendant by the said Chung Kwok Yan and another.

5. By Action No. 969 of 1969 (as affirmed on appeal in Civil Appeal No. 23 of 1971) in which the Plaintiff was 1st Plaintiff and the 1st Defendant was Defendant, the allegation of the then Plaintiffs was that the 1st Defendant was the beneficial owner of the property described in paragraph 6 below, that the Plaintiff was a mere trustee for him and that in consequence the mortgage described in paragraph 7 below was null void and of no effect. The court however held that (subject to the said mortgage) the Plaintiff was the legal and beneficial owner of the said property and that the said mortgage was not void. The Plaintiff accepts that decision and this action is based thereon.

6. In consequence the Plaintiff was at material times the legal, beneficial and registered owner of the Crown Lease to the property known as all that piece or parcel of ground registered in the Land Office as Section I of Inland Lot No. 2802 and of and in the messuages erections and buildings thereon known at the date hereof as Nos. 195 and 197 Johnston Road and No. 114 Thomson Road (hereinafter called "the said property"), and after the mortgage pleaded below, the person entitled to the equity of redemption.

7. By a legal mortgage made the 27th day of May, 1968

In the Supreme Court of Hong Kong

No. 2

Amended Statement of Claim

21st March 1972

(cont.)

between the Plaintiff of the one part and the 1st Defendant of the other part and registered in the Land Office by Memorial No. 630367, the Plaintiff mortgaged the said property together with the messuages erections and buildings thereon being erected or thereafter to be erected thereon to the 1st Defendant to secure repayment on the 22nd day of May, 1970 of advances in an aggregate sum of $1 million in 5 instalments to be made in various stages as specified in accordance with the progress of the building work of a 14-storey building scheme then carried on at the said property with interest at the rate of $11.00 per $1,000.00 per month (hereinafter called "the said mortgage").

8. Only $995,000.00 out of the agreed aggregate sum of $1 million under the said mortgage was in fact advanced to the Plaintiff. The 5th instalment in a sum of $5,000.00 applied for and should be made under the said mortgage was never in fact advanced.

9. The Occupation Permit in respect of the said 14-storey building was issued on the 22nd day of November, 1968 to the Plaintiff by the Building Authority, Department of Public Works, the Government of Hong Kong.

10. By two assignments dated the 8th April, 1969 and the 6th June, 1969, and registered respectively in the Land Office by Memorial Nos. 675100 and 682828, the Plaintiff as Vendor sold by assignment in the usual form 2/45th parts or shares being the Ground floor of No. 197, Johnston Road and No. 114, Thomson Road and 2/45th parts or shares being 14th floor and the Main Roof of Nos. 195 and 197, Johnston Road and No. 114, Thomson Road of the said property for $187,000.00 and $44,500.00 respectively. The said assignments were completed at the office of Messrs. Patrick Poon and Company at the direction of the 1st Defendant as mortgagees. The proceed of sale of these units were appropriated by the 1st Defendant who (in consideration therefore) released these parts from the mortgage.

11. On the 26th day of November, 1969, the 1st Defendant purporting to exercise the power of sale on the said mortgage, put the remaining 41/45th parts or shares of the said property to auction sale at the auction rooms of Messrs. De Sousa's Auction Rooms Limited at Nos. 75-77, Wyndham Street, Mohan's House, Basement, Victoria aforesaid.

12. The remaining 41/45th parts or shares of the said property were purportedly knocked down to the 2nd Defendant for $1,040,000.00.

13. By an assignment dated the 6th day of January, 1970 made between the 1st Defendant of the one part and the 2nd Defendant of the other part and registered in the Land Office by Memorial No. 719719, the 1st Defendant purportedly assigned to the 2nd Defendant the remaining 41/45th parts or shares of the said property.

14. The said auction sale was fraudulent and/or in breach of the 1st Defendant's duty as mortgagee and/or was otherwise improper in that :

(a) The 1st and 2nd Defendants though under different cloak in their corporate disguises, were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain the remaining 41/45th parts or shares of the said property at a low price and to extinguish the Plaintiff's interest therein all to the Plaintiff's damage.

(b) There was only 4 clear days notice, including a weekend, of the said auction sale given to the public at large, which was insufficient, particularly as:

(c) The advertisements and offers referred prominently to said O.J.Action No. 969 of 1969 without explaining that the Action (because it alleged that the 1st Defendants were the beneficial owners) would not affect the buyer's ultimate title to the property, and not sufficient time was given for independent prospective buyers to make appropriate inquiries and/or obtain legal advice thereon or at all.

(d) The above-mentioned advertisements were calculated to frighten off buyers, to obtain the property for the 2nd Defendant and avoid obtaining a reasonable price therefor.

(e) The 1st and 2nd Defendants staged a mock auction purporting to be attended by 30 odd persons but in fact all or almost all persons present were the servants or agents of either

In the Supreme Court of Hong Kong

No. 2

Amended Statement of Claim

21st March 1972

(cont.)

the 1st or 2nd Defendants.

(f) The purported sale was made at a gross undervalue.

(g) That the 1st Defendant for the reason pleaded in paragraph 8 above, were themselves in breach of covenant in the said mortgage deed.

15. Further or in the alternative, the said auction sale was a complete sham and therefore, void, alternatively voidable.

16. By reasons of the foregoing, the said assignment by the 1st Defendant to the 2nd Defendant and the subsequent memorial of the same is also fraudulent, and/or void and/or voidable by the Plaintiff.

AND THE PLAINTIFF THEREFORE CLAIMS:-

(a) A Declaration that the purported auction sale of the property known as All Those 41 equal undivided 45th parts or shares of and in All That piece or parcel of ground registered in the Land Office as Section I of Inland Lot No. 2802 and of and in the messuages erections and buildings thereon known at the date hereof as Nos. 195 and 197 Johnston Road and No. 114 Thomson Road Together with the exclusive right to hold use occupy and enjoy All That Shop "A" on the Ground floor of the said building (being Ground floor of No. 195 Johnston Road) and All Those the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth floors of the said building including flat roof (if any) adjacent to the said Sixth and Tenth floors held on Wednesday the 26th day of November 1969 at 3 p.m. at De Sousa's Auction Rooms Limited at 75-77, Wyndham Street, Mohan's House, Basement, Victoria in the Colony of Hong Kong in which the 2nd Defendant was the purported successful bidder, should be set aside as fraudulent and/or in breach of the 1st Defendant's duty as Mortgagee and/or was otherwise improper.

(b) A Declaration that the said sale is void.

(c) Alternately, an Order setting aside the said sale.

(d) An Order for the delivery up of the Assignment of the said property registered by Memorial No.719719 with the Land Office to be cancelled.

(e) An Order that the said Memorial should be vacated from the register of the Land Office.

(f) A Declaration that the Plaintiff is still the Mortgagor of the property and the owner of the equity of redemption.

(g) An injunction to restrain the 1st and 2nd Defendants and/or their servants or agents to enter upon the said property and/or to do things or caused to be done things which are inconsistent with the rights of the Plaintiff to the said property.

(h) Supplementary and/or Auxiliary Declaration and/or Orders and such further or other relief as this Honourable Court thinks just and equitable.

(i) Costs of this action.

SAMUEL S.K. LEUNG

Counsel for the Plaintiff

Dated the 21st day of March, 1972

No. 3

AMENDED DEFENCE OF BOTH DEFENDANTS

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD. Plaintiff

and

DAO HENG BANK, LTD. 1st Defendant

CHOI KEE, LTD. 2nd Defendant

AMENDED DEFENCE OF BOTH DEFENDANTS

1. It is admitted that the Plaintiff is a company incorporated with limited liability in accordance with the laws of this Colony with its registered offices situate at the 3nd floor of Nos. 195-197, Johnston Road in the Colony of Hong Kong. Save as aforesaid, paragraph 1 of the Amended

In the Supreme Court of Hong Kong

No. 3

Amended Defence of both Defendants

18th April 1972

(cont.)

Statement of Claim is denied.

2. Paragraphs 2 and 3 of the Amended Statement of Claim are admitted.

3. Save as set out hereinafter, paragraph 4 of the Amended Statement of Claim is denied. In further answer to the particulars of such paragraph:-

(a) Particular 1 is admitted.

(b) It is admitted that at the time of the auction referred to in paragraph 11 of the Amended Statement of Claim the said Tung Wei Lin of 30, Kennedy Road, was but no longer is the 2nd largest individual shareholder and a director of the 1st Defendant in which he was described as a banker. It is further admitted that at the said time the said Tung Wei Lin was but no longer is the holder of one of the shares of the 2nd Defendant in which he was described as a merchant. Save as aforesaid, particular 2 is denied.

(c) It is admitted that the said Tung Hsi Hui was at the time of the said auction but no longer is the largest individual shareholder of the 1st Defendant. Subject to the foregoing, particular 3 is admitted.

(d) Particular 4 is admitted ~~Save that the said Choung King Tai was not a shareholder of the 2nd Defendant at the time of the said auction, particular 4 is admitted~~.

(e) Particular 5 is admitted.

4. It is admitted that paragraph 5 of the Amended Statement of Claim accurately sets out the position in Original Jurisdiction Action No.969 of 1969 and Civil Appeal No.23 of 1971.

5. Save that the said property was subject to the said mortgage, paragraphs 6 and 7 of the Amended Statement of Claim are admitted.

6. Save that the Plaintiff never applied for the said sum of $5,000.00 paragraph 8 of the Amended Statement of Claim is admitted.

7. Paragraph 9 of the Amended Statement of Claim is admitted.

8. The assignments referred to in paragraph 10 of

the Amended Statement of Claim were not completed at the direction of the 1st Defendant. The 1st Defendant consented to such assignments as mortgagee. No admission is made that the assignment for the said 2/45th parts or shares being the ground floor of No.197, Johnston Road and No.114, Thomson Road was completed at the offices of Messrs. Patrick Poon and Co. It is admitted that Messrs. Patrick Poon and Co. acted on behalf of the vendor in each of the said assignments. Save as aforesaid, paragraph 10 of the Amended Statement of Claim is admitted.

9. Save that the exercise of the said power of sale, the said knocking down and the said assignment were all genuine and not purported paragraphs 11, 12 and 13 of the Amended Statement of Claim are admitted.

10. Save as admitted hereinafter, paragraph 14 of the Amended Statement of Claim is denied.

(a) In answer to paragraph (a) of the said paragraph, the 1st Defendant properly exercised its aforesaid power of sale and the 2nd Defendant was the purchaser upon such exercise. Save as aforesaid, the said paragraph (a) is denied.

(b) Advertisements for the said auction were first inserted in the Wah Kiu Yat Po, The Sing Tao Jit Po and in the South China Morning Post on the 21st day of November, 1969, wherefore paragraph (b) of the said paragraph is denied.

(c) In answer to paragraphs (c), (d) and (f) of the said paragraph, it is admitted that the said advertisements referred to a lis pendens having been registered by the Plaintiff against the said property being the Writ of Summons in the said Original Jurisdiction Action No.969 of 1969. It is further admitted that no explanation was inserted in such advertisements to the effect that the said lis pendens would not affect the buyer's ultimate title.

(d) In further answer to the said paragraphs (c), (d) and (f), by a letter dated the 10th day of October, 1969, the 1st Defendant warned the Plaintiff that the aforesaid registration of the said lis pendens might well cause severe

In the Supreme Court of Hong Kong

No. 3

Amended Defence of both Defendants

18th April 1972

(cont.)

difficulties in finding a purchaser and that, with the matter dealt with in (e) and (f) hereunder, the price realised might well be further diminished. The 1st Defendant invited the Plaintiff to vacate the said registration. The Plaintiff did not reply to the said letter and did not so vacate the said registration.

(e) By a letter dated the 21st day of August, 1969, the 1st Defendant informed the Plaintiff that the 1st, 3rd and 4th floors of the said building were then occupied by certain unknown persons or firms and that one Mee Ah Hong Company, Ltd., of which company one Lai Yung Kwong was and is the principal shareholder, was occupying the 2nd floor thereof. The said Lai Yung Kwong was and is also the principal shareholder of the Plaintiff. By the said letter the 1st Defendant stated its intention to exercise its power of sale under the said mortgage, enquired whether the Plaintiff or the said Mee Ah Hong Company, Ltd., had let the said parts of the building or allowed persons to enter upon the same, stated that unless the said property could be sold with vacant possession the price realised would be substantially reduced and requested that the Plaintiff or the said Mee Ah Hong Company, Ltd., should eject such persons if the same were on the said premises with the permission of either of them. No reply was received to such letter. By the said letter dated the 10th day of October, 1969, the 1st Defendant repeated such request but the Plaintiff again did not reply and the said persons or firms continued so to occupy the said parts of the said building.

(f) By reason of the contents of (e) hereof, the 1st Defendant was compelled to advertise the said property as regards the 1st, 2nd, 3rd and 4th floors thereof subject to existing tenancies if any. The Defendants will rely upon the contents of a Defence filed in Original Jurisdiction Action No. 909 of 1970 by the Plaintiff herein, the said Mee Ah Hong Company, Ltd., and one Mee Ah Construction Co., Ltd., a company of which the said Lai Yung Kwong is and was the principal

shareholder as an admission by the Plaintiff that the said floors of the said building were occupied by or with the permission of the Plaintiff.

(g) The price obtained for the said property at the said auction was a proper one and was the true market value. If it be found that the said sale was at an undervalue, which is denied, such undervalue was caused by the Plaintiff as set out in (d), (e) and (f) hereof.

(h) Paragraphs (e) and (g) of the said paragraph are denied.

Save as hereinbefore expressly admitted paragraphs (c), (d) and (f) of the said paragraph are denied.

11. Paragraphs 15 and 16 of the Amended Statement of Claim are denied.

12. Save as hereinbefore expressly admitted each and every allegation contained in the Amended Statement of Claim is denied as if here set out and traversed seriatim. By reason of all of the aforesaid it is denied that the Plaintiff is entitled to any of the relief claimed.

CHARLES CHING

Counsel for the both Defendants.

Dated the 18th day of April, 1972

No. 4

SUMMONS

1972, No. 534

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD. Plaintiff

and

DAO HENG BANK LTD. 1st Defendant

CHOI KEE, LTD. 2nd Defendant

LET all parties concerned attend the Judge

In the Supreme Court of Hong Kong

No. 4

Summons

13th June 1972

(cont.)

in Chambers, at the Supreme Court, Hong Kong, on Monday, the 18th day of September, 1972, at 10 o'clock in the forenoon, on the hearing of an application on the part of the 1st Defendant and the 2nd Defendant for an order that:-

(a) The Statement of Claim herein be struck out as being vexatious, frivolous and/or otherwise an abuse of the process of this Honourable Court.

(b) Further and in the alternative to (a) hereof, an Order that the Statement of Claim herein be struck out on the grounds that the Plaintiff herein elected in O.J.Action No. 969 of 1969 to sue upon the ground that he was not the beneficial owner of the property in question.

Inherent Jurisdiction Order 18 rule 19 (1) (b) and (d)

(c) Judgment for the 1st Defendant and the 2nd Defendant.

(d) Further and in the alternative to (a), (b) and (c) hereof, an order that all proceedings herein be stayed until the Plaintiff should pay costs taxed against the Plaintiff in the aforesaid O.J.Action No.969 of 1969 and the amount adjudged to be due to the 1st Defendant on the Counterclaim in the said O.J.Action No.969 of 1969.

(e) For an Order that the costs of this application be provided for.

(f) Such further or other Orders as may be just.

Dated the 13th day of June, 1972.

J.R. OLIVER (L.S.)
Registrar

This Summons was taken out by Messrs. Patrick Poon & Co., of Room 402, Central Building, Victoria, Hong Kong, Solicitors for the 1st and 2nd Defendants.

To the above-named Plaintiff and its solicitors, Messrs. D'Almada Remedios & Co.

(Estimated time not exceeding 2 days)

(sd) PATRICK POON & CO.

No. 5

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

AFFIRMATION OF PATRICK HUI WITH ANNEXED EXHIBITS

1972, No. 534

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD. Plaintiff

and

DAO HENG BANK LTD. 1st Defendant

CHOI KEE, LTD. 2nd Defendant

I, PATRICK HUI, Solicitor, of Messrs. Patrick Poon & Co., Solicitors, Central Building, Victoria in the Colony of Hong Kong, do solemnly, sincerely and truly affirm and say as follows:-

1. I am the solicitor having the conduct of this action on behalf of both Defendants herein.

2. There are now produced and shown to me the following:-

(a) Copy of the Writ of Summons in O.J.Action No.969 of 1969, annexed hereto as "PH-1";

(b) Copy of the Statement of Claim in O.J.Action No.969 of 1969, annexed hereto as "PH-2";

(c) Copy of further amended Defence and Counterclaim in O.J.Action No.969 of 1969, annexed hereto as "PH-3";

(d) Copy of amended Reply in O.J.Action No.969 of 1969, annexed hereto as "PH-4";

(e) Copy of the judgment given in O.J.Action No.969 of 1969; annexed hereto as "PH-5";

(f) Copy of the judgment in Civil Appeal No.23 of 1971, being the appeal from the aforesaid judgment in O.J.Action No.969 of 1969, annexed hereto as "PH-6A" and "PH-6B".

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

(cont.)

3. There is now produced and shown to me marked "PH-7" a copy of the shorthand transcript of the proceedings in O.J. Action No. 969 of 1969. This consists of a bundle of over 400 pages and is not annexed hereto but can be inspected in the offices of Messrs. Patrick Poon & Co.

4. There is now produced and shown to me the further copy documents as follows:-

(a) Statement of Claim in O.J.Action No.909 of 1970, annexed hereto as "PH-8";

(b) Defence in O.J.Action No.909 of 1970, annexed hereto as "PH-9"; and

(c) Copy of Reply in O.J.Action No.909 of 1970, annexed hereto as "PH-10".

5. In O.J.Action No.969 of 1969, judgment on the counterclaim was given in favour of the 1st Defendant herein against the Plaintiff herein in the sum of $45,231.97. Costs of that action as well as of the Counterclaim were also given in favour of the 1st Defendant against the Plaintiff herein and the other Plaintiffs in such case in the sum of $52,225.50. Up to the date hereof neither the said judgment debt nor the said costs had been paid. The 1st Defendant, also Defendant in the said O.J.Action No. 969 of 1969, has made the following atempts to execute on the aforesaid judgment and costs:

A writ of fieri facias was taken out on behalf of the 1st Defendant by my firm on the 15th day of June 1971, a copy of which is now produced and shown to me marked "PH-11". By a letter dated the 23rd day of June, 1971, a copy of which is now produced and shown to me marked "PH-12" my firm was informed by the Chief Bailiff that the Plaintiff herein and its co-Plaintiff in O.J. Action No.969 of 1969 could not be found at the address set out in "PH-11", which address was in fact the address set out in the writ of summons in O.J.Action No.969 of 1969, the Plaintiff herein and its co-Plaintiff in the said O.J.Action No.969 of 1969 being said to be situate on the 2nd floor of Nos.195-197, Johnston Road, Hong Kong. Thereafter a search was made at the Companies Registry to ascertain if the Plaintiff herein and its co-Plaintiff in O.J.Action No.969 of 1969 have registered a change of address. The search revealed that the registered office of the Plaintiff herein was in fact situate on the 3rd

floor of Nos.195-197, Johnston Road, and not on the 2nd floor of Nos.195-197, Johnston Road as stated in the said writ of summons. There is now produced and shown to me and marked "PH-13" a copy of the Annual Return of the Plaintiff herein made up to the 29th day of December 1970. There is now also produced and shown to me marked "PH-14" a further letter dated 12th day of July 1971 from the Chief Bailiff to my firm.

There has been the following correspondence between my firm and the Plaintiff's Solicitors in O.J.Action No.969 of 1969:-

(a) My firm's letter dated 25th June 1971, a copy of which is now produced and shown to me marked "PH-15" to Messrs. H.M. So & Co. the Plaintiff's then solicitors in O.J.Action No.969 of 1969. No answer was received.

(b) My firm's letter to the said Solicitors dated 7th July 1971, a copy of which is now produced and shown to me marked "PH-16". No answer was received.

(c) My firm then received a "without prejudice" letter from Messrs. Samuel Soo & Co., the Plaintiff's (Appellant's) Solicitors in Civil Appeal 23 of 1971 (from O.J.Action No.969 of 1969) who acted in place of Messrs. H.M. So & Co., which did not give the information sought and in reply on 10th July 1971, my firm again requested such information, enclosing a copy of "PH-15". No answer was received.

(d) My firm's letter dated 19th July 1971, to Messrs. Samuel Soo & Co. a copy of which is now produced and shown to me marked "PH-17". No answer was received.

(e) My firm's letter dated 6th August 1971 a copy of which is now produced and shown to me marked "PH-18". In reply, Messrs. Samuel Soo & Co. wrote a letter dated 13th August 1971, a copy of which is now produced and shown to me marked "PH-19".

It will be noted from "PH-13", "PH-14" and "PH-19" that there is uncertainty as to the registered office of the Plaintiff herein. My firm has caused a further search to be made at the Companies Registry

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

(cont.)

on the 19th day of August 1971 and the result was the same as disclosed in "PH-13". By reason of all of the aforesaid, I submit that the Plaintiff herein and its co-Plaintiff in O.J.Action No.969 of 1969 have been evading execution of both the judgment debt and of costs set out above and/or are unable to pay the same.

AFFIRMED at the Courts of Justice, Victoria, Hong Kong, this 13th day of June, 1972. } PATRICK HUI

Before me,

C. Young

A Commissioner for Oaths.

This affirmation is filed on behalf of the Defendants.

1972, No. 534

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD. Plaintiff

and

DAO HENG BANK LTD. 1st Defendant

CHOI KEE, LTD. 2nd Defendant

THE EXHIBITS REFERRED TO IN THE AFFIRMATION OF PATRICK HUI FILED HEREIN ON THE 14TH DAY OF JUNE, 1972

Exhibit Marked	consists of sheet
"PH-1"	4
"PH-2"	6
"PH-3"	9
"PH-4"	4
"PH-5"	24
"PH-6A"	3

Exhibit Marked	consists of sheet
"PH-6B"	3
"PH-7"	386
"PH-8"	4
"PH-9"	3
"PH-10"	3
"PH-11"	3
"PH-12"	1
"PH-13"	4
"PH-14"	1
"PH-15"	1
"PH-16"	1
"PH-17"	1
"PH-18"	2
"PH-19"	1

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

(cont.)

(PATRICK POON & CO.)

EXHIBIT "PH-1"

Exhibit "PH-1"

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT COMPANY LIMITED 1st Plaintiff

and

MEE AH CONSTRUCTION COMPANY LIMITED 2nd Plaintiff

and

DAO HENG BANK LIMITED Defendant

ELIZABETH THE SECOND, BY THE GRACE OF GOD, OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND OF OUR OTHER REALMS AND TERRITORIES QUEEN, HEAD OF THE COMMONWEALTH, DEFENDER OF THE FAITH.

To DAO HENG BANK LIMITED whose registered office is situate at Nos.7-9 Bonham Strand East Victoria in the Colony of Hong Kong

WE Command you that within eight days after the service of this writ on you, inclusive of the day of

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-1"

(cont.)

service, you do cause an appearance to be entered for you in an action at the suit of YAT TUNG INVESTMENT COMPANY LIMITED and MEE AH CONSTRUCTION COMPANY LIMITED whose respective registered offices are situate at Nos. 195-197 Johnston Road Second Floor Victoria aforesaid and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS the Honourable Sir Michael Hogan K.C.M.G. Chief Justice of Our said Court, the 8th day of August, 1969.

E.S. HAYDON.

Registrar.

Note: This writ may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE.

The defendant may enter an appearance in person or by a solicitor either (1) by handing in the appropriate forms, duly completed, at the Registry of the Supreme Court in Victoria, Hong Kong, or (2) by sending them to the Registry by post.

1. The 1st Plaintiff's claim is for:-

(a) A declaration that the property registered in the Land Office as Section I of Inland Lot No.2802 (hereinafter referred to as "the said property") conveyed to the 1st Plaintiff by an Assignment dated the 23rd day of May 1968 made between the Defendant of the one part and the 1st Plaintiff of the other part and registered in the Land Office by Memorial No.630,364 was conveyed to the 1st Plaintiff as a nominee and/or trustee of the Defendant.

(b) A declaration that the Building Mortgage dated the 27th day of May 1968 made between the 1st Plaintiff of the one part and the Defendant of the other part and registered in the Land Office by Memorial No.630,367 for securing repayment of an aggregate sum of $1,000,000.00 and interest

thereon on the security of the said property is void.

2. The 1st Plaintiff and the 2nd Plaintiff claim against the Defendant for payment of the sum of $435,783.81 being cost of construction of a building erected upon the said property at the request and on behalf of the Defendant.

3. Alternatively the 1st Plaintiff claims to be indemnified against payment of the said construction cost of $435,783.81.

4. Such further or other relief as to the Court may seem just.

5. Costs.

L. CHAN & KO

Solicitors for the 1st and 2nd Plaintiffs.

This writ was issued by LAU, CHAN & KO of Alexandra House, 6th Floor, Victoria, Hong Kong, Solicitors for the 1st and 2nd Plaintiffs whose respective registered offices are situate at Nos.195-197 Johnston Road Second Floor, Hong Kong.

L. CHAN & KO

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-1" (cont.)

Exhibit "PH-2"

EXHIBIT "PH-2"

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN:

YAT TUNG INVESTMENT COMPANY LIMITED	1st Plaintiff
and	
MEE AH CONSTRUCTION COMPANY LIMITED	2nd Plaintiff
and	
DAO HENG BANK LIMITED	Defendant

STATEMENT OF CLAIM

This Writ of Summons was issued on the 8th day of August 1969.

1. The 1st Plaintiff is a limited company incorporated in Hong Kong with its registered office at Nos. 195-197 Johnston Road, 2nd floor, Victoria in the Colony of Hong Kong.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-2"

(cont.)

2. The 2nd Plaintiff is a limited company incorporated in Hong Kong with its registered office at the same address.

3. The 1st Plaintiff is an investment company and the 2nd Plaintiff is a construction company. They are both private companies and the majority of the shares in each of them is owned by Mr. Lai Yung Kwong. The 2nd Plaintiff was incorporated on 20th December 1966 and prior to its incorporation was known as Mee Ah Hong Construction Company of which firm the said Mr. Lai Yung Kwong was the sole proprietor.

4. The Defendant is a limited company incorporated in Hong Kong whose business is banking and its registered office is at Nos.7-9 Bonham Strand East Victoria aforesaid.

5. The Defendant was the mortgagee of the property registered in the Land Office as Section I of Inland Lot No.2802 under a building mortgage dated 31st January 1964 with the former owners of this property. This building mortgage was to secure the sum of $1,200,000.00 to be lent by the Defendant to the owners for the development of the property by the construction of a multi-storey building on the site.

6. The building contractors for the property were the said firm Mee Ah Hong Construction Company under a building contract with the owners dated 17th March 1966.

7. Disputes arose between the former owners and the said firm which led to an action O.J.No.1200 of 1966 between them. This action was however compromised on terms incorporated into a written agreement dated 20th August 1966 which included a provision that 20% of the proceeds of any sales of units in the building would be paid to the contractors towards outstanding construction costs.

8. Upon incorporation of the 2nd Plaintiff on 20th December 1966 the 2nd Plaintiff superseded the Mee Ah Hong Construction Company as contractors.

9. The former owners created a further charge dated 14th July 1967 upon the property in favour of the Defendant to secure a further loan of $200,000.00 to pay for the construction costs, but only $129,500 out of this sum was lent.

10. On 13th May 1968 the Defendant purported to

exercise its power of sale under the building mortgage and further charge. The 1st Plaintiff was the successful bidder but the sale was a sham as it had been agreed between the 1st Plaintiff and the Defendant that the 1st Plaintiff would buy the property on behalf of the Defendant and as its trustee.

11. The agreement for this was reached between one Mr. Au Wai Choi for the Defendant and Mr. Lai Yung Kwong for the 1st Plaintiff and was at the instigation of Mr. Au Wai Choi who was the head of the loans department of the Defendant. In return the Defendant by Mr. Au Wai Choi promised that it would pay for all the outstanding construction costs payable to the 2nd Plaintiff as well as future construction costs and other incidental charges. It was further specifically promised that upon any future sales of units in the new building, 40% of the proceeds would be paid to the 2nd Plaintiff towards any outstanding construction costs. All the aforesaid arrangements were confirmed and ratified to Mr. Lai Yung Kwong by the General Manager and Director of the Defendant one Mr. Tang Pang Yuen.

12. The price bid for the property at the auction sale on 13th May 1968 was $880,000.00 which was the figure agreed on beforehand. The 10% deposit expressed to be paid at the sale was not in fact paid.

13. The assignment of the property was completed on 23rd May 1968. No money was however paid to the Defendant. Simultaneously, at the request of Mr. Au Wai Choi for the Defendant, the 1st Plaintiff executed a building mortgage in favour of the Defendant to secure the sum of $1,000,000.00. This building mortgage was subsequently dated 27th May 1968 and contained provisions for the payment of the $1,000,000.00 by five instalments. Out of the first instalment of $940,000.00, the sum of $880,000.00 was retained by the Defendants as the nominal purchase price, and a further sum of $24,551.00 was deducted as legal costs and stamp duty, leaving a balance of $35,449.00 of which $32,060.00 was paid to the 1st Plaintiff to make disbursements in connection with the construction of the building and the balance of $3,389.00 was retained by the Defendant's solicitors. Of the remaining instalments totalling $60,000.00, the total sum of $55,000.00 has been paid towards the construction costs of the 2nd Plaintiff leaving a

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-2"

(cont.)

balance of $5,000.00 unpaid.

14. After the aforesaid assignment, the 1st Plaintiff, at the direction of the Defendant, entered into agreements for sale and purchase followed by assignments of various units in the new building which had been the subject of sales by the former owners namely:

(a) The ground floors of Nos.197 Johnston Road and 114 Thomson Road for $187,000.00.

(b) The 14th Floor of Nos.195 and 197 Johnston Road and No.114 Thomson Road together with the roof for $44,500.00.

15. The proceeds of sale of the above units totalling $231,500.00 were however paid direct to the Defendant, but, out of these proceeds, pursuant to the agreement pleaded in paragraph 11 above, 40% being $92,600.00 was appropriated to Mr. Lai Yung Kwong for the 2nd Plaintiff towards construction costs. At the request of Mr. Au Wai Choi, Mr. Lai Yung Kwong signed a promissory note dated 29th May 1968 for this sum in favour of the Defendant. Out of the sum of $92,600.00, only $50,000.00 was actually paid and the balance of $42,600.00 was deposited with the Defendant in a savings account in Mr. Lai Yung Kwong's name. The pass book for this account, however, was kept by Mr. Au Wai Choi.

16. The Plaintiffs have taken into account the sums of $32,060.12 and $55,000.00 mentioned in paragraph 13 above and the sum of $50,000.00 mentioned in paragraph 15 above which have been received on account of the 2nd Plaintiff's construction costs as agreed with Mr. Au Wai Choi for the Defendant. There remained owing on 31st January 1969 the sum of $435,783.81, full particulars of which were delivered to the Defendant on 29th January 1969.

Particulars are also given hereunder:

30% retention money plus interest thereon to 31st January 1969	$241,120.61
Compensation paid to employees during suspension of work plus interest to 31st January 1969	$ 30,725.90

Compensation paid to sub-contractors to resume work	$ 34,600.00
Payment to caretakers from 1st October, 1967 to 31st January 1969	$ 48,000.00
Additional works plus interest to 31st January 1969	$ 50,266.10
Miscellaneous expenses plus interest to 31st January 1969	$ 31,071.20
Total :	$435,781.81

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-2"

(cont.)

17. The 1st Plaintiff by a letter in Chinese dated 29th January 1969 has called upon the Defendant to pay these monies; that letter also requested that the property should be transferred back to the Defendant. The Defendant by its letter dated 5th February 1969 rejected this request.

18. Since the date of the Writ the Defendant has purported to exercise its power of sale under the building mortgage with the 1st Plaintiff and has purported to sell the mortgaged property less the aforesaid assigned units at an auction sale on 26th November 1969.

19. The 2nd Plaintiff claims an additional sum of $30,000.00 being caretakers' charges from 1st February 1969 to the date of the aforesaid sale on 26th November 1969.

20. The Plaintiffs claim:

(a) A declaration that the 1st Plaintiff acted on behalf of the Defendant and as its trustee in purchasing the said property, Section I of Inland Lot No.2802, and that the Assignment dated 23rd May 1968 is void.

(b) A declaration that the building mortgage dated 27th May 1968 is likewise void.

(c) Payment of the aforesaid sums of $435,783.81 and $30,000.00 totalling $465,783.81.

(d) Interest on this amount at the rate of 8% per annum from the commencement of this action until payment.

(e) Costs.

(f) Further and other relief.

DATED the 27th day of December 1969

Counsel for the Plaintiffs

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

(cont.)

Exhibit "PH-3"

EXHIBIT "PH-3"

1969, No. 969

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN:

YAT TUNG INVESTMENT CO., LTD., 1st Plaintiff

and

MEE AH CONSTRUCTION CO., LTD., 2nd Plaintiff

and

DAO HENG BANK LIMITED Defendant

FURTHER AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM

1. Paragraphs 1 to 6 inclusive and paragraph 8 of the Statement of Claim are admitted.

2. The matters set out in paragraphs 7 and 9 of the Statement of Claim are irrelevant to this action and no admissions are made thereto.

3. It is admitted that the Defendant exercised its power of sale and pursuant thereto that on 13th May 1968 upon public auction the 1st Plaintiff was the successful bidder for the said property at a price of $880,000.00. Save as aforesaid each and every allegation contained in paragraphs 10, 11 and 12 of the Statement of Claim is denied. In the alternative if there was any agreement as alleged in paragraph 11 of the Statement of Claim between the said Au Wai Choi and the said Lai Yung Kwong, the said Au Wai Choi was never authorised by the Defendant and had no authority to enter into such agreement on behalf of the Defendant.

4. It is admitted that the assignment of the property was completed on the 23rd day of May, 1968. It is denied that no money therefor was paid to the Defendant. The said Lai Yung Kwong on his own behalf, alternatively on behalf of the 1st Plaintiff borrowed from the said Au Wai Choi the sum of $88,000.00 for the purposes of paying a deposit on the purchase of the said property and the same was paid to the Defendant in the name of the 1st Plaintiff as a 10% deposit on account of the aforesaid sale and purchase.

5. It is admitted that the 1st Plaintiff executed a building mortgage in favour of the Defendant to secure the sum of $1,000,000.00 which mortgage was dated the 27th day of May, 1968. The instalments by which the sum were to be paid were as set out in paragraph 13 of the Statement of Claim. It is further admitted that of the said $1,000,000.00 the sum of $5,000.00 was never paid to the 1st Plaintiff, the same never having been requested by the 1st Plaintiff.

6. ~~It is admitted that of the 1st instalment of the said mortgage, namely the sum of $940,000.00 the Defendant retained the balance of the purchase price which balance, amounted to $792,000.00 leaving $148,000.00 of the said 1st instalment available to the 1st Plaintiff.~~ The Defendant paid the 1st instalment of the said mortgage namely the sum of $940,000.00 to Messrs. Patrick Poon & Co., Solicitors for the 1st Plaintiff, which Solicitors paid to the Defendant therefrom the sum of $792,000.00 being the said purchase price less the said deposit of $88,000.00 leaving $148,000.00 of the said 1st instalment available to the 1st Plaintiff. It is further admitted that out of the said $148,000.00 costs and stamp duty were paid, amounting to $24,551.00. The remainder of the said 1st instalment after the above reductions amounted to $123,449.00. Upon the instructions of the said Lai Yung Kwong, Messrs. Patrick Poon & Co. Solicitors on behalf of the 1st Plaintiff, paid to the said Lai Yung Kwong the sum of $32,060.12 and to the said Au Wai Choi the sum of $91,388.88.

7. The payment of the said $91,388.88 to the said Au Wai Choi represented repayment to him of the loan of $88,000.00 referred to in paragraph 4 hereof together with an additional sum of $3,388.88 which sum was on 24th May 1968 credited by the said Au Wai Choi to the sundry creditors account of the 1st Plaintiff with the Defendant. The said Lai Yung Kwong gave no instructions as to the disposal of the said $3,388.88 which sum has now been credited against interest owing by the 1st Plaintiff on the said mortgage. Save as admitted in this paragraph and in paragraphs 4, 5 and 6 hereof, paragraph 13 of the Statement of Claim is denied.

8. It is admitted that after the aforesaid assignment the 1st Plaintiff entered into agreements for the sale and purchase and assignments of the

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-3"

(cont.)

units set out in paragraph 14 of the Statement of Claim at the prices therein set out. The Purchasers thereof were the purchasers who had entered into agreements for sale and purchase of the said units from the former owners.

9. It is admitted that the proceeds of the sales referred to in paragraph 8 hereof amounted to $231,500.00 but less the sum of $1,307.50 being costs and less the sum of $600.00 being agreed interest retained by the purchasers of the units referred to in paragraph 14 (a) of the Statement of Claim due to late completion of the building. Before the said proceeds were paid by the said purchasers, the said Lai Yung Kwong approached the Defendant for a loan on his own behalf and on behalf of the 1st Plaintiff. The Defendant agreed to make such loan provided that the said Lai Yung Kwong should be personally responsible for the whole thereof and signed a promissory note therefor, provided also that the whole of such loan would be repaid out of the proceeds of the aforesaid sales and provided that the loan to be made to the said Lai Yung Kwong would be applied for payment of lift works and other works done on the said property by the 2nd Plaintiff.

10. Pursuant to the matters set out in paragraph 9 hereof, the Defendant lent to the said Lai Yung Kwong and the 1st Plaintiff the total sum of $92,600.00 being 40% of the anticipated proceeds of the sales referred to in paragraph 8 hereof. The said Lai Yung Kwong thereupon executed to the Defendant a promissory note dated 28th May, 1968 for the said amount. Of the sum of $92,600.00 the sum of $50,000.00 was paid to the said Lai Yung Kwong by cashier order dated 29th May 1968 and the sum of $42,600.00 was credited to a savings account in the name of Lai Yung Kwong of Yat Tung Investment Co. Ltd. Upon payment of the aforesaid proceeds of sale $98,296.76 being the aforesaid $92,600.00 plus interest in the sum of $5,696.76 thereof was applied in satisfaction of the said promissory note, $19,500.00 was paid by the Defendant on behalf of the 1st Plaintiff for monies owing on account of lift works. The total loans and disbursements set out in paragraph 9 hereof and in this paragraph amounted to $119,704.26 which deducted from the aforesaid proceeds of sale namely $231,500.00 leaves a balance of $111,795.74 which balance was credited

against the said mortgage. Save as admitted in this paragraph and in paragraphs 8 and 9 hereof, paragraphs 14 and 15 of the Statement of Claim are denied.

11. In answer to paragraph 16 of the Statement of Claim it is admitted that $55,000.00 was drawn under the said mortgage and that as set out in paragraph 10 hereof the sum of $42,600.00 was lent to the said Lai Yung Kwong. It is admitted that the particulars set out in paragraph 16 of the Statement of Claim were sent to the Defendant on 29th January, 1969 together with the letter referred to in paragraph 17 of the Statement of Claim. The said letter requested the Defendant to take over the said property upon payment by the Defendant of the sum of $435,783.81. Save as admitted in this paragraph, paragraphs 16 and 17 of the Statement of Claim are denied. In particular it is denied that the 1st or 2nd Plaintiff expended the monies set out in the said Particulars or are entitled to the same from the Defendant. It is further in particular denied that the Defendant kept any retention or other money save for the $5,000.00 payment of which was never requested under the said mortgage.

12. Save that the exercise of the power of sale and the sale were both genuine, paragraph 18 of the Statement of Claim is admitted.

13. No admissions are made that the 2nd Plaintiff expended the monies set out in paragraph 19 of the Statement of Claim. The 2nd Plaintiff is in any event not entitled to any monies from the Defendant.

14. Save as has been hereinbefore expressly admitted, each and every allegation contained in the Statement of Claim is denied as if here set out and traversed seriatim. By reason of all of the aforesaid it is denied that the Defendant is liable to the Plaintiffs or either of them or at all or that the Plaintiffs or either of them are entitled to the relief claimed or any relief.

COUNTERCLAIM

15. The Defendant here adopts paragraphs 1 to 4 inclusive of the Statement of Claim.

16. Under the building mortgage referred to in paragraph 5 hereof the Defendant advanced to the 1st Plaintiff a total of $995,000.00 which was reduced

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-3"

(cont.)

by $111,795.74 being the balance of the proceeds of sale referred to in paragraphs 9 and 10 hereof bearing interest at 1.1% per month. The 1st Plaintiff therefore on the 15th day of January 1969 owed the Defendant $883,204.26 as principal under the said mortgage. The 1st Plaintiff defaulted in payment of interest wherefore the Defendant exercised its power of sale under the said mortgage and sold the said property by public auction to Choi Kee Limited for the price of $1,040,000.00 on the 26th day of November, 1969, at which time interest on the said mortgage amounted to $185,576.09 less the sum of $3,388.88 referred to in paragraph 7 hereof leaving a total of $182,187.21. The Defendant therefore suffered a loss of $25,391.47.

17. By reason of the 1st Plaintiff's aforesaid default and the consequent exercise of the said power of sale by the Defendant, the Defendant was put to the following expense:-

(a)	Expenses of auction including advertising	$16,840.50
(b)	Legal costs	$ 3,000.00

Together with the loss of $25,391.47 referred to in paragraph 16 hereof, the Defendant therefore suffered a total loss of $45,231.97.

18. On the 23rd day of August 1969 the Plaintiffs registered the Writ herein against the said property as a lis pendens. By a letter dated the 10th October, 1969 the Defendant requested the Plaintiffs to vacate the said registration. The Plaintiffs and each of them have failed and neglected to vacate such registration and have failed and neglected to reply to the said letter. By the same letter the Defendant requested the 1st Plaintiff, alternatively the said Lai Yung Kwong, to deliver to the Defendant all of the keys of the said property. No such keys have yet been delivered.

19. By a letter dated the 21st August, 1969, the Defendant pointed out to the Plaintiffs that certain units of the said property, namely the 1st, 2nd, 3rd and 4th floors were occupied, the said 2nd floor being occupied by one Mee Ah Hong Co., Ltd., a company incorporated with limited liability in accordance with the laws of the said Colony, of which the said Lai Yung Kwong was at

all material times the majority shareholder and a director. The Defendant, as mortgagees, never authorised any person to let any part of the said property or otherwise to allow any person to go into possession thereof. The 1st Plaintiff never obtained the consent of the Defendant to let out the said property or any part thereof. By the said letter the Defendant enquired whether the said persons had been let onto the said units by the Plaintiffs or either of them and if so then that the said persons should be ejected. No reply was ever received to the said letter and the said persons remain upon the said premises.

20. By reason of the matters set out in paragraphs 18 and 19 hereof, the Defendant in exercising its power of sale as aforesaid was forced to sell the said property subject to the aforesaid registration of lis pendens and subject to existing tenancies, if any, and to give an indemnity against all damages which might be suffered by any purchaser. The Defendant sold the said property to Choi Kee Limited on the 26th day of November 1969 subject to the aforesaid conditions and gave to the said Choi Kee Limited an indemnity as aforesaid.

AND THE DEFENDANT CLAIMS BY WAY OF COUNTERCLAIM :

(a) Against the 1st Plaintiff the sum of $45,231.97 referred to in paragraph 17 hereof together with interest from the 27th day of November 1969 until payment at 1.1% per month or at such rate as to this Honourable Court may seem just.

(b) Against the 1st Plaintiff, alternatively against the 2nd Plaintiff, alternatively against both Plaintiffs a declaration that the Defendant be indemnified against all costs, other expenses and damages caused or occasioned or which may be caused or occasioned by them in respect of (i) the lis pendens registered against the said property and the vacation of the same, (ii) the presence upon and ejectment from the said property of the persons referred to in paragraph 19 hereof, (iii) the cost of new locks and keys for the said property.

(c) Costs of this action.

(d) Further and/or other relief.

Dated the 27th day of February, 1970

(sd.) CHARLES CHING
Counsel for the Defendant

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

(cont.)

Exhibit "PH-4"

EXHIBIT "PH-4"

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD. — 1st Plaintiff

and

MEE AH CONSTRUCTION CO., LTD. — 2nd Plaintiff

and

DAO HENG BANK LIMITED — Defendant

AMENDED REPLY AND DEFENCE TO COUNTERCLAIM

1. The Plaintiffs join issue with the Defendant on the Statement of Defence and Counterclaim and in further reply to the Counterclaim say as follows:-

1A. In further reply to paragraph 3 of the Further Amended Statement of Defence and Counterclaim, the said Au Wei Choi had express, alternatively, ostensible authority to enter into the agreement in question on behalf of the Defendant, in the further alternative, was held out by the said Tang Pang Yuen to have such authority.

2. It is denied that the 1st Plaintiff on 15th January, 1969 or on any date owed to the Defendant the sum of $883,204.26 or any sum as pleaded in paragraph 16 of the ~~Statement of Claim~~ Counterclaim or at all. For the reasons given in the Statement of Claim, the Defendant at all material times was indebted to the Plaintiffs.

3. It is admitted that the Defendant sold the property to one Choi Kee Limited on 26th November, 1969. It is denied that the 1st Plaintiff owed any interest to the Defendant at that or any date. It is denied that the Defendant suffered any loss on the sale. The said Choi Kee Limited is a related company of the Defendant, and they have common directors and shareholders.

4. None of the expenses and costs pleaded in paragraph 17 of the Counterclaim is admitted and the Plaintiffs deny any liability to the Defendant for the sum of $45,231.97 or any sum.

5. It is admitted that the Plaintiffs registered the Writ in this action against the property as a lis pendens. The letter from the Defendant dated

10th October, 1969 is admitted. It is denied that the letter contained any request for the delivery up of the keys of the property.

6. The Defendant's letter dated 24th August, 1969 is admitted. It is admitted that Lai Yung Kwong is a majority shareholder and a director of the Mee Ah Hong Limited. The registered office of this company is at the second floor of the said building but no business is carried on there. The 1st, 2nd, 3rd and 4th floors are used for the storage of building materials left over from the construction of the building and occupied by employees of the 2nd Plaintiff who act as caretakers. The Plaintiffs have been in occupation of these floors by permission of the Defendant first as building contractors and later also as intending purchasers, it being recognised that, the 1st Plaintiff being but a nominal owner of the property, any purchase of units in the property would have to be approved by the Defendant as real owner, and the 1st Plaintiff's intention to purchase is evidenced by a letter from the 1st Plaintiff to the Defendant dated 9th January, 1969.

7. It is admitted that no reply was given to the Defendant's aforesaid two letters. Both letters were written after the issue of the writ in this action.

8. No admission is made that the Defendant gave any indemnity to the said Choi Kee Limited as purchaser. Alternatively as the said purchaser is a related company of the Defendant, any such indemnity is unnecessary.

Dated the 4th day of May, 1970.

Counsel for the Plaintiffs.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

(cont.)

Exhibit "PH-5"

EXHIBIT "PH-5"

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION NO. 969 of 1969

BETWEEN

YAT TUNG INVESTMENT CO. LTD.	1st Plaintiff
MEE AH CONSTRUCTION CO. LTD.	2nd Plaintiff
and	
DAO HENG BANK LTD.	Defendant

Coram: Pickering J. in Court.

JUDGMENT

In this action the plaintiffs claim:-

(i) A declaration that a Deed of assignment of certain land and property to the first plaintiff company is void and that that company acted on behalf of the defendant company and as its trustee in purchasing the property.

(ii) A further declaration that a building mortgage of the property executed by the first plaintiff company in favour of the defendant company to secure the sum of $1,000,000, is likewise void.

(iii) The sum of $465,783.81 said to have been expended by the plaintiffs in the construction costs of and otherwise in relation to the property in question, together with interest and costs.

The first plaintiff limited company is an investment company and the second a construction company. Both are private companies in which, behind their corporate identities, the majority shareholder and the guiding spirit is a Mr. LAI Yung-kwong. Prior to its incorporation in December 1966 the second plaintiff company was known as the Mee Ah Hong Construction Company of which Mr. LAI Yung-kwong was the sole proprietor.

As its name implies, the defendant limited company is a bank and it will be convenient to refer to it in this judgment as "the bank".

Under a building mortgage dated 31st January

1964 the bank became the mortgagee of the property registered in the Land Office as Section 1 of Inland Lot No.2802. This mortgage was designed to secure the sum of $1,200,000 to be lent by the bank to the then owners of the property who were to develop the property by constructing a multi-storey building on the site. The contractor for the scheme under a building contract with the then owners dated 17th March 1966 was the Mee Ah Hong Construction Company and upon the incorporation of this firm in December 1966 the Limited Company of the same name (that is the second plaintiff company) superseded that firm as the contractor.

On 14th July 1967 the owners of the property (whom, for reasons which will become apparent, it will be convenient henceforth to refer to as "The former owners") created a further charge upon the property in favour of the bank to secure a further loan of $200,000 towards construction costs.

On 13th May 1968, the former owners having disappeared, the bank exercised - the plaintiffs would say purported to exercise - its power of sale under the Building Mortgage and Further Charge. On that date the site and the unfinished building upon it were sold by public auction. The first plaintiff company was the successful bidder but it is the contention of the plaintiffs that the sale was a sham and that it had previously been agreed between the bank and the first plaintiff company that the latter would buy the property on behalf of the bank and as its trustee. The plaintiffs also allege that in return for this arrangement the bank undertook to pay all the outstanding construction costs then due to the second plaintiff company as well as future construction costs and other incidental charges and promised further that upon any future sales of units in the new building, 40% of the proceeds of such sales would be paid to the second plaintiff company towards any outstanding construction costs. There is no evidence that the bank was made aware of the amount of the outstanding construction costs which it is alleged it was undertaking to pay.

The price at which the property was knocked down to the first plaintiff company at the auction was $880,000. The plaintiffs say that this figure had been agreed upon previously with the bank and that the 10% deposit which, under the Terms and Conditions of Sale was to be paid immediately after the sale, was not in fact paid.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

On the 23rd May, 1969 the assignment of the property to the first plaintiff company was executed. The plaintiffs claim that no money was however paid to the bank. Instead, a building mortgage was executed by the first plaintiff company in favour of the bank to secure $1,000,000 to be payable by five instalments, and out of the first instalment of $940,000 the sum of $880,000 was retained by the bank as the nominal purchase price, a further sum of $24,551.00 was deducted as legal costs and stamp duty and of the balance of $35,449.00, $32,060.12 was paid to the first plaintiff company the remaining $3,388.88 being retained by the bank's solicitors. Of the remaining instalments under the building mortgage totalling $60,000.00, $55,000.00 have been paid towards the construction costs of the second plaintiff company leaving some $5,000.00 unpaid.

Subsequently the first plaintiff company, allegedly at the direction of the bank, assigned two units in the building namely the ground floors of Nos. 197 Johnston Road and 114 Thomson Road and the 14th floors of those same premises. The consideration for the former sale was $187,000.00 and that for the latter, $44,500.00 and this total sum of $231,500.00 was paid direct to the bank which, in pursuance of the agreement to which I have already referred, appropriated 40% thereof, or $92,600.00, to Mr. LAI Yung-kwong for the second plaintiff company towards construction costs. On the 29th May 1968 Mr. LAI Yung-kwong signed a promissory note for this sum in favour of the bank. Out of the said sum of $92,600.00 only some $50,000 was actually paid whilst the balance of $42,600 was deposited with the bank in a savings account the pass book in respect of which account was retained by the bank.

The plaintiffs claim that having taken into account the various sums which they admit having received from the bank (that is the three items, $32,060.12, $55,000.00 and $50,000.00 referred to previously), there remained owing to them on the 31st January 1969 the sum of $435,783.81.

On the 29th January, 1969 the first plaintiff company wrote to the bank requesting payment of this sum and requiring also that the property should be transferred back to the bank. The bank rejected these requests by a letter of the 5th February 1969 and the writ in this action was issued some six months later.

Since the date of the writ the bank has exercised - again the plaintiffs would say purported to exercise - its power of sale under the building mortgage with the first plaintiff company. The bank did so by means of a further auction on the 26th November 1969 when the property (less the two units already assigned by the first plaintiff) came under the hammer and was sold to a third party.

In addition to the sum of $435,783.81 which the plaintiffs say was owing to them on the 31st January 1969, the second plaintiff claims a further sum of $30,000 in respect of caretakers' charges from the 1st February 1969 to the 26th November 1969, the date of the second auction.

The plaintiffs now therefore claim the declarations to which I referred at the beginning of this judgment together with the sum of $465,783.81 with interest and costs.

The bank, for its part, admits that it was the mortgagee of the property under the $1,200,000.00 building mortgage with the former owners and admits that in exercise of its power of sale under that mortgage the property was auctioned on the 13th May 1968 when it was knocked down to the first plaintiff company at $880,000. That the sale was a sham in the sense that the bank was using the name of the first plaintiff company to buy the property for its own account, is however denied as is the alleged undertaking to pay all construction costs then due to the second plaintiff company as well as all future such costs and certain incidental expenses. It is further denied that there was any agreement for the bank to pay 40% of the sale proceeds of any units to the second plaintiffs or that the 10% deposit due to be paid immediately after that auction was not in fact paid. It is the bank's contention that Mr. LAI Yung-kwong, either on his own behalf or that of the first plaintiff company borrowed $88,000 from a Mr. AU Wai-choi who was then a sub-accountant in the Loans Department of the bank. Despite Mr. AU's position in the bank, this loan is said by Mr AU and the bank to have been a personal loan from Mr. AU and not one from the bank. Its purpose is claimed to have been the payment of the deposit on the purchase of the property at auction by the first plaintiff company and it is the bank's case that this sum was paid to it for

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

that purpose in the name of the first plaintiff company.

The bank admits the creation by the same company of a building mortgage in its favour in the sum of $1,000,000 and that $5,000 of that amount has never been advanced to the first plaintiff company. It is further the bank's case that out of the first instalment of the mortgage, that is $940,000, it retained the balance of the purchase price (after crediting the $88,000 received as deposit) namely $792,000 and that out of the balance of that first instalment ($148,000), $24,551 was expended upon costs and stamp duty leaving a remainder of $123,449. The bank claims that from this remaining sum Messrs. Patrick Poon & Company, solicitors, on the instructions of Mr. LAI Yung-kwong, paid $32,060.12 to Mr. LAI and $91,388.88 to Mr. AU Wai-choi this latter payment representing repayment of Mr. AU's personal loan of $88,000 together with an additional sum of $3,388.88 which additional sum was credited by Mr. AU to the sundry creditors account of the first plaintiff company with the bank and subsequently credited against interest owed by the first plaintiff company on the said building mortgage.

The assignments of the ground and fourteenth floors to which reference has already been made are admitted by the bank which claims that the proceeds of sale were not $231,500 but that sum less $1,307.50 costs and less a further sum of $600 being agreed interest retained by the purchasers of the units due to late completion of the building.

Moreover the $92,600 which the first plaintiff company claims to have received as representing 40% of the purchase price of the two units sold, is accounted for somewhat differently by the bank which says that before the sale prices of these two units were paid by the purchasers, Mr. LAI Yung-kwong approached the bank for a loan on his own behalf or on behalf of the first plaintiff company. The bank says that it agreed to make such a loan provided that Mr. LAI would be personally responsible for its repayment signing a promissory note therefor and provided that the amount of the loan would be applied in payment for lift works and other works done on the property by the second plaintiff company. Another condition was

that the loan was to be repayable out of the proceeds of sale of the relevant two units. Upon these arrangements being agreed and the promissory note signed, the bank lent Mr. LAI some $92,600 being 40% of the anticipated proceeds of the sales of the two units and of this sum of $92,600, $50,000 was paid to Mr. LAI by a cashier order dated the 29th May 1968 and the balance of $42,600 was credited to a savings account in the name of "Dao Heng Bank Ltd., Loans Department, on behalf of Mr. LAI Yung-kwong of Yat Tung Investment Company Limited."

Upon payment of the $231,500 the purchase price of the two units, $98,296.76 being the aforesaid $92,600 plus interest was applied in satisfaction of the promissory note and $19,500 was paid by the bank on behalf of the first plaintiff company for monies owing on account of lift works in the building. The total of these sums plus the figures already mentioned of $1,307.50 for costs and $600 in respect of agreed interest is $119,704.26 leaving a balance from the $231,500 the proceeds of sale, of $111,795.74 which balance was credited against the building mortgage.

The bank agrees that $55,000 was drawn by the first plaintiff company out of the $60,000 representing the 2nd to the 5th instalments under the building mortgage, and that $5,000 has never been paid since, according to the bank, its payment has never been requested.

The bank has counterclaimed against the plaintiffs alleging that it has advanced to the first plaintiff company a total of $995,000 under the building mortgage which sum was reduced by the figure of $111,795.74 the balance of the proceeds of sale referred to above, and claims that as at the 15th of January 1969 the first plaintiff company owed the bank $883,204.26 as principal under the mortgage together with the sum of $182,187.21 in respect of unpaid interest. Deducting from the total of these two sums the figure of $1,040,000.00 which was the price obtained for the property when it was auctioned by the bank for the second time on the 26th of November 1969, the bank claims to have suffered a loss of $25,391.47 and to have incurred expenses of auction of $16,840.50 and legal costs of $3,000. The bank therefore counterclaims against the first plaintiff company in the sum of $45,231.97 together with interest from the 27th of November 1969,

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

the day following the second auction. Since moreover the plaintiffs have registered the writ in this action as a lis pendens and since the plaintiff companies or one of them is still in possession of certain floors of the property, the bank further counterclaims for a declaration that it be indemnified against all costs, expenses and damages which may be caused or occasioned by the plaintiffs in respect of the lis pendens and their presence upon the property together with the cost of new locks and keys for the property.

Mr. LAI Yung-kwong, whom I have described as the major shareholder and the guiding spirit in each of the plaintiff companies, related in evidence details of the building contract (Exhibit A.2) entered into between the then unincorporated Mee Ah Construction Company and the former owners of the property together with details of an agreement in Chinese (Exhibit P.3) of the same date containing variations of the method of payment set out in the building contract (Exhibit A.2) as well as of the terms of a compromise agreement reached between the former owners and himself in O.J. Action 1200/66. In essence, this provided for 13 payments by the former owners, 70% of each of payments 1 to 12 to be made at certain specified stages of the construction work, and the 13th payment together with the outstanding 30% of each of the first 12 payments to be made within 6 months of the issue of the occupation permit.

Mr. LAI recounted how having started work towards the end of August 1966, he received 70% of each of the first 3 agreed instalments but that no further payments had been made by the time he had completed the 6th stage of the construction. At that point (20th February 1967) he stopped work on the building. Following discussions between the former owners, the Architect and Mr. LAI, Mr. AU of the bank met Mr. LAI at the site and told him if he would resume work the bank would make a loan of a further $200,000 to the owners. Eventually the bank according to Mr. LAI gave him $87,500, $63,000 of which he applied in satisfaction of 70% of the full amounts of the 4th, 5th and the 6th instalments under his arrangements with the former owners, handing over the balance of $24,500 to the former owners.

Having resumed work, Mr. LAI on behalf of the

second plaintiff company was paid 70% of the monies due in respect of the 7th and 8th stages of the work. Although he completed all the work contracted for by the second plaintiff company by the 1st of October 1967, he received no further payments.

According to Mr. LAI, Mr. AU of the bank told him towards the end of 1967 that the property would be auctioned, and in March 1968 invited Mr. LAI to lunch at the Hilton Hotel where he suggested that at the auction sale Mr. LAI should bid for the property on behalf of the bank. In the upshot, about one week before the auction, which took place on the 13th of May 1968, Mr. LAI promised Mr. AU that he would bid for the property but pointed out that he did not have the necessary money whereupon Mr. AU said that the bank would take care of everything since it was not in a position to bid itself for property belonging to persons who owed the bank money. Mr. LAI further claimed that Mr. AU told him to bid $880,000 adding that after the sale the property would again be mortgaged to the bank, this time by the first plaintiff company, for $1,000,000; but from this sum $880,000 would be deducted in payment of the purchase price and the balance applied in payment of 70% of the 9th, 10th, 11th and 12th instalments due to the second plaintiff company. Mr. LAI then suggested to Mr. AU that the remaining 30% of the first 12 instalments should be paid by crediting to him 40% of the sale price of any flats sold, a proposition to which Mr. AU agreed. The 13th and final payment was likewise to be paid from an allocation of 40% of the proceeds of sale of flats.

Mr. LAI told the court that he was not altogether sure that Mr. AU had authority for the course which he was proposing to adopt and that he, Mr. LAI, went to see Mr. TANG Pang-yuen who was both the Chief Manager and a Director of the bank, some three days before the auction querying whether it was in order for him to bid for the property for the bank, whereupon Mr. TANG said that it was in order, that he confirmed on behalf of the bank whatever Mr. AU had said and that Mr. LAI should discuss the question of construction costs with Mr. AU.

According to Mr. LAI, he started the bidding at the auction at $800,000 having been told that a Mr. TUNG of the bank would theoretically contest the bidding with him. Mr. TUNG bid $850,000, whereupon Mr. LAI bid $880,000 which was the maximum he had been

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

authorised to go to by Mr. AU. There were no further bids and the property was knocked down to Mr. LAI at $880,000. He thereupon signed the contract for sale and purchase in the auction rooms in the name of the first plaintiff company but paid no deposit and received no receipt for $88,000.

It was Mr. LAI's understanding that any monies to be paid to him under the proposed $1,000,000 mortgage as well as sums paid to him from the proceeds of sale of units in the building were to be outright payments in respect of building costs and were not to be repayable to the bank. Moreover, although the building mortgage provided for the instalments payable thereunder to be paid only against architect's certificates, he never subsequently produced any architect's certificates for any of the monies he received under the mortgage.

Mr. LAI complained that the $32,060.12 which was the balance received by him of the first instalment of $940,000 due under the building mortgage constituted a shortfall of $3,388.88. As a matter of pure arithmetic this is correct but how this odd figure was arrived at has remained a mystery throughout the case and why it was dealt with as it was remains a matter of dispute. It will be recalled that Mr. LAI claims that the sum was retained by the bank's solicitors but Mr. AU says that the solicitors forwarded him a cheque for $91,388.88 which sum, it will be observed, is the total of the $88,000 said to have been loaned by Mr. AU to Mr. LAI for the purpose of paying the deposit after the auction, and of the mysterious figure $3,388.88. Mr. Patrick POON, solicitor, who acted both for the bank and for the first plaintiff company in regard to the assignment of the property by the bank to that company and in regard to the subsequent building mortgage by that company to the bank, says that Mr. LAI instructed him to pay the sum of $91,388.88 to Mr. AU and at Mr. POON's request signed a written authority to that effect. This document was produced in Court (Exh. "M"). Mr. LAI denies giving any such instruction and produced three carbon copies (Exhs. D1, 2 and 3) of audit notes addressed by him to Patrick Poon & Co. requesting their confirmation of a credit balance in his favour of $3,388.88. No replies were received to these requests.

It was further Mr. LAI's allegation that of the $92,600 representing 40% of the purchase price of the ground and 14th floors, he paid $50,000 to the architect at Mr. AU's request to induce the architect to withdraw from the scheme in favour of another who was to obtain the occupation permit. No receipt was given to him in respect of this payment which was said to have been made in cash. Mr. LAI, having first testified that the architect had refused to give him any receipt for this sum, subsequently said that he never asked the architect for a receipt since for "this sort of thing" no receipt would be given. The reason for persuading the architect to withdraw was said to be that Mr. AU did not see eye to eye with him and according to Mr. LAI, because Mr. AU was afraid that Mr. LAI might not hand the $50,000 to the architect, Mr. LAI was required to sign the promissory note for $92,600 it being agreed that the note would be cancelled upon the issue of the occupation permit.

Despite the production in evidence of a bundle of debit notes (Exh. F) dated between the 3rd June 1968 and the 3rd June 1969, issued by the defendant bank to the first plaintiff company and expressed to be for interest, Mr. LAI claims that the bank never made any demand upon him for interest until by a letter from Patrick Poon & Co., Solicitors, (A24) dated the 12th June 1969. There was, Mr. LAI claimed, no obligation to pay interest since he had merely bought the property on behalf of the bank. He admitted receiving the debit notes (the first seven or eight of which incidentally contained certain inaccuracies not corrected until December 1968) but claimed that he did not consider that he was really intended to pay or be debited with the interest stated therein but thought the issue of the notes merely had something to do with the bank's accounting system.

On the 9th January 1969, Mr. LAI wrote to the bank (A15) asking to be allowed to purchase the 2nd, 3rd and 4th floors of the property and to pay for them over a period of 10 years. Coming as it did from the registered owner of the property, this request can only be regarded as extraordinary and must, at any rate on the face of it, lend some colour to Mr. LAI's assertion that he bought the property not on his own account but merely as trustee for the bank. No reply was received from the bank to this letter,

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

which Mr. LAI claims was written by him on Mr. AU's suggestion. The letter produced in Court was Mr. LAI's copy. The original was never produced it being the evidence of Mr. AU that there is no record in the bank of any such letter ever having been received.

On the 29th of the same month Mr. LAI wrote a further letter to the bank (A16), again, according to him, at Mr. AU's suggestion. In that letter he proposed that the bank should accept the re-transfer of the property and he claimed payment of $435,783.81 in respect of construction costs and other matters. This, together with interest and a further $30,000 claimed by the second plaintiff company, is the pecuniary claim under the present writ. The bank rejected this suggestion and claim by letter of the 5th February 1969 (A17).

Mr. LAI agreed in evidence that he has kept the keys of the building and nailed up certain doors thereof, despite his claim that the building is not his. He had also caused notices to be posted on different units of the building forbidding entry; all this had been done because he had not yet received his construction costs.

No documents were produced in evidence to support Mr. LAI's assertion that he was only the nominal buyer of the premises, holding them on trust for the bank.

At the time of the advance by the bank of an additional $200,000 by way of further charge to the former owners, Mr. LAI executed a guarantee under which he undertook to complete the work on the building for a sum of $160,000. In evidence he claimed that he could not have completed the building without receiving more money than $160,000 and said that he had not understood the document to be a guarantee of completion on receipt of such further sum. The interpretation clause on the document was false and the clerk of Messrs. Yung, Yu, Yuen & Co. had not in fact interpreted the document to him, which had been merely explained to him by Mr. AU to the effect that Mr. AU would give Mr. LAI some $200,000 in return for which Mr. LAI would give the guarantee of completion of the building. He signed the guarantee in the prosence of Mr. YUNG Kwok-yue of Yung, Yu, Yuen & Co., telling Mr. YUNG that the document had in fact been interpreted to him and

making it clear to Mr. YUNG that he was going to complete the building upon payment of a further $200,000 and nothing less. He claims that Mr. YUNG confirmed to him just before he signed the guarantee that he would be getting $200,000. On being pressed as to whether Mr. YUNG had deceived him, Mr. LAI was extremely reluctant to use that term but maintained his evidence that Mr. YUNG had told him that he was to receive $200,000, and whilst baulking at the word "deceived" he did say that Mr. YUNG had not told him the truth about the contents of the guarantee, which he would not have signed had he understood the contents.

In regard to another solicitor, Mr. Patrick POON, Mr. LAI was less reticent stating unequivocably that Mr. POON had certainly conspired with the bank against him. Mr. POON had been at the auction sale at which Mr. LAI had bought the property for $880,000 and had there told him that on the bank's instruction he was to act for both vendor and purchaser and that if Mr. LAI came to his office in a few days' time the documents would be ready for him to sign. On the 23rd May Mr. LAI attended Patrick POON's office, when he signed a number of documents not really knowing what he was signing. These documents included Exh. M, the authorisation to Patrick POON to pay Mr. AU $91,388.88. Somewhat contradictorily Mr. LAI said that at no time did he authorise Mr. POON to pay this sum to Mr. AU.

Mr. LAI agreed that the first plaintiff company had in fact produced a brochure for the sale of the units in the property with its own name on the front cover, but claimed that the company was offering the premises for sale on behalf of the bank, which had instructed him verbally to put out the brochure.

Following Mr. LAI's letter to the bank of the 29th January, 1969 (A16) and the bank's rejection of the request contained therein that they should accept the re-transfer of the property and pay some $435,783.81, Mr. LAI claims to have sought an interview with the Chief Manager of the bank and, the latter being too busy to see him, actually to have had an interview with Mr. TANG Kong-yuen, brother of the Chief Manager, who agreed that the building should be re-transferred to the bank but demurred at the size of Mr. LAI's pecuniary

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

claim and suggested that the bank should pay only $350,000.00. To this proposal Mr. LAI says that he acceded, whereupon Mr. TANG Kong-yuen said that it would be necessary for Mr. LAI to see the Chief Manager, Mr. TANG Pang-yuen, again. At the subsequent meeting Mr. TANG Pang-yuen, according to Mr. LAI, retracted everything which Mr. TANG Kong-yuen had promised and said "I have taken advantage of you. Go ahead and sue me; you have no case."

Mr. LAI was shown a letter (H1) dated 29th October, 1969 addressed by the first plaintiff company to the bank requesting that "for audit purpose" the bank would confirm to the first plaintiff company's auditors that that company had a debit balance of $765,407.50 with the bank at the close of business on 31st March, 1969. When he was asked if this requested certificate, which must have been false had the first plaintiff company genuinely only been a trustee for the bank in the purchase of the property, was intended for tax return purposes, I warned Mr. LAI that he was not obliged to answer the question if he thought that the result of his answer might be to incriminate him. His reply was that he claimed privilege. The bank replied neither to this request nor to reminders addressed to it by the first plaintiff company.

It was a fact that after the auction on the 13th May, 1968 at which Mr. LAI purchased the property through the medium of the first plaintiff company, allegedly as a trustee for a bank, Mr. Lai continued to expend monies upon the building notably for the connection of electrical installations. He said he had not insisted that the bank should pay this charge because Mr. AU had asked him to pay it on behalf of the bank for the time being and if he had not done so the building could not have been effectively completed in that there would have been no connection of the electricity supply.

It was further Mr. LAI's evidence that he did not know what he was signing when he signed the promissory note (A13) for $92,600.00. The same remark applied to the guarantee (A14). Mr. Patrick POON has caused him to sign the promissory note without explaining it and whilst Mr. AU, upon the same occasion in Mr. Patrick POON's office, had explained the contents of the guarantee to him,

his explanation had been false. Upon the terms of the guarantee being read to the witness in court, he claimed then to understand the document for the first time and said that Mr. AU had told him that the document was an acknowledgment of Mr. LAI's receipt of the $92,600.00 which he was to receive and which represented forty percent of the sale proceeds of the ground and fourteenth floors. Mr. LAI denied that he knew full well at the time of signature what the promissory note and the guarantee were and said that he was given a bundle of documents and just signed them.

Mr. AU, according to Mr. LAI, had represented himself as head of the Loans Department of the bank but on the evidence of the bank's officials it is clear that this was not Mr. AU's position at the relevant time.

It was Mr. LAI's evidence that over a period of about 5 months in 1967 he had expended approximately $70,000.00 on the property although this was shortly after he had been forced to sell a plastic business for the purpose of raising funds to fight another court case. His explanation for his ability to make these payments was that he came into receipt of money as and when debtors repaid their loans to him. When asked if he could produce his bank statements for the relevant period he said he could not because he had lost them all and was unwilling to ask the bank to provide copies.

Mr. AU confirmed that in about June, 1967 he was the second-ranking officer in the Loans Department of the bank, some of his responsibilities being to handle applications for loans and check the security therefor. He himself had no authority to grant a loan, which authority was vested in a Loans Committee, the members of which were the Chairman of the Board, the Chief Manager and three other Managers, and the system was that either the Chief Manager alone or any two members of the Loans Committee could approve a loan.

The witness confirmed that the former owners had mortgaged the property to the bank and, having encountered difficulties, had suggested to the bank that a further charge of $200,000.00 should be granted to them to enable them to complete the construction work. The witness thereupon arranged a meeting between himself, the former owners and Mr. LAI, whom he understood to be the contractor, and this meeting took place at the office of Mr. YUNG Kwok-yue, solicitor. At the

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

meeting Mr. LAI said that about $160,000.00 was needed to complete the building. The bank regarded it as essential that this money should reach the hand of Mr. LAI, the contractor, direct and also that the contractor should execute a guarantee undertaking that upon receipt of $160,000.00 he would complete the building up to the stage of the issue of the occupation permit and that whether or not more than $160,000.00 proved to be necessary for that purpose.

Mr. AU said that after the bank had eventually given instructions to have the building mortgage and further charge in favour of the former owners called in, Mr. LAI came to see him at his office, saying that if the bank was to auction the property he would be unable to receive payment of the construction monies owed to him by the former owners; that all the ready cash of the second plaintiff company had been invested in the site, that his own financial position was straitened in regard to an ink factory which he ran, and that if he could not obtain payment of his construction costs from the former owners he might have to go bankrupt. Mr. AU claims to have replied that the bank had already decided upon the auction and that if Mr. LAI wanted to get his money he should buy the property at the auction, estimate the amount necessary for the completion of the building and following completion, sell the property unit by unit. This discussion continued until lunchtime and was resumed over lunch at the Hilton Hotel, where Mr. LAI said that he estimated that after completion the various units of the building could be sold for a total of $1,700,000 or $1,800,000 and that he needed approximately $150,000 in order to complete the building, which lacked mosaic flooring, plastic water tanks in the toilets, electric and fire prevention works and a lift. He said that he himself did not have the money to bid at the auction and asked if the bank would lend him sufficient money both to buy the incomplete building and to finish it. Mr. AU said that he would study the situation and, having returned to the bank, turned up the records and saw that the former owners owed the bank a little over one million dollars. His own estimate of the worth of the building after completion was $1,600,000, and he made a report to the Loans Committee suggesting that they advance a loan of one million dollars to

any successful bidder at the auction, including Mr. LAI. This recommendation was accepted by the Loans Committee.

Some five or seven days later at a further lunch at the Hilton Hotel, Mr. AU claims to have told Mr. LAI that the bank had agreed in principle to advance one million dollars to a successful purchaser at the auction upon the security of the property and to have asked Mr. LAI whether, if he should be successful at the auction, he could obtain money from other sources to complete the building, to which Mr. LAI replied that he could obtain materials on credit and could, if necessary, mortgage his residence in Stubbs Road. His anxiety, however, was in respect of the payment of the 10% deposit if successful at the auction and he requested Mr. AU to devise ways and means of raising the deposit money for him, at which Mr. AU eventually said that if absolutely necessary he would assist Mr. LAI in his own personal capacity. Mr. AU said that his motives for this apparently altruistic gesture were, first, that he was very anxious to solve the mortgage problem for the bank and, secondly, that he expected that if he lent money to Mr. LAI in a personal capacity the latter would pay him interest thereon. This expectation did not materialise, Mr. LAI apparently offering no interest and Mr. AU being embarrassed to ask for it.

Mr. AU emphatically denied that he had asked Mr. LAI to bid at the auction as a nominee of the bank or that he had promised Mr. LAI on behalf of the bank to pay outstanding and future building costs in connection with the scheme. He had never discussed with Mr. LAI any liability on the part of the bank to recompense Mr. LAI for compensation paid to sub-contractors by reason of the fact that work on the building had at one time been interrupted for a period of months. Similarly, there had been no undertaking on his part that the bank would pay the wages of employees retained on the site during the stoppage of work and it was untrue that he had instructed Mr. LAI to write the letter of the 29th January 1969 (A16) to the bank claiming payment of more than $435,000 and requesting the bank to accept a re-conveyance of the property.

Similarly, Mr. AU denied that before the auction there had been any agreement between Mr. LAI and himself as to the amount to be paid for the property, namely $880,000; he was in no position to

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5" (cont.)

forecast the amount of the successful bid or the identity of the successful bidder. He attended the auction, having previously instructed the auctioneer that the upset price of the property was to be $700,000 and that bids should be accepted in units of $5,000. There were, he said, two or three bids and the property was knocked down to Mr. LAI at $880,000; none of the other bidders was known to him and none was from the bank. Following the sale he paid a deposit of $88,000 in the auctioneer's office on behalf of Mr. LAI. The witness identified his personal cheque (Exhibit W), and, asked if he would have any objection to producing his bank statements for the two or three months around May 1968 said, in marked contrast to Mr. LAI's reply to a similar question, that he would have no objection. The witness did in fact subsequently produce these accounts and certain internal documents of the bank.

Mr. AU agreed that after the assignment of the property to Mr. LAI and the execution of the building mortgage by Mr. LAI in favour of the bank in the sum of one million dollars, he did receive from Patrick Poon & Co. a cheque in the amount of $91,388.88. He did not understand why the cheque was $3,388.88 in excess of the $88,000 which he had lent to Mr. LAI for the purpose of paying the deposit and caused that surplus sum to be entered into a provisional temporary receipt item as being the money of the first plaintiff company.

Some days later Mr. LAI told him that the balance of the monies remaining from the mortgage of one million dollars was insufficient to enable him to complete the building, which still required a lift, fire prevention installations and wiring, and Mr. LAI requested a further loan of $100,000 from the bank. Since Mr. AU understood that there were in existence agreements for the sale of the ground and 14th floors at a total price of about $230,000, he suggested to the Loans Committee that they should give Mr. LAI a further loan amounting to 40% of that purchase price, namely $92,600. This was done, it being a condition of the loan that Mr. LAI signed a promissory note and a pledge to the effect that repayment of this sum was to be realised out of the sale proceeds of the ground and 14th floors of the property.

It was Mr. AU's version of events that, having signed these two documents, Mr. LAI was given $50,000

in the form of a cashier order and said that he would give this sum to the former architect, who had failed to inform the Public Works Department that he had resigned from the job with the consequence that Mr. LAI was having difficulty in employing a replacement architect. Mr. AU claims that Mr. LAI requested him to retain the balance of $42,600 and hold it against subsequent payments in respect of the installation of the lift. Mr. AU did so retain this money, opening a savings account in the name of "Dao Heng Bank Ltd., Loans Department, on behalf of Mr. LAI Yung-kwong of Yat Tung Investment Co. Ltd." Subsequently Mr. AU effected payment from this account to the Ryoden Electrical Engineering Co. Ltd. of $27,500 in respect of part payment for the installation of a lift.

I have already observed that Mr. LAI claims to have written a letter of the 9th January 1969 to the bank (A15) in which, inter alia, he requested the bank to permit him to buy the 2nd, 3rd and 4th floors of the premises, effecting payment over a period of 10 years. Mr. AU said in evidence that there is no record in the bank that such a letter was ever received and that the first time he became aware of the allegation was when he saw a copy of this letter at Messrs. Patrick Poon's office during the preparation of this case. It was true that in January 1969 Mr. LAI had verbally made such a proposition to him, requesting that the bank release those three floors to Mr. LAI lending him the necessary money which would be repaid over a period of 10 years. Mr. AU considered the request very unreasonable as calculated to extinguish the bank's security to the extent of three floors of the building and refused Mr. LAI verbally on his own responsibility.

Mr. AU denied that he was acting as a mere conduit pipe for the bank when he lent the $88,000 to Mr. LAI for the purpose of paying the deposit and denied also that anybody called TUNG was at the auction or that a person of that name was a professional bidder for the bank at auction sales.

The Auctioneer who conducted the auction on the 13th of May, 1968 gave evidence and said that there were two persons bidding, and that in all thirteen bids were made. He had no written record of the bids but from memory specified the sequence of the

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5" (cont.)

bidding and the actual amount of each bid. Since that time he had conducted some fifteen auctions of landed property and approximately two every month of chattels. I hope that I am not doing the auctioneer an injustice when I say that such total recall at an interval of more than two and a half years during which period he had conducted another fifteen auctions of land and property, seems to be improbable, but however that may be I do not think that the evidence of the auctioneer advances the case one way or the other.

Mr. Patrick POON was present at the auction but, sitting at the front of the room, was unable to see the bidders behind him, nor could he recall the number of bids made. Mr. POON said that he did not know whether or not the sale of the property to Mr. LAI was a collusive sale and that the conveyancing instructions to him would have taken the same form whether or not collusion existed between Mr. LAI and the bank. However, he was not concerned in any arrangement with the bank to "do Mr. LAI down". Mr. POON was insistent that Mr. LAI gave him instructions to pay $91,388.88 to Mr. AU, and that when he signed the authorisation to that effect (Exh. M) Mr. LAI was well aware of what he was signing. Had this not been so, Mr. POON added, Mr. LAI would have queried the amount of the cheque which he received representing the eventual balance due to him on completion of the building mortgage.

Mr. LO Hing-sheung, a clerk with Messrs. Yung, Yu, Yuen, solicitors, testified that he drew up Exh. O, the guarantee and undertaking signed by Mr. LAI, and that he explained it including the proposed advance of $160,000 to Mr. LAI asking him if he was clear about about the matter. The guarantee was not drawn up by Mr. AU, and Mr. YUNG Kwok-yu, solicitor in whose presence Mr. LAI signed the guarantee, had repeatedly asked Mr. LAI whether he understood it. This witness was not shaken in cross-examination, and Mr. YUNG who gave confirmatory evidence as to the circumstances under which Mr. LAI signed the guarantee and undertaking, was not cross-examined on that aspect of his evidence.

Mr. TAM Sang-kin, a conveyancing clerk with Patrick Poon & Co., testified that he explained the Building Mortgage to Mr. LAI, who wanted the term of the deed to be for two years instead of eighteen

months as drafted. Mr. TAM said that he obtained agreement by telephone to this alteration from Mr. AU, and that he thereafter interpreted the salient points of both the Assignment and the Building Mortgage to Mr. LAI. Mr. LAI had signed Exh. M, the authorisation to Patrick Poon & Company to pay $91,388.88 to Mr. AU in the witness's presence, and had also signed the promissory note in his presence after it had been explained.

Mr. TANG Pang-yuen, the Chief Manager of the bank, described the whole transaction regarding the property in dispute as a normal banking transaction. He denied that the transaction was a sham or that Mr. AU had any authority to enter into any such sham. He had not ratified or purported to ratify an agreement made by Mr. AU with Mr. LAI for a bogus sale of the property and had indeed seen Mr. LAI only once - and that in 1969 after the date of the auction - when he told Mr. LAI to deal with the Loans Department. Mr. TANG explicitly denied any conversation in which he had said to Mr. LAI, "I have taken advantage of you. You can sue me. You have no case." He further denied that he had sent anybody from the bank to bid at the auction. He was prepared to give assistance to a successful bidder at the auction to the extent of one million dollars, but had he been aware that Mr. AU was personally lending money to Mr. LAI for the purpose of paying the deposit on the purchase price for the property he would not have approved such a transaction. He was unaware that Mr. LAI was on the verge of bankruptcy, and had Mr. AU revealed this to him, as he ought to have done, the witness would not have agreed to finance a building contractor in that position.

Mr. Douglass John Brassett, a Distribution Engineer with the Hong Kong Electric Company, was called for the plaintiffs and identified a letter which he had written on behalf of the company, and which had been signed by a Mr. Collins, who is no longer in Hong Kong. The letter, which was dated 24th of July, 1968, was addressed to an architect and began:-

"Dear Sir,

191-197 Johnston Road

We understand from Mr. AU Wai-choi, representative of Dao Heng Bank Limited, 7-19 Bonham Strand, part owners of the

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

above mentioned building, that you are now architect of this building."

The witness said that he had used the term "part owners" in relation to the bank quite deliberately in the light of what he understood following a conversation with Mr. AU.

In cross-examination it was put to the witness that Mr. AU had said that since the bank were mortgagees they were in fact the legal owners, to which Mr. Brassett replied that the impression he had at the time was that they were part owners. It could be that Mr. AU had said the bank were the mortgagees, but the witness felt that the impression with which he had been left in July 1968 was that the bank were "part owners".

I do not propose to deal in detail with all the aspects of Mr. Swaine's cross-examination of the defence witnesses. The plaintiff having proved a poor witness and an inadequate protagonist in his own cause, such cross-examination largely represented an indefatigable attempt by digging, delving and probing into the documentary exhibits, to discredit the defence and assert the allegedly bogus nature of the sale by auction of the 13th May 1968 and of the subsequent building mortgage entered into between the first plaintiff company and the bank.

The cross-examination of the defence witnesses constituted a very thorough fishing expedition on the part of counsel for the plaintiff who, whenever he found himself in waters for which he lacked the appropriate tackle, induced the defence witnesses to lend it to him. This they did very willingly by producing, at Mr. Swaine's request, Mr. AU's bank statements, all available documents regarding Mr. AU's overdraft facilities with the bank and certain internal documents of the bank.

Every apparent discrepancy discovered by minute scrutiny of the numerous documentary exhibits was made the object of a cast but the catch was small indeed. Thus was queried the fact that the building mortgage was dated 27th May 1968 whereas the deed of assignment of the property by the bank to the first plaintiff company was dated 23rd May 1968. Mr. Patrick POON solicitor, who had acted for both parties in

these transactions explained that the mortgage was not signed on behalf of the bank until the 27th whereupon the deed was so dated and described this as quite normal conveyancing practice. The mortgage deed was further queried as reciting that the one million dollars to be advanced thereunder was for the purpose of "completing" the building whereas in fact $880,000 thereof represented the purchase price of the incomplete building. Mr. POON described this form of recital as usual in a building mortgage even where the greater part of the sum to be advanced represents the purchase price of the property. Whilst the recital is undoubtedly loose and inaccurate, I can perceive nothing sinister in it nor does it appear to me to add any weight to the plaintiffs' contention that the document together with the deed of assignment, was a sham. Exh. X1, the application to the bank for the loan of $1,000,000 also described the loan as to be used for the "completion" of the building and whilst that statement is substantially inaccurate, I cannot attribute to it the significance which Mr. Swaine invites. That largely incorrect description of the purpose of the loan does not go any distance to assist the plaintiff to put upon its feet his assertion that the whole transaction was a sham. Another document probed was Exh. A9 the printed particulars and conditions of the sale at auction of the 13th May 1968; Mr. Swaine was concerned to know why the property was not therein expressed to be sold subject to the two agreements previously entered into by the former owners of the sale of the ground and 14th floors respectively. Mr. POON's explanation was that this was unnecessary because the mortgage by the former owners in favour of the bank was registered prior to the registration of those agreements and took priority over them so that any purchaser from the bank would acquire the property free from any obligation under such agreements.

The lack of any architect's certificate before payment was made of the later instalments under the building mortgage, the bank's motive in having the property sold by auction instead of foreclosing upon it, Mr. AU's failure to charge interest upon the $88,000 which he lent to Mr. LAI to enable him to pay the deposit upon the purchase price of the property, Mr. AU's choice of his current account rather than his overdraft account as the source of this $88,000, the acceptance by Mr.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

Patrick POON of Mr. AU's personal cheque in payment of the deposit of $88,000 instead of, as stipulated in the particulars and conditions of sale either cash or a banker's order, the willingness of the bank to advance $1,150,000 to a company having an authorised capital of only $20,000 (explained by the fact that the loan was not a credit loan but a loan upon the security of a building estimated to be worth $1,600,000 when completed), were amongst other matters the subject of cross-examination by Mr. Swaine and were all either completely or substantially satisfactorily explained.

If the attempt to establish the plaintiff's case by attacking the defence witnesses and their documents failed, it was not for want of industry on Mr. Swaine's part but in my view fail it did. The onus of proof - and by the very nature of the allegations made it is a heavy onus - is upon the plaintiff and is not to be discharged in a case of this nature by a rear-guard action however valiantly fought. The plaintiff himself never really put his own case upon its feet despite the fact that the sheer boldness of his assertions initially lent to them a certain superficial credibility.

Despite the sometimes unsatisfactory mechanics of the transactions between the plaintiff companies and the bank and some inaccurate book-keeping by the bank, uncovered by Mr. Swaine in the course of his very searching cross-examination of defence witnesses, as well as certain other matters to some of which I shall refer, Mr. LAI is far from showing that the assignment and mortgage were sham transactions.

On the contrary the evidence shows him to be a man who, as Mr. Gittins aptly put it, labours under an obsession in regard to these premises. Certainly his conduct in the pursuit of his claim (which is essentially to recover that proportion of his building costs which he alleges rightly or wrongly never to have been paid) has been extravagant. He has accused two solicitors, alleging that Mr. Patrick POON conspired with the bank to cheat him and that Mr. YUNG Kwok-yu had deliberately misled him as to the contents of the Guarantee (Exh. O) before asking him to sign it. He has charged his own solicitors with failure to carry out his instructions

to reply to letters addressed to them by Patrick Poon & Co. (Exhs. A26 and A27) on the 21st August and 10th October, 1969 respectively and of failing to correct, on his instruction, certain mistakes appearing in their letter of 4th July 1969 to Patrick Poon & Co. (Exh. A25). He has also accused Mr. AU of deceiving him in regard to the contents of the guarantee (Exh. "O"). Despite the fact that contends that he is not and never has been the true owner of the premises he continues to occupy, through the medium of the two plaintiff companies, three floors thereof and has nailed up the entrances to the other floors and put up notices denying admission to all and sundry.

His allegations in regard to Mr. POON and Mr. YUNG were not pursued by his counsel and were refuted by the evidence of those gentlemen themselves and that of clerks in the employment of the respective firms of which they are members. His assertion that Mr. AU misled him as to the terms of the Guarantee (Exh. "O") were likewise demolished by the evidence of the clerk who drafted the document and explained it to him and by that of Mr. YUNG. His charges against his own solicitors remained uncontradicted but significantly nobody from that firm came into the witness box to support Mr. LAI's charges and agree that from oversight or some other cause, their client's instructions had indeed not been carried out.

All these matters together with Mr. LAI's assertion, unspported by any evidence, that the purchaser of the property at the second forced sale by auction on the 26th November 1969, is also only the nominal owner of the property whilst the bank remains the true owner, leave him devoid of credibility as to his main contention which is the very bold one that the bank conspired with him to buy in the property at auction for its own account but in the name of the first plaintiff company. How the bank could be certain of obtaining the property at an advertised public auction for precisely the prearranged sum of $880,000 was never explained.

There was no corroboration of Mr. LAI's story the evidence of Mr. Brassett, of the Hong Kong Electrical Company being too tenuous to carry any weight.

Another matter which goes to the credit of

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

Mr. LAI is his palpable inflation of his monetary claim. Even his counsel who strove so assiduously on his behalf was obliged to state frankly in his closing address that he could not support the full quantum of the claim. In particular Mr. LAI claims to have retained all his workmen between February and July 1967 a period during which all work had stopped on the site as a result of the former owners being in arrear with the payment of construction costs. Quite apart from any obligation to mitigate damages that claim, together with Mr. LAI's assertion that during this period he disbursed more than $70,000 in paying wages to workmen with no work to do and in compensating sub-contractors, must be regarded with considerable scepticism the more so since no receipts or other documentary evidence was produced to support it and Mr. LAI refused to ask his bank for copies of his bank statements which he said he had lost.

Yet another factor militating against the contention that the assignment and building mortgage represented a sham transaction is the history of District Court action 1494 of 1969. In that action the first plaintiff company was sued for $4,650 in respect of fire equipment installed in the premises and judgment was obtained for this amount. It is Mr. LAI's story that his then solicitors (not the solicitors now acting for him) advised him that he had no defence to the action - and this despite the fact that he had disclosed to them that he was a mere trustee for the bank which was the real owner of the property. Had that disclosure genuinely been made it is highly improbable that the advice given would have been that there was no defence to the action and much more probable that Mr. LAI would have been told that he had a defence based upon his capacity as an agent or nominee or that he could bring in the bank as a third party to the action. No witness was called from this firm of solicitors to corroborate Mr. LAI's evidence of having instructed that he was only the nominal and the bank the true owner of the premises. There must be a strong inference that no such instructions were ever given and that at that time Mr. LAI knew full well that he was both the legal and the beneficial owner of the property and had not yet mentally formulated his present claim that the sale to him was a sham.

Mr. Swaine placed great emphasis upon the fact that Mr. LAI put up none of the money either for the purchase-price of the incomplete building or for its completion whereas the bank was prepared to advance him $1,150,000 upon the security of property which had been knocked down at auction for $880,000. I found nothing surprising in this latter fact for the bank was ensuring, for a total advance of $1,150,000 upon which it was to receive interest, the completion of a building which would then be worth, and offer it a security of, $1,600,000. In those circumstances it was quite unnecessary for the bank to call upon Mr. LAI, who was known to Mr. AU to be financially pressed, to put up any money. Moreover when the building had been completed to the stage contemplated by the second plaintiff company's building contract with the former owners, certain work not included in that contract remained to be performed, notably the electric wiring and the connection of the electrical supply. It is to be observed that it was Mr. LAI and not the bank (which, he says, is the true owner of the building) who paid for this and his explanation in evidence that Mr. AU asked him to do so for the time being and on behalf of the bank, appears unlikely.

All this is not to say that the bank's case is without its weaknesses. Thus the form of exhibit HH3, an internal document of the bank recording the loan by the bank to Mr. AU of the $88,000 which Mr. AU subsequently lent to Mr. LAI for the purpose of paying the deposit upon the purchase of the property was never completely satisfactorily explained. Again Mr. AU was somewhat vague as to precisely when the amounts of the various instalments under the building mortgage and the contingencies upon which they were to be paid, were discussed between him and Mr. LAI. Moreover Mr. LAI's failure to sell any of the units in the property except the two previously contracted to be sold by the former owners, raises the suggestion that this is peculiar if he or his first plaintiff company was in fact the owner. On the other hand it is the fact that Mr. LAI put out a brochure designed for would-be purchasers and that brochure was in the name of the first plaintiff company. Mr. LAI's request to buy three floors of the property, admitted by Mr. AU to have been made verbally to him, also accords ill with the action of an owner of the property. And it is a matter for comment that the brother of the Chief Manager of the bank was not called to deny his offer to settle Mr. LAI's pecuniary

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-5"

(cont.)

claim at the figure of $350,000.

When all these matters are taken into consideration however, it remains the fact that such of the explanations of the bank as may not be considered entirely satisfactory are quite insufficient to offset the inadequacy of the plaintiffs' case. The onus of proving their claims on the balance of probabilities is upon them and they have failed to discharge it. Mr. LAI was a very inadequate witness and the witnesses for the bank were far more credible.

I find that there was no agreement between the bank on the one hand and either of the plaintiff companies or Mr. LAI on the other that the property should be bought by anybody as trustee for the bank; that the deed of assignment of the property from the bank to the first plaintiff company dated 23rd May 1968 was a genuine deed of assignment; that the building mortgage executed by the first plaintiff company in favour of the bank and dated 27th May 1968 was a genuine building mortgage; that there was no undertaking by the bank to pay all the outstanding construction costs due as at the date of the auction to the second plaintiff company and no undertaking to pay future construction costs and other incidental charges.

It follows that the declarations sought must be refused and the plaintiffs' pecuniary claim dismissed. All these claims are dismissed with costs.

I have already set out the details of the bank's counterclaim. Its pecuniary claim against the first plaintiff company succeeds but the judgment will not carry interest as claimed since the effect would be to award interest upon interest because the second sale by auction, that of the 26th November 1969, yielded the bank $1,040,000 which was sufficient to extinguish the first plaintiff company's principal indebtedness and also extinguished the greater part of its indebtedness in respect of interest. The remaining indebtedness represents interest upon which I cannot award further interest. (See Supreme Court Ordinance s.30A (2)(a))

The bank is also entitled as against both plaintiffs to the declaration as to indemnity sought in para.20(b) of its Defence and Counterclaim

together with the costs of the counterclaim.

(. . Pickering)
Puisne Judge

Swaine (Lau, Chan & Ko) for the Plaintiffs.
Gittins, Q.C. & C. Ching (Patrick Poon & Co.) for the Defendant.
Judgment handed down.

EXHIBIT "PH-6A"

Exhibit "PH-6A"

IN THE SUPREME COURT OF HONG KONG
APPELLATE JURISDICTION
CIVIL APPEAL NO. 23 of 1971
(On appeal from O.J. Action No. 969 of 1969)

BETWEEN

YAT TUNG INVESTMENT CO. LTD.	1st Plaintiff (1st Appellant)
MEE AH CONSTRUCTION CO. LTD.	2nd Plaintiff (2nd Appellant)
and	
DAO HENG BANK LTD.	Defendant (Respondent)

Coram: Full Court (Blair-Kerr, S.P.J. and Huggins, J.)

JUDGMENT

Blair-Kerr, S.P.J.:

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-6A"

(cont.)

We do not think that it is necessary to go into the matters raised in this appeal in any detail. No point of law arose thereon. The appeal was entirely against the learned judge's findings of fact.

Clearly it was in the interests of the respondent bank that the building should be completed; and, having regard to their experience with the former owners (who had disappeared) I can well understand how they felt that it would be to their advantage if they were to deal in future with a developer and contractor who were one and the same person.

Be that as it may, the 1st appellant company became the legal owner of the property by virtue of the assignment dated 23rd May 1968, and this company mortgaged the property to the respondent bank under the building mortgage dated 27th May 1968. It is common ground that the money for the purchase of the property came from the bank.

The basis of the plaintiff's claim was the alleged oral agreement between their managing director (Lai) and an officer of the bank named AU Wai-choi, to the effect that Lai should bid for the property in the auction but only as nominee of the respondent bank; and that in consideration of his doing so, the bank would pay Lai all outstanding construction costs then due as well as future construction costs. Lai's evidence in regard to this alleged agreement was disbelieved by the trial judge who accepted the evidence of Au and the managing director of the bank, TANG Pang-yuen.

Counsel for the appellants referred to a number of documents which were before the trial judge, documents which were the subject matter of a great deal of cross-examination by counsel for the plaintiffs in the court below. True, they reveal one or two odd features as regards banking practice; but no court could possibly deduce from these documents an agreement between the parties that the plaintiffs should purchase the property as nominees of the bank.

As regards the evidence of Mr. Brassett, if Au had in fact said words to this effect: "The bank are owners of the property", one wonders how Brassett or his colleague could possibly have used the expression "part-owners". Au gave

evidence that Brassett did ask what the bank had to do with the property and that he (Au) had told him that they were mortgagees.

When the bank received the proceeds of sale of the ground and 14th floors, the sums involved were applied in partial discharge of the plaintiffs' mortgage debt and the floors were then released from the mortgage.

In his letter of 9th January 1969 addressed to the bank, Lai said:-

> "Also, with regard to the 2nd, 3rd and 4th floors for our company's own use we wish your bank would allow us to pay by instalments over ten years ....."

The appellants laid great stress on this letter. Their argument ran thus: How could Lai have suggested that the appellants "pay by instalments" for the three floors if they in fact owned the entire building?

Au said that this letter was never received by the bank, although he agreed that Lai had told him that he (Lai) intended to use the three floors for his own use as offices; and in evidence Au said:-

> "He requested the bank to release the three floors....."

The bank were mortgagees. They would not have released the floors without a partial discharge of the mortgage debt. To Lai's lay mind, this would have meant that he had somehow to "purchase back" the three floors before the bank would release them from the mortgage.

Be that as it may, this was merely one of many matters which were carefully considered by the learned judge before coming to his conclusion.

On the whole of the evidence acceptable to him, the trial judge was of the opinion that the plaintiffs never really began to put their case on its feet, and in particular that they failed to show that the assignment and mortgage were sham transactions. We saw no reason to differ from these conclusions; and on 4th February we dismissed the appeal without calling upon counsel for the respondents.

(W.A. Blair-Kerr)
President

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-6A"

(cont.)

Samuel Leung (D'Almada Remedios & Co.) for 1st and 2nd appellants.

Gittins, Q.C. and Charles Ching (Patrick Poon & Co.) for respondent.

Exhibit "PH-6B"

EXHIBIT "PH-6B"

IN THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 23 OF 1971

BETWEEN

YAT TUNG INVESTMENT CO. Ltd.	1st Appellant (1st Plaintiff)
MEE AH CONSTRUCTION CO. LTD.	2nd Appellant (2nd Plaintiff)
and	
DAO HENG BANK LIMITED	Respondent (Defendant)

Coram: Blair-Kerr, S.P.J. and Huggins, J.

JUDGMENT

Huggins, J.:

The first contention on behalf of the Appellants is "that the learned judge ought to have held on the evidence before him that in reality the 1st Appellant did not pay the purchase price or any part thereof but acted as the

Respondent's trustee in the purchase of the said property". The substance of the argument is that the judge made two findings of fact which, it is said, led to the inevitable conclusion that the 1st Appellants were trustees. One finding was that on 9th January, 1969 Mr. Lai wrote on behalf of the 1st Appellants to the Bank indicating a desire to purchase three flats in the property from the Bank. That suggestion was, of course, inconsistent with the 1st Appellants' being the absolute owners of the property, but it is common ground that they were not the absolute owners; the Bank were the owners by reason of the assignment to them by the 1st Appellants by way of legal mortgage. The proposal was not inconsistent with that position and the letter certainly does not point to the 1st Appellants having purchased the property as trustees. The second finding relied upon was that the voucher, Exh. HH3, was not satisfactorily explained. That was an internal document of the Bank supporting a debit in favour of Mr. AU for the purpose of paying a deposit on the property. The learned judge did not say what sort of further explanation he would expect. I would agree that a debit in favour of their own officer was in the circumstances something which the officer might justifiably be called upon to explain to the Bank, but the document shows clearly a transfer of funds to Mr. AU in his personal capacity for a particular purpose. It was signed by two persons purporting to be officers of the Bank, although they were never identified. There is nothing whatever in it to indicate that the eventual recipient of the money was to be a trustee of the property purchased. The general contention that the judge should have analysed the evidence more fully does not come within the scope of this ground of appeal, but nothing pointed out to us persuades me that such an analysis would have led to a different conclusion.

Next it is said that the judge failed to decide whether the letter of 9th January 1969 was written by Mr. Lai. In fact he expressly said that Mr. Lai did write it and went on to say that "coming as it did from the registered owner of the property [the request that the 1st Appellants be allowed to purchase three floors] can only be regarded as extraordinary". This passage may, indeed, have been unduly favourable to the Appellants because at least in one sense it is not entirely accurate to say that the letter came from the "registered owner":

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-6B"

(cont.)

as I have already mentioned, the property had been mortgaged to the Bank by assignment and, the mortgage having been registered, the Bank were the registered owners of the property, while the 1st Appellants had nothing more than an equity of redemption.

It is complained that the judge did not give sufficient consideration to the evidence concerning the reference in the letter dated 24th July, 1968 from the Hong Kong Electric Company to the Bank's being "part owner" of the property. He set out the letter in full, although he did not indicate what conclusion he drew from it. For my part I think the letter could have been of no assistance to him: the phrase used was as consistent (or, perhaps, inconsistent) with the case for the Respondents as with that for the Appellants.

Much emphasis was placed on the fact that the Bank, over a period of several months, rendered to the 1st Appellants inaccurate debit notes in respect of interest on the money advanced to the 1st Appellants by the Bank under the new building mortgage. The error was that the sum claimed each month was $1,034 instead of $10,340. This was apparently noticed at the end of the year and a corrective debit note submitted before the 1st Appellants first made their allegation of trusteeship. I cannot agree that such an error supports the contention that the transaction at the auction was a sham.

The final complaint appears to be that the learned judge said "there is no evidence that the Bank was made aware of the amount of the outstanding construction costs which it is alleged it was undertaking to pay". I think it is clear that the judge was drawing a distinction between the Bank and Mr. Au, who, although an officer of the Bank, claims to have been acting in his personal capacity. There was no evidence that the construction costs were discussed with anyone other than Mr. Au: indeed, Mr. Lai agreed that he did not discuss that matter with Mr. Tang, the Managing Director of the Bank, despite the fact that he claimed to have had confirmation from Mr. Tang that the 1st Appellants were to purchase as trustees for the Bank.

As Blair-Kerr, J. has said, the case really turned upon the evidence of Mr. Lai and he was

disbelieved. I see no reason to think that the learned judge came to a wrong conclusion and I agree that the appeal must be dismissed.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-6B"

(cont.)

EXHIBIT "PH-8"

Exhibit "PH-8"

1970, No. 909

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION

BETWEEN

CHOI KEE, LTD.	Plaintiff
and	
MEE AH CONSTRUCTION CO.,LTD.	1st Defendant
MEE AH HONG CO., LTD.	2nd Defendant
YAT TUNG INVESTMENT CO., LTD.	3rd Defendant
KEUNG WAI SHUM	4th Defendant

Writ of Summons issued on 16th June, 1970

STATEMENT OF CLAIM

1. The Plaintiff is a company incorporated with limited liability in accordance with the laws of the Colony of Hongkong and has its registered office at No. 9 Ice House Street, Victoria in the said Colony. The Plaintiff is the registered owner of the property registered in the Land Office of the said Colony as All Those Forty One Equal Undivided Forty Fifth Parts or Shares of and in Section I of Inland Lot No.2802

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-8"

(cont.)

together with the buildings thereon known as Nos. 195, 197, Johnston Road and 114, Thomson Road (hereinafter referred to as "the said property") save and except the shop B on the ground floor of the said property (being the ground floors of No. 197 Johnston Road and No. 114 Thomson Road), the main roof (including the flat roofs thereof) of the said property and the upper roof of the said property.

2. The 1st, 2nd and 3rd Defendants are all companies incorporated with limited liability in accordance with the laws of the said Colony and all have their registered offices at the aforesaid 195, 197, Johnston Road, and 114, Thomson Road that of the 1st Defendant being on the 2nd floor thereof and that of the 2nd and 3rd Defendants being on the 3rd floor thereof. The majority share-holder of each of the 1st, 2nd and 3rd Defendants is one Lai Yung Kwong who is also a director of each of the same.

3. The 4th Defendant occupies the 4th and 5th floors of the said 195, 197, Johnston Road and 114, Thomson Road.

4. Upon a date or dates unknown to the Plaintiff the Defendants and each of them began to occupy and yet occupy the respective parts of the said property as set out in paragraphs 2 and 3 hereof. The 1st and 3rd Defendants also occupy the 1st floor of the said property, alternatively the 1st to 5th floors inclusive thereof. Such occupation is without the consent of the Plaintiff and the Defendants and each of them are trespassing upon the Plaintiff's said property.

5. At a date or dates unknown to the Plaintiff between the 13th and 16th days of February, 1970, the 1st Defendant alternatively all or some of the Defendants placed or caused to be placed upon each of the doors to units on the 6th to 13th floors inclusive of the said property the following:-

(a) Metal strips affixed to the said doors by nails and affixed also to the frames of the said doors preventing any of the same from being opened. On each of the said doors one of the said metal strips has been affixed as aforesaid over the keyhole preventing the insertion of a key therein.

(b) A notice in the Chinese language. At the

end of each of such notices the name of the 1st Defendant appears. The said notices allege that construction money is owing to the 1st Defendant by the Plaintiff and by Dao Heng Bank Ltd. and threaten legal proceedings against all persons entering the said units and damaging the locks and keys. The Plaintiff will refer at trial to the said notices for their full terms.

And the Plaintiff claims against the Defendants and each of them:-

(a) Possession of the 1st to 5th floors inclusive of the said property.

(b) An order that the Defendants and each of them, their servants and their agents do remove from the Plaintiff's property registered in the Land Office of this Colony as All Those Forty One Equal Undivided Forty Fifth Parts or Shares of and in Section I of Inland Lot No.2802 and known as Nos.195,197 Johnston Road and 114, Thomson Road.

(c) An order restraining the Defendants and each of them whether by themselves, their servants or their agents or otherwise howsoever, from entering, re-entering, remaining upon or otherwise howsoever, trespassing upon the Plaintiff's said property.

(d) An order that the Defendants and each of them their servants and their agents do remove all metal strips nailed on and all notices painted on the doors of the said property and to make good all damage to the said property so caused. Alternatively an order to the said effect against the 1st Defendant.

(e) An order restraining the Defendants and each of them whether by themselves, their servants, their agents or otherwise howsoever, from erecting signboards in or upon, posting or painting signs notices or messages in or upon, and interfering with the locks of and in the Plaintiff's said property.

(f) An order restraining the Defendants and each of them whether by themselves, their servants, their agents or otherwise howsoever, from interfering in any way with the Plaintiff's quiet enjoyment of the said property.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-8"

(cont.)

(g) Damages.

(h) The Costs of this action.

(i) Such further or other relief as to this Honourable Court may seem fit.

Dated the 31st day of July 1970.

(Sd.) Charles Ching
Counsel for the Plaintiff.

Exhibit "PH-9"

EXHIBIT "PH-9"

1970, No. 909

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN

CHOI KEE, LTD.	Plaintiff
and	
MEE AH CONSTRUCTION CO.,LTD.	1st Defendant
MEE AH HONG CO., LTD.	2nd Defendant
YAT TUNG INVESTMENT CO.LTD.	3rd Defendant
KEUNG WAI SHUM	4th Defendant

STATEMENT OF DEFENCE

1. It is admitted that the Plaintiff is a limited liability company incorporated in Hong Kong. No other admission is made to paragraph 1 of the Statement of Claim.

2. Paragraph 2 of the Statement of Claim is admitted.

3. The 4th Defendant is a caretaker employed by the 3rd Defendant.

4. It is admitted and asserted that the 1st, 2nd and 3rd Defendants are in possession of the

1st, 2nd, 3rd, 4th and 5th floors of the suit premises. The 4th Defendant's occupation of the same is as caretaker of the 3rd Defendant.

5. The 1st, 2nd and 3rd Defendants have been in possession of the 1st, 2nd, 3rd and 4th floors of the suit premises from a time prior to the Plaintiff's purported purchase of the suit premises on 26th November, 1969. The Plaintiff cannot therefore claim against the Defendants in trespass in respect of these floors.

6. Further or in the alternative, the Plaintiff has no title by which it may claim relief against the Defendants. The Plaintiff purported to purchase the suit premises from the Dao Heng Bank Limited who purported to sell as mortgagee pursuant to a power of sale under a mortgage dated 27th May, 1968 between the 3rd Defendant as mortgagor and the said bank as mortgagee. The said mortgage was however void and of no effect and the 3rd Defendant, as co-Plaintiff with the 1st Defendant, in O.J. Action No. 969 of 1969 commenced on 8th August, 1969, has claimed against the said bank as Defendant for a declaration to that effect. The Defendants will refer to the Statement of Claim in that Action for the particulars relied on to support their present defence.

7. The Writ in the said Action No. 969 of 1969 was registered as a lis pendens against the suit premises on 23rd August, 1969 before the purported sale to the Plaintiff in this Action. The Plaintiff's purported purchase of the suit premises was with express notice of the aforesaid Writ of Summons which notice was contained in the conditions of sale issued by the said bank. Further, the Plaintiff is a related company of the said bank as they have common directors and shareholders, so that the Plaintiff, at all material times, knew that the mortgage dated 27th May, 1968 was void and of no effect, and knew of the Defendants' possession.

8. In reply to paragraph 5 of the Statement of Claim, it is admitted that the 1st Defendant has sealed the doors of the 6th to 13th floors inclusive of the suit premises and has posted a notice on these doors in the terms set out in sub-paragraph (b). For the reasons given in paragraphs 6 and 7 above, the Plaintiff is not entitled to any relief against the 1st Defendant's actions.

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-9"

(cont.)

9. Further or in the further alternative, the Plaintiff has never had or been in possession of the suit premises wherefore the Plaintiff cannot maintain a claim in trespass against the Defendants. The Plaintiff, before Writ, made no claim for the premises.

Dated the 15th day of August, 1970.

Counsel for the Defendants.

Exhibit "PH-10"

EXHIBIT "PH-10"

IN THE SUPREME COURT OF HONG KONG 1970, No. 909

ORIGINAL JURISDICTION

BETWEEN

CHOI KEE, LTD.	Plaintiff
and	
MEE AH CONSTRUCTION CO., LTD.	1st Defendant
MEE AH HONG CO., LTD.	2nd Defendant
YAT TUNG INVESTMENT CO.,LTD.	3rd Defendant
KEUNG WAI SHUM	4th Defendant

REPLY

1. Save where the same consists of admissions and save as hereinafter expressly admitted the Plaintiff joins issue with the Defendants and each of them upon the Statement of Defence.

2. In reply to paragraph 3 and the last sentence of paragraph 4 of the Statement of Defence, no admission is made as to the employment of the 4th Defendant. If it be found that the 4th Defendant is in occupation of the property or any part thereof as caretaker of the 3rd Defendant, the 3rd Defendant has no right to be in possession of the same and the 4th Defendant equally has no right.

3. In reply to paragraph 5 of the Statement of Defence, no admission is made as to the date upon which the 1st, 2nd and 3rd Defendants went into possession of the 1st, 2nd, 3rd and 4th floors of the said property or any part thereof. If the 1st, 2nd and 3rd Defendants were in possession as alleged in the said paragraph 5 it is denied that the Plaintiff cannot claim against them in trespass for the said floors.

4. It is admitted that the Dao Heng Bank, Ltd., sold the said property as mortgagee under a power of sale contained in a mortgage dated 27th May, 1968, which mortgage is referred to in paragraph 6 of the Statement of Defence. It is further admitted that the Plaintiff purchased the said property upon the said Bank exercising the said power of sale. The said mortgage, the said exercise of the said power of sale and the said purchase were all valid.

5. In further reply to paragraph 6 of the Statement of Defence, it is admitted that the 3rd and 1st Defendants have brought action namely O.J. Action No.969 of 1969 against the said Bank for the declaration referred to. In the said action the said Defendants claim that the said Bank was the true owner of the said property. The Plaintiff will refer at trial to the pleadings in the said action for the full terms and effect thereof. If it be found that the said Bank was the true owner of the said property at the time the Plaintiff purchased the same, the said sale was a valid one.

6. The sale and purchase and the mortgage referred to in paragraph 7 of the Statement of Defence were valid. It is denied that the Plaintiff at any time knew that the said mortgage was void and of no effect or that the Plaintiff knew at all material times of the Defendants' possession. Save that the Directors of the Plaintiff are also shareholders of the said Bank, it is denied that the Plaintiff and the said Bank are related or have common directors and shareholders. Subject to the foregoing, the said paragraph 7 is admitted.

7. Paragraph 9 of the Statement of Defence is denied. Shortly after the Plaintiff purchased the said property on the 26th day of November, 1969, the Plaintiff by its servants or agents entered into the said property and on the 13th day of February, 1970, the Plaintiff by its rent collector further made an entry onto the said property and supervised the

In the Supreme Court of Hong Kong

No. 5

Affirmation of Patrick Hui with annexed Exhibits

13th June 1972

Exhibit "PH-10"

(cont.)

changing of the locks and keys of the main doors of the various units of the said property.

Dated the 8th day of September, 1970.

(Sd.) Charles Ching
Counsel for the Plaintiff.

No. 6

Judgment of The Hon. Mr. Justice Briggs

23rd October 1972

No. 6

JUDGMENT OF THE HON. MR. JUSTICE BRIGGS

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION NO. 909 OF 1970

BETWEEN

CHOI KEE, LTD.	Plaintiff
and	
MEE AH CONSTRUCTION CO., LTD.	1st Defendant
MEE AH HONG CO., LTD.	2nd Defendant
YAT TUNG INVESTMENT CO.,LTD.	3rd Defendant
KEUNG WAI SHUM	4th Defendant

Coram: Briggs, J. in Chambers.

JUDGMENT

There are three summonses now before the Court, two in O.J. 909 of 1970 and one in O.J. 534 of 1972. I shall call these two actions "909" and "534" respectively. It will also be necessary to

refer to O.J. 969 of 1969. I shall refer to that action as "969".

909 is an action between Choi Kee Ltd. and four Defendants, i.e. the Mee Ah Construction Co. Ltd., Mee Ah Hong Co. Ltd., Yat Tung Investment Co. Ltd. and Keung Wai Shum.

By a summons filed on June 14th, 1972 the Plaintiffs seek an order to strike out the defence which is dated August 15th 1970. In addition they seek judgment on their claim.

By a second summons filed on September 27th 1972 the Defendants ask for liberty to amend their Statement of Defence.

The 4th Defendant, Keung Wai Shum was served and his solicitor appeared at the hearing before me. He was unable to assist the Court in any way as he had received no instructions. 909 is an action for the recovery of possession of certain premises. The reason the 4th Defendant was made a party to that action is that he was a caretaker in these premises at the time that the writ was issued. The Plaintiffs claim is that he was wrongfully in possession. He has since left, and his whereabouts was unknown at the time of the hearing of the summons before me. I therefore allowed his solicitor to withdraw and to take no further part in the proceedings.

The Plaintiff in 534 is the Yat Tung Investment Company Ltd. The Defendants are the Dao Heng Bank Limited and Choi Kee Limited. The Plaintiff in 534 is one of the Defendants in 909 and the second Defendant in 534 is the Plaintiff in 909.

By a summons filed on June 14th 1972 the Defendants seek an order to strike out the Statement of Claim in 534 and for judgment.

In order to understand the present position it is necessary to refer to 969. That was an action brought by the Yat Tung Investment Company Ltd. and the Mee Ah Construction Company Ltd. against the Dao Heng Bank Limited. It is common ground that the Yat Tung Investment Company and the Mee Ah Construction Company Ltd. are both private companies, the majority of the shares is cash being owned by a certain Lai Yung Kwong. For the purposes of these summonses they are one.

The Statement of Claim in 969 was dated

In the Supreme Court of Hong Kong

No. 6

Judgment of the Hon. Mr. Justice Briggs

23rd October 1972

(cont.)

In the Supreme Court of Hong Kong

No. 6

Judgment of the Hon. Mr. Justice Briggs

23rd October 1972

(cont.)

December 27th 1969 about seven months before that in 909. On January 2nd 1971 the parties agreed that the latter action should be stayed pending the trial of 969.

969 was an action concerned with certain property which was registered in Section 1 of Inland Lot 2803. In January 1963 the owners who were not parties to 969, mortgaged this property to the Defendants, the Dao Heng Bank. It was a building mortgage to secure one million dollars which was to be used by the owners to develop the property. Later there was a second mortgage of $200,000 made for the same purposes. The second Plaintiff, the Mee Ah Construction Company Ltd. was the company entrusted with the development of the property.

The owners of the property disappeared and the Dao Heng Bank Limited, in exercise of its power of sale, sold the property by auction. At that time the building, a multi-storeyed affair, had not been completed. The first Plaintiff, the Yat Tung Investment Company Ltd. who is of course the third Defendant in 909, and the Plaintiff in 534, was the successful bidder at the auction. The price was $880,000.

The property was assigned to the Yat Tung Investment Company Ltd. on May 23rd 1968 and four days later the premises were mortgaged back to the Bank for one million dollars. Much of this sum was never received by the Yat Tung Investment Company Ltd., it was used to satisfy the greater part of the purchase price of the building.

The Yat Tung Investment Company Ltd. defaulted in the payment of interest under the mortgage and so the Bank sold the property by auction to Choi Kee who is of course the Plaintiff in 909 and the second Defendant in 534. The price was $1,040,000. And the date November 26th 1969. This date is after the date of the writ in 969 but before the date of the Statement of Claim in that action.

The Dao Heng Bank Limited made a counter-claim in 969. They claimed the sum of 45,000 odd dollars. Part of this was the difference between the amount owed to them by the Plaintiffs under the mortgage and part was due to other

transactions between the parties with which we are not here concerned.

The Bank's case was that some 25,000 odd dollars was still owing under the mortgage after deducting the amount realised by the sale to Choi Kee.

There were other matters in litigation between the parties in 969 which need not detain us.

The Plaintiffs case (in part) was that the sale of the property to the Plaintiffs and the mortgage by Yat Tung Investment Company Ltd. to the Bank were a mere sham. The allegation was that in effect Yat Tung Investment Company Ltd. was acting in collusion with the Bank when they purported to buy the property. The Bank wished to purchase the premises but could not as mortgagees. So an arrangement was made between the Plaintiffs and the Bank that the Plaintiffs should purchase the property as trustee for the Bank. They asked for a declaration that the assignment and mortgage of the property were void and of no effect. There was a claim for other relief in respect of other matters. If the Plaintiffs were right it would follow that the subsequent sale to Choi Kee was invalid.

The Court held that both the assignment and mortgage were genuine transactions and refused to grant the declarations sought.

The Court also found in favour of the Defendant Bank on the counterclaim and awarded the Defendants the amounts claimed less certain interest.

The Plaintiffs appealed but the appeal was dismissed by the Full Court. It is clear therefore that in 969 the Court came to two firm conclusions of fact:-

(1) that the assignment of the property by the Dao Heng Bank Limited to the Yat Tung Investment Company Ltd. and the mortgage by them back to the Bank in May 1968 were genuine transactions;

(2) that the sale of the property to Choi Kee in November 1969 by the Bank was also a genuine transaction.

This must follow from the fact that the Court found in favour of the Defendant on his counterclaim which was in effect for the balance of an account one item

In the Supreme Court of Hong Kong

No. 6

Judgment of the Hon. Mr. Justice Briggs

23rd October 1972

(cont.)

of which was the price received by the Bank from Choi Kee as a result of the auction of the property. It is obvious if that sale had not been a valid transaction that the Court would not have awarded any sum in respect thereof.

I will now deal with 909. The original defence filed alleged that the mortgage of the property by the third Defendant, i.e. the Yat Tung Investment Company Ltd. to the Bank was a sham. In fact the defence contains the same allegations as are to be found in the Statement of Claim filed by the Yat Tung Investment Company Ltd. in 969. The defence in 909 expressly refers to the claim in 969. And we know that the courts, both the Supreme Court and the Full Court have found as a fact that there is no foundation for such allegations.

In consequence of the judgment in 969 the Yau Tat Investment Company seeks to amend this defence. This is the Defendants summons in 909 dated 27th September 1972. The amendments sought to be made are drastic. The whole basis of the Defendants case has been changed. They no longer say that the mortgage was a sham; they say it was perfectly valid. The findings of 969 are referred to in so many words. And the Defendants now claim to have been the legal and beneficial owner of the premises

In 969 one Lai Yung Kwong gave very extensive evidence. He was described by the Judge in that case as the "major shareholder and the guiding spirit in each of the Plaintiff companies". He gave evidence to the effect that the purchase and assignment of the property to his company and the building mortgage was a sham. His evidence went into great detail and I was told that some 150 pages of the transcript are devoted to it. He even described how the auction of the property at which he was the successful purchaser was rigged. However his evidence was not believed by the Judge. Indeed the Plaintiff's case was totally rejected. And the Full Court did not interfere with that decision.

It is quite obvious that if the Defendant is allowed to amend his defence in 909 a case will be set up by the Defendant totally at

variance with their case as put forward on affirmation by Mr. Lai in 969. I have read the judgment in 969 and it is obvious that if the case for the Defendants in 909 as amended is to get off the ground, Mr. Lai will have to give evidence. And what evidence can he give? If it is in accordance with his previous evidence the defence falls to the ground. If different and so very different, proceedings might well be contemplated in another court.

The Court will in a proper case give leave to a party to amend his pleadings even, as here, at a very late stage. The principles on which the Court acts are well known and are set out clearly in the White Book. I need only refer to the well known dictum of Brett M.R. in the Clarapede Case (1) where he said:-

> "However late the proposed amendment, the amendment should be allowed if it can be made out without injustice to the other side."

Usually a party seeks to make an amendment because of some omission or error in his pleading. That is not the case here. The Defendant seeks to go much further. He seeks to set up an entirely new defence and moreover, one which is based on facts which he has denied in other court proceedings. It is also the first time in these proceedings that fraud is alleged.

The question is whether the Court should assist such a litigant.

But the matter goes further. One, indeed the principal, amendment to the defence is an allegation that the sale of the property to Choi Kee, the Plaintiff by the Bank is void and indeed fraudulent. However the courts have already, as I have noted above, found in effect that this was not so. That fact has been litigated.

A line of cases was quoted to me for the proposition that a litigant cannot change horses in midstream. If he elects to set up a certain claim and loses that claim he cannot set up a second claim of another nature. Scarf v. Jardine (2) is such a case. It is a case which deals with the election of

(1) 32 W.R. 263
(2) 7 R.C. 345

In the Supreme Court of Hong Kong

No. 6

Judgment of the Hon. Mr. Justice Briggs

23rd October 1972

(cont.)

which party to sue. A more important case from the Plaintiff's point of view is Vine v National Dock Labour Board (3). This is a chambers application and I do not intend to set out the relevant portions of the judgment in that case. They are to be found at pages 320, 328 and 329.

Neither of those cases is, of course, on all fours with the present. But they are helpful in showing the attitude of the court to a litigant who seeks to have it both ways, to blow hot and when that fails him, to blow cold.

For the Defendant Mr. Bernacchi pointed out that the sale to Choi Kee took place only after the writ in 969 had been issued. However it was before the Statement of Claim was served in 969 and was long before the defence filed in 909. I do not see how this helps the Yat Tung Investment Company. If they had wished to claim that the sale to Choi Kee was fraudulent at the time of the sale to Choi Kee or up to the close of the pleadings in 969. That could (sic) have been achieved. The writ in 969 and subsequent pleadings could have been either withdrawn or amended; or at a later stage a counterclaim could have been filed to the counterclaim in that action.

I am of the opinion that it would be wrong to allow the Defendant to amend his defence.

The following are my reasons. The validity of the sale to Choi Kee is a fact which has been litigated (on this point I shall have more to say when dealing with the summons in 534). It would be unjust to the Plaintiff to allow that fact to be litigated a second time. And this is so despite the fact that the Plaintiff was not a party to the proceedings in which that fact was decided.

I do not think that the court should entertain a claim by a litigant who changes the whole tenor of his version of the facts on which he relies to make out his case. He took a certain course, relied on a certain version of the facts and should not be encouraged to set up a second version, particularly when the new version alleges fraud which, in the amended defence, is not particularised. Nor is the summons supported by affirmation. I am aware that in an ordinary application to amend a

(3) (1956) 2 W.L.R. 311

pleading, an affidavit in support is not usually considered to be necessary. However in an application of this nature where fraud is being alleged and the evidence on affirmation of the principal shareholder of the Defendants is in effect being denied by the Defendant, I should have thought that the filing of an affirmation would have been prudent if only to show the integrity of the party.

Finally the application is very late. The writ in this action was issued as long ago as June 1970. Connected with this is the fact that the Defendants have not satisfied the judgment of the Full Court in 969 nor paid the considerable sum of costs which they owe the Respondents in that appeal. And I was told from the bar that the Defendants are still in possession of the premises is at least of part of them.

The summons dated September 27th 1972 must be dismissed with costs.

This means that the Defendants are left with their original defence. The Plaintiffs ask for an order to strike this out. In my view they must succeed. That defence is substantially the same as the Plaintiff's Statement of Claim in 969. He did not succeed in that action. It would be pointless to say more. And the defence must be struck out.

By this summons the Plaintiffs also ask for other relief. They ask for judgment and for orders for possession. On July 23rd 1970 in 909 I refused an application for an interlocutory injunction brought by the Plaintiffs (Choi Kee) to restrain the Defendants from remaining on the premises. This was before the judgment had been delivered in 969. And the reason for my refusal was that there was a doubt as to the purity of the title of the Plaintiffs (Choi Kee) not because the sale to Choi Kee by the Bank was invalid much less fraudulent, but because of the allegations made by the Plaintiff in 969 in his Statement of Claim. In my view the Plaintiffs are entitled to the orders sought. It is true that no affirmations were filed directly in support of that part of the summons which relates to orders for possession. That does not matter. Any orders for possession will be made as part of the judgment in 909. They will not be interlocutory orders.

(sic)

In the Supreme Court of Hong Kong

No. 6

Judgment of the Hon. Mr. Justice Briggs

23rd October 1972

(cont.)

In the Plaintiffs summons dated June 14th 1972 there will be an order in the terms of paragraphs (a) and (b) thereof with costs. This means that the Statement of Defence is struck out and the orders for possession etc. claimed in the Statement of Claim are granted. The fourth Defendant is excluded from this order. He took no part in the proceedings. Indeed it would appear that the parties are not interested in his part in this litigation any more.

The final summons is the Defendants summons to strike out the statement of claim in 534. And from what I have said above it is clear that the Defendants must succeed. The real point at issue in 534 is the validity of the sale to Choi Kee. In 969 the Court by its award of damages to the Defendants in that action clearly upheld the validity of that sale. The Statement of Claim in 534 alleges fraud in the alternative but there is no allegation of concealed fraud. And the judgment of the Full Court in 969 upholding the award of damages on the Respondent's counter-claim was upheld.

The leading case is Reichel v. Magrath (4). The facts of that case were as follows. A certain vicar was accused of immorality. He was told by his bishop that he must either submit to an inquiry or resign the living. In the interest of the parish the vicar, acting on a proposal put forward by the Bishop, executed a deed of resignation. Eight days later the vicar executed a deed cancelling his resignation. The vicar brought an action against his Bishop claiming he was still vicar and that his resignation was void. It was held by the House of Lords that the resignation was valid. The Respondent was appointed to the benefice as the successor to the vicar. The Respondent instituted proceedings for the recovery of the house and lands from the vicar who had resigned. The latter set up as his defence the same facts that he had set up when he pursued his claim against his bishop. The Privy Council held that to do so was an abuse of the process of the court and struck out his defence. They held that in the former proceedings the courts had found as a

(4) 14 A.C. 665, see also 14 A.C. 259

fact that the vicar had resigned from the living. He was bound by that decision. It was an abuse of the process of the court to seek to relitigate the same facts. It will be noted that the parties in the two actions were different. In the former the vicar sued his Bishop. In the latter he was sued by his successor.

A more modern case is Greenhalgh v. Mallard (5) If a Plaintiff has chosen to put his case one way he cannot thereafter bring the same transactions before the court putting his case in another way saying he is relying on a new cause of action.

In 969 the case for the Yat Tung Investment Company was that the mortgage was void therefore the sale to Choi Kee was not a valid sale. Now, in 534 their case is the mortgage was valid but the sale is attacked because it was effected in breach of the duties of the mortgagee, the Bank.

This the court will not allow. It is an extension of the doctrine of res judicata which is in the words of Somervell L.J. in the Greenhalgh Case:-

> "is not confined to the issues which the court is actually asked to decide, but ... covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them" (See also the other cases quoted in Greenhalgh's case)

As I have said before, and more than once, the court in 969 awarded damages to the Defendant in the counterclaim to that action. The sum awarded took into consideration the amount of money received by the Bank from the sale of the property to Choi Kee, the Defendant in 534 [See pp. 6 and 24 of the judgment of PickeringJ.]. This can only mean that the sale to Choi Kee was a genuine sale. If a court were to hold now that the sale was not genuine, what becomes of the judgment of the Full Court in 969?

There will therefore be an order in the

(5) (1947) 2 A.E.R. 255

In the Supreme Court of Hong Kong

No. 6

Judgment of the Hon. Mr. Justice Briggs

23rd October 1972

(cont.)

Defendants summons dated June 14th 1972 in 534 in the terms of paragraphs (a) and (b) of that summons with costs to the Defendants.

To sum up:-

(1) in 909 - (a) The summons of the Defendants dated 27th September 1972 is dismissed with costs.

(b) The summons of the Plaintiffs dated 14th June 1972 succeeds with costs.

(2) in 534 the summons of the Defendants dated 14th June 1972 succeeds with costs.

There will be liberty to all parties to apply.

(G.G. Briggs)
Puisne Judge
23rd Octo., 1972.

C. Ching (P. Poon & Co.) for Plf. in O.J.909/70, Deft. in O.J.534/72

B. Bernacchi, Q.C., S. Leung (D. Remedios & Co.) for Plf. in O.J.534/72 1, 2 & 3 Deft in O.J.909/70

No. 7

ORDER

In the Supreme Court of Hong Kong

No. 7

Order

23rd October 1972

IN THE SUPREME COURT OF HONG KONG 1972, No.534
ORIGINAL JURISDICTION

BETWEEN

YAT TUNG INVESTMENT CO., LTD. Plaintiff

and

DAO HENG BANK LTD. 1st Defendant

CHOI KEE, LTD. 2nd Defendant

BEFORE THE HONOURABLE MR. JUSTICE BRIGGS, IN CHAMBERS

ORDER

Upon hearing Counsel for the Plaintiff and for the 1st and 2nd Defendants IT IS ORDERED that the Statement of Claim herein be struck out with costs to the 1st and 2nd Defendants to be taxed.

Dated the 23rd day of October, 1972.

Assistant Registrar.

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 8

Notice of Appeal

16th November 1972

No. 8

NOTICE OF APPEAL

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 51 of 1972

(on appeal from O.J. Action 534/72)

BETWEEN

YAT TUNG INVESTMENT CO., LTD.	Plaintiff (Appellant)
and	
DAO HENG BANK LTD.	1st Defendant (1st Respondent)
CHOI MEE, LTD.	2nd Defendant (2nd Respondent)

NOTICE OF APPEAL

Take notice that the Full Court will be moved so soon as counsel can be heard on behalf of the above-named Plaintiff on appeal from the judgment herein of the Honourable Mr. Justice Briggs given on the hearing of a Summons on the 5th and 6th October, 1972, whereby it was ordered that the Statement of Claim herein be struck out as being vexatious, frivolous and/or otherwise and abuse of the process of this Honourable Court on the ground as that the Plaintiff herein elected in O.J. Action No.969 of 1969 to sue upon the ground that it was not the beneficial owner of the property it would be an abuse of the Court's process for it to found an action now on an allegation that it was the beneficial owner and that judgment be given for the 1st and 2nd Defendants with costs, for an order that the said judgment may be set aside.

And further take notice that the grounds of this appeal are:-

(1) That the learned judge was wrong in law in holding that the plaintiff having sued in O.J. Action No. 969 of 1969 upon the ground that it was not the beneficial owner of the property cannot now accept the decision of the court in that Action and, in the present Action to assert that it was the beneficial owner aforesaid.

(2) That the learned judge misdirected himself by holding that the Court in O.J. Action No.969 of 1969 had, inter alia, come to a firm conclusion of fact that the sale of the property to Choi Kee in November, 1969 by the bank was a genuine transaction.

(3) The learned judge further misdirected himself by holding that the Court in O.J. Action No.969 of 1969 must have come to a firm conclusion as stated in (2) herein on the reasoning that the said Court had found in favour of the Defendants on his counter-claim for specific amount which sum was in effect the balance of an account one item of which was the price received by the bank from Choi Kee as a result of the auction property.

(4) That the learned judge was wrong in law in holding that at the time the Appellant took out O.J. Action No.969 of 1969, the Appellant was confronted with two mutually exclusive course of action between which the Appellant must make his choice. (sic)

(5) That the learned judge further was wrong in

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 8

Notice of Appeal

16th November 1972

(cont.)

law in holding that by takint out O.J. Action No. 969 of 1969 the Appellant had conclusively elected one course of action to the exclusive (sic) of the other course of action thereby the Appellant should be estopped to sue upon the present Action on the doctrine of Res Judicata.

(6) That in so far as the learned judge held that damage sufficient to found an estopped was (sic) done to the Defendants, he was wrong in law and in fact on the evidence before him.

(7) Generally that the judgment of the learned judge was wrong in that the matters raised by the Defendants should be raised in the Defence and decided at the trial of the action.

DATED the 3rd day of November, 1972.

(sd) D'Almada Remedios & Co.

Solicitors for the Appellant

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 9

Judgment of the Hon. Mr. Justice Huggins

21st March 1973

No. 9

JUDGMENT OF THE HON. MR. JUSTICE HUGGINS

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.50 OF 1972

(On Appeal from O.J. Action No. 909/70)

BETWEEN

CHOI KEE, LIMITED	Plaintiff (Respondent)
and	
MEE AH CONSTRUCTION COMPANY LIMITED	1st Defendant (1st Appellant)
MEE AH HONG COMPANY LIMITED	2nd Defendant (2nd Appellant)
YAT TUNG INVESTMENT COMPANY LIMITED	3rd Defendant (3rd Appellant)
KEUNG WAI SUM	4th Defendant (4th Appellant)

CIVIL APPEAL NO. 51 of 1972
(On Appeal from O.J. Action No. 534/72)

BETWEEN

YAT TUNG INVESTMENT COMPANY LIMITED	Plaintiff (Appellant)
and	
DAO HENG BANK LIMITED	1st Defendant (1st Respondent)
CHOI KEE, LIMITED	2nd Defendant (2nd Respondent)

Coram: Blair-Kerr, Huggins and McMullin, JJ.

JUDGMENT

Huggins, J.:

To understand these cases it is essential to know precisely what was in issue in Action No. 969

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 9

Judgment of the Hon. Mr. Justice Huggins

21st March 1973

(cont.)

of 1969 and yet, despite repeated enquiries from the Bench, it was only at a quite late stage that we were referred to the pleadings in that action. For simplicity I will throughout this judgment refer to Yat Tung Investment Co. Ltd. as "Yat Tung", to Mee Ah Construction Co. Ltd. as "Mee Ah" and to the Dao Heng Bank Ltd. as "the Bank".

Yat Tung and Mee Ah sued the Bank first in its capacity as mortgagee and second as party to an alleged agreement whereby the Bank "promised that it would pay for all the outstanding construction costs payable to /Mee Ah/ as well as future construction costs and other incidental charges". The prayers included an application for a declaration that the first sale by the Bank as mortgagee was void and also a claim for the construction costs and "other incidental charges". It is clear that upon those claims no question arose as to the validity of the second sale by the Bank as mortgagee - the sale to Choi Kee Ltd. However, the Bank counterclaimed for damages in the sum of $45,231.97 for breach by Yat Tunf of the personal covenant in the building mortgage. That figure was arrived at after giving credit to Yat Tung for the benefit received by the Bank when it made the second sale as mortgagee - the sale under the building mortgage to Choi Kee Ltd.

In Action No. 969 of 1969 the judge gave judgment for the Bank on both claim and counter-claim. In Action No. 909 of 1970 Yat Tung repeated their allegation that the first sale by the Bank as mortgagee was void, but that issue having been decided against them, they sought to amend and to accept the validity of the first sale but to attach the validity of the second sale. With respect to the learned judge at chambers, who appears to have thought otherwise, it seems clear that the validity of the second sale was not decided in Action No. 969 of 1969: what was decided was the validity of the first sale. If the first sale had been avoided, then the building mortgage executed by the purchaser would have been avoided also and the Bank would have had no title to pass to Choi Kee Ltd. However, it is now sought to challenge the second sale not on the ground that the Bank had no title but on the ground that the second sale was itself conducted in a fraudulent manner.

It is, I think, important to appreciate the nature of the counterclaim in Action No. 969 of 1969. When the judge at chambers said "It is obvious if [the sale to Choi Kee Ltd.] had not been a valid transaction that the court would not have awarded any sum in respect thereof", he overlooked the fact that the burden of proof upon the counterclaim had been on the Bank: the court did not "award any sum in respect thereof" but merely refrained from awarding a sum which the Bank did not claim. The counterclaim was a claim upon the personal covenant, and the breach of the promise to pay which was the cause of action was committed as soon as the date for repayment had passed. The fact that the obligation subsequently became, by reason of the sale of the security, an obligation to pay only a reduced sum did not alter the cause of action: see In re McHenry, McDermott v. Boyd 1894 3 Ch. 290. Although after the sale it would have been improper for the Bank to sue for more than the deficiency, had they done so it would have fallen to Yat Tung to set up the sale in diminution of the debt. By accepting the credit of the benefit received by the Bank upon the sale, which was clearly pleaded, it seems to me they have in effect conceded the validity of the sale. The matter can be put in another way. If the sale to Choi Kee Ltd. were to be avoided on the ground of fraud it would follow that the price obtained was less than would have been obtained upon a proper sale, but if more had been obtained the Bank would not have been entitled to as much as $45,231.97 in Action No. 969 of 1969. Therefore, Yat Tung could have adduced evidence of the true market value in that action, and the sum awarded to the Bank might have been reduced - possibly to vanishing point - or they might even have been able to claim a balance as damages. By tacitly accepting the correctness of the purchase price for which credit was given by the Statement of Claim Yat Tung admitted that a higher price could not have been obtained and cannot now be heard to say that it could. If a higher price was not obtainable they were not defrauded. Therefore in the words of Somervell, L.J. in Greenhalgh v. Mallard 1947 2 All. E.R. 255, 257 the validity of the sale to Choi Kee Ltd. was an issue "which [was] so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of [it]".

I agree that the appeals should be dismissed.

21st March, 1973.

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

No. 10

JUDGMENT OF THE HON. MR. JUSTICE McMULLIN

IN THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 51 OF 1972
(ON APPEAL FROM O.J. 534 of 1972)

BETWEEN

YAT TUNG INVESTMENT CO., LIMITED	Plaintiff (Appellant)
and	
DAO HENG BANK LIMITED	1st Defendant (1st Respondent)
CHOI KEE, LIMITED	2nd Defendant (2nd Respondent)

CIVIL APPEAL No. 50 OF 1972
(ON APPEAL FROM O.J. 909 OF 1970)

BETWEEN

CHOI KEE, LTD.	Plaintiff (Respondent)
and	
MEE AH CONSTRUCTION CO., LTD.	1st Defendant (1st Appellant)
MEE AH HONG CO., LTD.	2nd Defendant (2nd Appellant)
YAT TUNG INVESTMENT CO., LTD.	3rd Defendant (3rd Appellant)
KEUNG WAI SHUM	4th Defendant

Coram : Full Court (Blair-Kerr, S.P.J., Huggins & McMullin, JJ.)

JUDGMENT

McMullin J. :

The appeals in these two actions arise from certain orders made by Briggs J. in chambers when, on the 5th and 6th of October, 1972, he dealt with three separate summonses arising from two related

actions viz: O.J. Action 909 of 1970 and O.J. Action 534 of 1972. Both of these actions concern the property known as 195 and 197, Johnston Road and 114, Thomson Road, a single plot on which a 14-storey building now exists having been under construction since about 1963 and being eventually completed in 1968. In Action 909, Choi Kee, Ltd., as alleged owners of the plot and the building thereon, seek primarily possession against the Yat Tung Investment Co. Ltd. and two other associated companies all of which are private companies the majority shareholder and principal executive of which is Mr. LAI Yung-kwong. The fourth defendant in that action, KEUNG Wai-shum, who was apparently a caretaker employed by the third defendant, had disappeared both from the building and from the proceedings at the time the summonses came on for hearing before the judge in chambers so that, effectively, the existing defendants in that action are three closely inter-linked limited companies under the control of Mr. Lai. In Action 534 of 1972 one of these companies, the Yat Tung Investment Co. Ltd., as plaintiff, seeks, among other relief, declarations which would invalidate the claim of Choi Kee, Ltd., (the second defendant in that action and plaintiff in Action 909) to be beneficially entitled to the property in question.

The circumstances leading up to the three applications in chambers are somewhat complicated and the two actions referred to already are closely associated with an earlier O.J. Action, No. 969 of 1969, to which it will be necessary to refer. Before turning to look at the history of these events in more detail, the orders made by the judge in chambers will form a convenient point of departure. The effect of his written judgment delivered on the 23rd October 1972, and covering the summonses in all three applications was to dismiss an application by the Yat Tung Investment Co. Ltd. and the other defendants in Action 909 of 1970 to amend their common defence and to allow two applications by their opponents, one, in Action 909, to strike out the existing statement of claim by the Yat Tung Investment Co. Ltd. as frivolous and vexatious, and the other, in Action 909, to strike out the defence of the Yat Tung Investment Co. Ltd. and the other defendants in that action upon closely similar grounds. Judgment for possession of the premises against all defendants in Action 909 was also given and was, as will be seen, a logical consequence of the other orders made. I will for

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

convenience hereafter refer to these three actions by their numbers without further description and to the two companies principally concerned as Yat Tung Ltd. and Choi Kee, Ltd.

The tale begins in 1964 when the building, then under construction, and the plot were in the hands of owners who have since disappeared from the proceedings. At that time, however, the work of construction was already in the hands of a company which was, effectively, the property of Mr. Lai. The company at that date was known as the Mee Ah Hong Construction Company but, upon the 20th of December 1966, it was transformed, by incorporation, into the Mee Ah Construction Company Limited i.e. the second plaintiff in 969 and the third defendant in 909. The then owners of the property had, earlier, already mortgaged it to the Dao Heng Bank Limited (the defendant in 969) and they created a further charge upon the property on the 14th of July 1967 the total of both charges being $1,400,000. Because the then owners were in default to the Dao Heng Bank in respect of the payment of interest under these charges, on the 13th of May 1968 there occurred the event which may fairly be regarded as the root of the litigation which in the course of the next five years grew and swelled into the tangle of actions and applications with which the courts are still concerned. It is the bank's contention that upon that date, in lawful exercise of its power of sale under the building mortgage and further charge created by the original owners, it sold the property to Yat Tung Ltd., a company which, according to the bank, had actually been set up by Mr. Lai for the very purpose of holding and managing this property. The Mee Ah Construction Company Limited continued, however, to be the contractors upon the site. These two companies were the first and second plaintiffs in the first of the actions, 969. In that action what was primarily at issue was whether or not the defendant bank owed to the plaintiffs a sum of $435,783.81. This simple pecuniary claim, however, although the substantive relief claimed, is buttressed by claims for two separate declarations without which it would not be sustainable and which are themselves necessitated by the state of facts alleged by the plaintiffs in connection with the purported sale of the

property to Yat Tung Ltd. on the 13th of May 1968. It is common ground between the parties that subsequent to the purported sale an assignment of the property to Yat Tung Ltd. was completed on the 23rd of May 1968. On the same date Yat Tung Ltd. executed a building mortgage in favour of the bank to secure a sum of $1,000,000. The views of the two parties as to what actually occurred on the 13th and 23rd of May however are in total collision. According to Yat Tung and its co-plaintiff, Mee Ah Hong Construction Co., the sale at the auction on the 13th and the subsequent assignment and mortgage were all part of an elaborate artifice to conceal the truth of an agreement arrived at privately between the parties that Yat Tung Ltd. would hold the property in trust for the bank, which, by virtue of its relationship with the prior mortgagors, would not have been entitled to buy the property itself, and that the company lent itself to this device in return for a promise on the part of the bank to pay all outstanding construction costs and all such costs in the future arising from the erection and completion of the building. The company thus became nominal owner only and the bank true owners of the property. These allegations were wholly denied in the defence put in by the bank in 969 in which the validity of the sale to the plaintiffs and the subsequent mortgage were affirmed and in which it was stated that the bulk of the money secured by the mortgage was advanced to the first plaintiff. Both parties in their pleadings, and in their evidence, dealt with certain other financial adjustments made between them as a result of the selling of two of the units in the completed building each party accounting differently for the ultimate disposal of the proceeds of such sales but it will be unnecessary to venture into the complications of these subsidiary claims. In the upshot, the bank, having denied the allegation of a sham sale and mortgage, and having presented its own figures concerning the state of accounts between the two parties counterclaimed for a sum of $45,231.97.

The writ in 969 issued on the 8th of August 1969, the statement of claim being filed on the 27th of December in the same year. Between the issue of the writ and the filing of the statement of claim however, a further event had occurred which is of considerable importance to these appeals. It is the bank's contention that Yat Tung Ltd. had fallen into arrears in the payment of the interest upon its

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

mortgage and it is undoubtedly the fact that, in purported exercise of the right of sale under this mortgage, the property was once more put up for auction and was sold to Choi Kee, Ltd., the plaintiff in 909, on the 26th of November 1969. Thereafter the progress of action 969 was as follows: The defence by the bank in its final form was filed on the 27th of February 1970; reply and defence to the counterclaim were filed by the Yat Tung on the 3rd of May 1970; the action came on for hearing before Pickering J. on the 5th of January 1971 and was completed on the 22nd of that month. Judgment was given in favour of the bank on the 23rd of April 1971; the plaintiffs appealed to the Full Court and the appeal came on for hearing on the 3rd of February 1972 being dismissed by the Full Court on the following day.

Meanwhile Choi Kee, Ltd. the purchaser of the property, finding that Mr. Lai's various companies were still in actual physical possession of the first five floors of the premises, and had in addition barred entry to all the remaining floors, itself commenced action 909 by writ issued on the 16th of June 1970 i.e. about one month subsequent to the close of pleadings in Action 969. In this second action possession of the premises was the primary claim supplemented by a prayer for certain consequential orders concerning the removal of certain signs and fastenings upon doors etc. and the restraining of Yat Tung Ltd. and its two associate companies and its caretaker from further interference with the Choi Kee Company's quiet enjoyment of the premises. The three defendant companies and the caretaker in the employment of Mr. Lai filed a common defence to this action on the 20th of August 1970. In this defence the alleged trespass is denied on the grounds that Choi Kee, Ltd. had no lawful title to the premises because of the matters advanced by the plaintiffs in 969 (to which action specific reference is made in the defence) viz: that the mortgage under which the bank had purported to sell the property to Choi Kee, Ltd. was void and of no effect. It is further pleaded that Choi Kee, Ltd. being a related company of the Dao Heng Bank and sharing common directors and shareholders therewith was aware of this state of affairs by virtue of the fact that the writ in 969 had been registered as a lis pendens on the 23rd of August 1969 shortly after

the issue of the writ in the former action. It should be noted that at the date of this defence the hearing of 969 was still more than four months in the future. A reply to this defence was put in on the 8th of September 1970 and in this the mortgage and sale to the Yat Tung Investment Co. Ltd. of the 13th of May 1969 were affirmed as valid. What is important to note at this point, therefore, is that Yat Tung Ltd. was relying, as defendant in 909 on the very matter which had been pleaded by it as the factual basis of its claim as plaintiff in 969 and at the date of the defence in 909 the issues in 969 had not yet been resolved by judgment. So far as 909 is concerned the matter rested in that position until the filing of the several summonses which were dealt with by the judge in chambers. Mr. Ching, who appeared for the Dao Heng Bank and for Choi Kee, Ltd. told the court that it was his understanding that the parties at this juncture were agreed that the result of Action 909 should depend upon the result of 969, but Mr. Bernacchi for the respondents was unable to bear him out in this and Mr. Ching sought to put the matter no further. It was, however, agreed (as the learned judge at chambers notes in his judgment) that 909 should be stayed pending the trial of 969.

The situation, then, at the close of pleadings in 909 was that all the parties in these two actions were awaiting the result in 969 and Yat Tung Ltd. and its associated companies were standing fast upon the position maintained by them in the earlier action. As has been noted above, judgment was given in 969 on the 23rd of April 1971 but the appeal to the Full Court was not disposed of until the 4th of February 1972. We were informed that a great part of the delay was due to the preparation of the record in the appeal which, because of the long trial and the many documents involved, presented a formidable task. Since there was no appeal to the Privy Council one might have thought that Choi Kee, Ltd. would have pursued its advantage by moving swiftly to judgment in 909 but in fact the next initiative was on the part of the defeated Yat Tung Ltd. which, only a month after the dismissal of the appeal in the Full Court, issued its writ in the last of the three associated actions, viz. 534, on the 3rd of March 1972, statement of claim being filed on the 21st of that month. In this action, to which the Dao Heng Bank Ltd.

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

and Choi Kee, Ltd. are defendants, Yat Tung Ltd. essays to make an adroit accommodation to the turn affairs had taken by boldly proclaiming that the very finding of Pickering J. which, at the pain and expense of protracted litigation it had previously sought diligently to prevent, was now to become the very basis of its fresh claim. Paragraphs 5 and 6 of that statement of claim are in the following terms :

> "By Action No. 969 of 1969 (as affirmed on appeal in Civil Appeal No. 23 of 1971) in which the Plaintiff was first Plaintiff and the first Defendant was Defendant, the allegation of the then Plaintiffs was that the first Defendant was the beneficial owner of the property described in paragraph 6 below, that the Plaintiff was a mere trustee for him and that in consequence the mortgage described in paragraph 7 below was null void and of no effect. The court however held that (subject to the said mortgage) the Plaintiff was the legal and beneficial owner of the said property and that the said mortgage was not void. The Plaintiff accepts that decision and this action is based thereon.
>
> 6. In consequence the Plaintiff was at material times the legal, beneficial and registered owner of the Crown Lease to the property known as all that piece or parcel of ground registered in the Land Office as Section I of Inland Lot No. 2802 and of and in the messuages erections and buildings thereon known at the date hereof as Nos. 195 and 197 Johnston Road and No. 114 Thomson Road (hereinafter called 'the said property'), and after the mortgage pleaded below, the person entitled to the equity of redemption. "

Among the declarations sought is a declaration that the plaintiff is still mortgagor of the property and owner of the equity of the redemption. The effect of this, if such were granted, would be, of course, wholly to circumvent the endeavour of Choi Kee, Ltd. in 909 to evict the Lai companies from the premises.

By this resilient pleading the Yat Tung Company sought to deprive the bank of the fruits of victory in 969 by seizing from it the very trophy which had been won by the bank in the first tournament and using it as a weapon to disarm its opponents in the later action. The facts relied upon to justify this remarkable volte-face are set forth in paragraphs 11 to 15 of the statement of claim and amount to the allegation, now put forward for the first time, that the sale and assignment of the property by the bank to Choi Kee, Ltd. which took place on the 26th of November 1969 and the 6th of January 1970 respectively were a complete sham and thus were fraudulent; in the alternative in breach of the first defendant's duty as mortgagee; alternatively, otherwise improper. These improprieties are further particularized in paragraph 14 as follows:-

"(a) The 1st and 2nd Defendants though under different cloak in their corporate disguises, were in fact essentially one certain interest and/or alternatively, acting in concert with a common design calculated to obtain the remaining 41/45th parts or shares of the said property at a low price and to extinguish the Plaintiff's interest therein all to the Plaintiff's damage.

(b) There was only 4 clear days notice, including a weekend, of the said auction sale given to the public at large, which was insufficient particularly as :

(c) The advertisements and offers referred prominently to said O.J.Action No. 969 of 1969 without explaining that the Action (because it alleged that the 1st Defendants were the beneficial owners) would not affect the buyer's ultimate title to the property, and not sufficient time was given for independent prospective buyers to make appropriate inquiries and/or obtain legal advice thereon or at all.

(d) The above-mentioned advertisements were calculated to frighten off buyers to obtain the property for the 2nd Defendant

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

and avoid obtaining a reasonable price therefor.

(e) The 1st and 2nd Defendants staged a mock auction purporting to be attended by 30 odd persons but in fact all or almost all persons present were the servants or agents of either the 1st or 2nd Defendants.

(f) The purported sale was made at a gross undervalue.

(g) That the 1st Defendant for the reason pleaded in paragraph 8 above, were themselves in breach of covenant in the said mortgage deed."

It is said that as a result of these matters the sale to Choi Kee Ltd. is either void or voidable. The last of the matters particularized (parag. g) refers to the contention that the bank refused to pay the third of the instalments of the advance made under the mortgage. This was explicitly denied by the bank and was a claim which had never been advanced in 969.

It may be that the bank and Choi Kee, or their legal advisers, were taken aback by the boldness of this tactic for their first reaction was to put in a detailed and vehement defence on the 18th of April 1972. No doubt thereafter the singularity of the situation prompted second thoughts for on the 14th of June they took out two summonses one in 909 and one in 534, both very similarly worded, asking the court to strike out the Yat Tung claim in 534 and the defence of Yat Tung and its associated companies in 909 as being vexatious frivolous and/or otherwise an abuse of the process of the court. Thereafter nothing appears to have happened until the 27th of September 1972 when the Lai Companies moved by summons to amend the defence put in by them in 909. This final summons was obviously a necessary and very drastic adjustment of the defence put forward in 909, necessitated by the final result in 969 to bring the matter pleaded into line with the novel claim put forward by Yat Tung in 534. The amendment which it thereby sought to make would substitute for the pleading that the transaction between the bank and the Yat Tung Ltd. in 1969 was invalid the wholly

different pleading that the purported purchase by Choi Kee, Ltd. from the bank in 1970 was void and of no effect for the reasons stated in the statement of claim in 534. It would appear that the bank's two summonses to strike out were originally set down for hearing on the 18th of September 1972. Eventually those summonses together with the Yat Tung Company's summons to amend were all set down for hearing on the same day and this was therefore the somewhat tangled state of affairs which confronted Briggs J. in chambers on the 5th of October 1972.

Before dealing with the grounds of appeal and arguments thereon, it will perhaps be as well to stress the following features of that situation. Firstly, in 969 the bank and the Yat Tung Company were primarily at issue on the question of accounts. If the company made good its claim the bank would be found to owe it a sum in the region of $435,000; if the bank made good its defence and counterclaim not only would it not owe that sum but on its accounting it would be owed a sum of $45,000 by the company. Secondly, in 969 the question of the subsequent sale by the bank to Choi Kee, Ltd. is not put in issue by the statement of claim which, in paragraph 18, refers thereto briefly only as a matter of history; but it is introduced in the counterclaim as an essential part of the bank's explanation of the figure which it claims as outstanding on the accounts between them. Thirdly, the validity of the sale to Choi Kee Ltd. is not directly impugned either in the statement of claim or in the reply to the defence and counterclaim. It was, however, a possible corollary of the allegation that the mortgage executed between Yat Tung Ltd. and the bank was a sham, and that any purported sale by the bank under the terms of that mortgage would be voidable so that any accounting which had reference to the sum allegedly paid by Choi Kee, Ltd. to the bank as the purchase price of the property might have to be disregarded. As the pleadings stood in 969 this possibility was not dealt with and the claim of Yat Tung Ltd. was presented as though the discrediting of the mortgage was only incidental to establishing the correctness of its own figures. But when in 534 it purported to accept its position as mortgagor as a consequence of the court's findings in 969, the odd position had come aboutthat, in impugning the subsequent sale to Choi Kee, Ltd., Yat Tung was expressly renouncing the

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

benefit of the credit allocated to it by the bank arising from that sale so that, instead of owing the bank the $45,000 claimed by the bank in its counterclaim in 969, it would put the bank in a position to claim the entire $1,000,000 advanced under the mortgage thus affirmed. This is the point at which it becomes very apparent that the dispute between the parties had shifted from being one of mutual accounting and payment in 969 to one of trespass and possession in 534 and 909. This peculiarity in the Yat Tung Company's present stance is one that touches at the very root the opposing contentions of the parties in these three cases and which lies at the heart of the decision given by the judge in chambers. Essentially the appellants' complaints are to be found on grounds 2-6 of the grounds of appeal filed in Appeal 51 and these may be reduced to the allegations that the judge wrongly found, (a) that the validity of the sale to Choi Kee, Ltd. was a matter conclusively decided by 969 and not subject to further question; and, (b) that the appellants had chosen to put their case in 969 in one way and were not to be permitted thereafter to present it again in a different and contradictory way.

Mr. Bernacchi would have it that the only real difficulty confronting his clients arises from their failure to plead the invalidity of their sale to Choi Kee Ltd. when defending the counterclaim put in by the bank in 969. There was good reason for him to wish tomaintain that line because the sale to Choi Kee Ltd. did not take place until after the writ in that action had been issued and although his clients were aware of the sale by the time the statement of claim was put in it would, as Mr. Ching concedes, have been improper to include the further pleading concerning that sale since the same had not been referred to in the writ. It was because of this that we were treated to some argument on the question whether this new matter might have been urged by way of defence to the counterclaim or whether it would have been necessary to adopt the somewhat unusual expedient of putting in a counterclaim to the counterclaim. To that I will refer later. I will turn first however to the reasons given by the judge in chambers for his refusal to allow the amendment of the defence in 909. What he has to say on that subject is the key to the principal difficulties which this case has presented upon appeal in relation

to the questions of res judicata and election for there is no doubt that the judgment is primarily founded upon the application of those two principles. On page 6 of the judgment the learned judge said :

> "Usually a party seeks to make an amendment because of some omission or error in his pleading. That is not the case here. The Defendant seeks to go much further. He seeks to set up an entirely new defence and moreover, one which is based on facts which he has denied in other court proceedings. It is also the first time in these proceedings that fraud is alleged.
>
> The question is whether the Court should assist such a litigant.
>
> But the matter goes further. One, indeed the principal amendment to the defence is an allegation that the sale of the property to Choi Kee, the Plaintiff by the Bank is void and indeed fraudulent. However the courts have already, as I have noted above, found in effect that this was not so. The fact has been litigated."

The reference there to the courts was, of course, to the finding of Pickering J. and its affirmation on appeal by the Full Court. He then goes on to cite Scarf v. Jardine (1) and Vine v. National Dock Labour Board (2) as authority for the proposition that a party, if he elects to set up a certain claim and loses upon that claim, cannot set up a second claim of another nature in the same cause of action. On page 7 he goes on to say as follows:

> "For the Defendant Mr. Bernacchi pointed out that the sale to Choi Kee took place only after the writ in 969 had been issued. However it was before the Statement of Claim was served in 969 and was long before the defence filed in 909. I do not see how this helps the Yat Tung Investment Company. If they had wished to claim that the sale to Choi Kee was fraudulent at the time of the sale to Choi Kee or up to the close of the pleadings in 969. That could have been achieved. The writ in 969 and subsequent pleadings could have been either withdrawn or amended: or at a later stage a counterclaim could have been filed to the counterclaim in that action. (sic)

(1) 7 R.C. 345
(2) 1956 W.L.R. 311

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

I am of the opinion that it would be wrong to allow the Defendant to amend his defence.

The following are my reasons. The validity of the sale to Choi Kee is a fact which has been litigated (on this point I shall have more to say when dealing with the summons in 534). It would be unjust to the Plaintiff to allow that fact to be litigated a second time. And this is so despite the fact that the Plaintiff was not a party to the proceedings in which that fact was decided.

I do not think that the court should entertain a claim by a litigant who changes the whole tenor of his version of the facts on which he relies to make out his case. He took a certain course, relied on a certain version of the facts and should not be encouraged to set up a second version, particularly when the new version alleges fraud which, in the amended defence, is not particularised."

There is no doubt that there one sees not only a finding that Yat Tung Ltd. had elected between two possible contentions as its source of right but also a specific conclusion that the validity of the sale to Choi Kee, Ltd. has actually been litigated in 969. The reason which the judge in chambers gives for the latter finding is found on page 4 of the judgment where having set out that finding he says:

> "This must follow from the fact that the Court found in favour of the Defendant on his counterclaim which was in effect for the balance of an account one item of which was the price received by the Bank from Choi Kee as a result of the auction of the property. It is obvious if that sale had not been a valid transaction that the Court would not have awarded any sum in respect thereof."

This finding which is the substance of the second and third grounds of appeal rests of course upon the fact that Pickering J. in giving the bank judgment upon its counterclaim in 969 necessarily did so on the facts as pleaded in that counterclaim. However, I think Mr. Benacchi is right to say that

that matter was not directly litigated before the court of trial. If the judge in chambers was implying that there had been express adjudication by Pickering J. upon that very issue and that the matter was therefore res judicata in that sense I would, with respect, be inclined to disagree. But I do not understand him to be employing the doctrine in that way. Although he took the view that the court in 969 by its award of damages upheld the validity of that sale I think it would be more truly put by saying that the court upheld the validity of the bank's pecuniary claim which was predicated upon the validity of that sale. This is an area of the law where some subtle seeming distinctions must be made and that form of estoppel which is usually called res judicata has limits which it is not always easy to state. That he was not using it in its strictest sense it is clear from the fact that the judge in chambers expressly relies on the words of Somervell L.J. in the case of Greenhalgh v. Mullard (3) where that learned judge (at page 257) says that :

> "res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

I say this by way of a necessary clearing of the ground for the proper application of this principle for I think that the passage in the judgment immediately preceding that quotation led Mr. Bernacchi to belabour a finding which was not strictly necessary to the conclusions arrived at and which counsel, I believe rightly, did not think was supported by the pleadings or the evidence. Thus at page 10 the judge in chambers said :

> "In 969 the case for the Yat Tung Investment Company was that the mortgage was void therefore the sale to Choi Kee was not a valid sale. Now, in 534 their case is the mortgage was valid but the sale is attacked because it was effected in breach of the duties of the mortgagee, the Bank."

(3) 1947 2 A.E.R. 255

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

It was never part of the case for Yat Tung Ltd. in 969 that the sale to Choi Kee was not a valid sale. The point is first raised by way of defence in 909. Indeed the reply to the defence and counterclaim in 969 admits that the defendant sold the property to Choi Kee Ltd. and contents itself with denying that the bank did in fact suffer any loss as a result of the sale. As I have said, the validity of that sale seems not to have been put in issue and could only be said to have been adjudicated in the sense that it was never challenged. Admittedly what Yat Tung Ltd. is now doing wears the appearance of a total contradiction of its previous stance, but, I think Mr. Bernacchi rightly maintains that, the Yat Tung pleadings in 969 are not in actual collision with its pleadings in the two later actions. The matter urged by way of defence in 909 and by way of claim in 534 and the claim in 969 cannot be said to set up mutually exclusive or contradictory cases. The improprieties now alleged against the sale to Choi Kee Ltd. could readily have been made the subject of an additional claim in 969 had the matter been known to the plaintiff at the time of the writ. The fact that it was not so known at that date has given Yat Tung Ltd. its excuse for not pleading it. But when one turns to consider the original defence put in in 909, some nine months after that sale, it is clear enough that no such explanation for failure to plead the additional defence is available. I feel therefore that it is unnecessary to go into the argument and the several cases referred to by counsel concerning the necessity for showing two mutually inconsistent causes of action before a party is put to an election between them. The original defence and the proposed amended defence in 909 are clearly not mutually exclusive although they are different. The apparent contradiction is rather in Yat Tung Ltd. now claiming (in 534) a declaration that it is the mortgagor of the property whereas in 969 it claimed that it was not. The later claim is a logical pursuit of benefit arising from an adverse decision and the contradiction is more apparent than real since the two actions involve different causes of action. But even though that is so, I believe that the wider principle of estoppel per rem judicatam upon which the judge in chambers relied is

perfectly applicable in respect of the application to amend. The defence in 909 as it originally stood was that the defendant companies were entitled to resist the claim for possession on the ground that Choi Kee Ltd. had no good title and they relied for that purpose upon the defect in the plaintiffs' title which they deemed had arisen because of the bank's purported selling to Choi Kee Ltd. under what the defendants alleged was a bogus mortgage. Mr. Ching has raised the issue, without pressing for it to be decided, as to whether that was in any event a good defence to the action as it stood. Indeed a nice question arises since all that the defendants then were saying was that the bank had purported not as mortgagee but as cestui que trust to pass title to Choi Kee Ltd. a point to which I will return later. The alternative and far more formidable defence which had been available to them then since November 1967 was to be found in those matters of fraud, negligence or other impropriety attributed to the sale by the bank to Choi Kee Ltd. The question as I see it is not one of res judicata in the strict sense or even res judicata by implication but in that wider sense referred to in the case of Greenhalgh v. Mallard (3). The stricter meaning of the doctrine is very admirably set out at page 152 of the second edition of Spencer-Bower on Res Judicata. He first of all refers to the decision of Coleridge J. in Reg. v. Hartington, Middle Quarter (Inhabitants) (4) at pages 794 - 7 where it was said that the judgment relied upon as res judicata :

> "concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the ground work of the decision itself, though not then directly the point at issue",

or is

> "conclusive evidence not merely of the fact directly decided but of those facts which are ..... necessary stops to the decision",

in the sense that they are

> "so cardinal to it that, without them, it cannot stand".

(4) (1855) 4 E & B. 780
(3) (1947) 2 A.E.R. 255

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

In a later passage on the same page the same learned author says:

> "On the whole, it is conceived that the rule may compendiously, but safely, be stated in the following form. Where the decision set up as a res judicata necessarily involved a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms : but, beyond these limits, there can be no such thing as res judicata by implication."

I think Mr. Bernacchi was right to maintain that the validity of the sale to Choi Kee was not directly put in issue and was not directly decided in 969. What was before Pickering J. was a dispute concerning two opposed versions of a certain statement of accounts. The Yat Tung version depended upon it showing a bogus mortgage and creation of a trust in return for a promise to pay construction costs which resulted in a balance in its favour of $435,000 odd. The bank's version of the same affair affirmed the validity of the mortgage and, in giving a somewhat different picture of the general accounts between the parties, incidentally threw into the balance the price it claimed to have got for its sale of the property to Choi Kee Ltd. Of course it was necessary to the decision of Pickering J. in giving judgment on the counterclaim to assume that there had been a valid sale to Choi Kee Ltd. and he did so, no doubt, in rejecting the suggestion that the mortgage had been a bogus arrangement. But his mind was never directed to the question whether there had been any degree of fraud or impropriety attaching to the actual circumstances of the sale to Choi Kee. If therefore he can be said to have, by implication, affirmed the validity of that sale it would surely be stretching the rule to say that his adjudication concluded that issue to any greater extent than could be implied from the matter actually put before him viz: the alleged invalidity of the mortgage

itself. If, following his decision Yat Tung Ltd. had sought to persist in its original defence in 909 then although invalidity of the sale to Choi Kee resulting from the allegedly bogus nature of the mortgage had not been argued in 969, when raised in 909 the answer of res judicata in the strict sense would have been complete. The present situation is perhaps analogus to the situation in In the Estate of Park, Park v. Park (5) which is referred to on page 155 of Spencer-Bower whose note of the decision is in the following terms:

> "A judgment (in which the court pronounced against the will on the ground of incapacity of the testator) in an action for probate in solemn form brought against a certain defendant (with others) in which the pleadings averred that she was the widow of the testator, the action proceeding on this basis to judgment, did not estop the same parties from alleging against the defendant in a subsequent action that she had never been lawfully married to the testator."

It is true that the plaintiff in 969 is disaffirming the reality of the mortgage between itself and the bank but it is not strictly speaking (all appearances to the contrary notwithstanding) affirming its reality in the subsequent actions; rather it is asking the court to reaffirm its own decision by declaration. What it is doing in 534, and what it and its related companies are seeking to do in 909, is making it clear that they are not seeking to dispute the court's finding in 969 but wish to bring to the court's attention a matter which had not been brought to its attention before and which has never been considered by any court in any of the actions thus far. For this reason I do not see that there is much force in Mr. Ching's observation that if, as the judge in chambers thought, Mr. Lai must give evidence again, he will be in an impossible position either as defendant in 909 or plaintiff in 534. No doubt considerable play can be made in cross-examination with the equivocal nature of his stance. But it is not the case that he will be compelled to commit perjury or else lose his action and fail in his defence. It would be perfectly in order for him to say:

> "I still say, if you press me, that the mortgage between me and the bank was a sham but the court held otherwise and I am not

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

trying to upset the court's finding but on the contrary asking merely that it confirm the status it ascribed to me by a declaration to that effect. But irrespective of that I wish the court to understand now that although I have not said so before there are other good grounds for saying that Choi Kee Ltd. acquired a title to the premises which was at the very best, voidable and that it should be voided for fraud etc."

He has not blown hot and cold in respect to his case against the sale to Choi Kee: rather it would be proper to say that he blew as hot as he could and when that was insufficient he sought later to blow hotter still. The real reason for the judge's refusal to permit him to amend is to be found in the passage where he says: (on page 6)

"He seeks to set up an entirely new defence and moreover, one which is based on facts which he has denied in other court proceedings. It is also the first time in these proceedings that fraud is alleged."

It should be noted there that the judge is careful to say that the new defence is "based on facts" which were formerly denied and not that the Yat Tung Investment Company now is seeking to affirm the truth of those facts. A very useful statement of the principle of res judicata in the wider sense in which I believe the judge relied upon it is to be found in Henderson v. Henderson (6) in passage from the judgment of Wigram, V.C., (a passage quoted in Greenhalgh v. Mallard at page 258):

"I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in

(6) (1843) 3 Hare 100

special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

Although the judge in chambers referred to the lateness of the amendment, the fact that it alleged a fraud and the lack of an affidavit in support, and although Mr. Ching relies upon these same matters in disputing the companies' right to have their amendment I think it is clear that the judge in chambers regarded these as subsidiary to the main question i.e. whether such a litigant should receive the assistance of the court when by "such a litigant" he meant one who had changed horses in mid-stream and altered the whole quality of his defence. I doubt whether he would have dismissed that application upon the subsidiary grounds alone, since he expressly cited the dictum of Brett M.R. in the case of Clarapede (7) to the effect that however late an amendment is proposed it should be permitted if it can be made out without injustice to the other side. As it appears to me he took these subordinate matters together with the main question as to whether issues of election and res judicata also stood against the Yat Tung Company in dismissing that application. This is clear from what is said on page 7 when in giving the reasons for refusing leave to amend he refers not only to the change of the whole tenor of the defence and the fact that the defendant, having chosen to rely on a certain version of the facts now alleges a new version, and in particular a fraud, and goes on to say that he should not be encouraged to do so. These reasons follow immediately upon his conclusion that what the defendant now seeks to put forward has already been litigated at the former action. Although Mr. Ching would have it that any one of the grounds advanced both before us and in the court below for refusing the application to amend would be of itself sufficient I would hesitate to agree. The lateness and novelty of the defence and the introduction of a serious claim of fraud although they might be good grounds on their own for the exercise of the judge's discretion in refusing such an amendment were not, in my view, the principal reason why the amendment was in fact

(7) 32 W.R. 263

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

refused. Without resorting to the idea of election and without the finding that the matter had been litigated in 969 it seems very unlikely that he would have refused the amendment. Nor do I think that this court should take a different attitude. The real issue to be decided is whether it be true to say that the allegation of fraud and the voidability of the sale to Choi Kee were matters available for litigation in 969 and that Mr. Lai chose not to rely on them and whether they are to be regarded as res judicata in the sense that they ought to have been so litigated.

It has been a recurrent refrain throughout Mr. Bernacchi's argument in dealing with his many grounds of appeal that the action in 969 was primarily in contract or for goods sold and delivered and that proof of the claim involved reference to the mortgage relationship only incidentally and that this was a totally different ground of action from the ground now alleged in 534 and in the defence in 909 concerning the voidability of the sale to Choi Kee. Further, it was his contention that the causes of action in 969 and 909 were not only different but that they were not mutually exclusive i.e. in the sense that they are not inconsistent and could stand together. As I have indicated, I believe that view is well founded. If the learned judge in chambers had found they were mutually exclusive I would be in agreement with the substance of ground 4 of the grounds of appeal which alleges such a finding. But I do not think that he did so. Rather, he based himself partly upon the doctrine of res judicata in the wider sense in which I have tried to describe it above and partly upon his conclusion that the Yat Tung Company and its associates had from the start elected to pursue one line of action and that it was too late for them now to shift to a different line. Indeed the whole question of election was only pursued by Mr. Ching in the sense that he maintained that from very nearly the outset of the proceedings in 969 a cause of action and a source of defence was known to and available to the Yat Tung Company which had deliberately decided not to put it forward. Obviously the concepts of election in this sense and of res judicata in the wider sense are closely linked and to some extent overlapping. As it seems to me the root of the matter is

concerned with the vital issue of the counterclaim in 969. Throughout, Mr. Bernacchi has clung to the fact that the sale to Choi Kee Ltd. took place after the issue of the writ although he concedes that it was before the filing of the statement of claim. He maintains that if, as Mr. Ching undoubtedly suggested in the court below, Yat Tung Ltd. could only be said to have been under the necessity of putting in a counterclaim to the bank's counterclaim then, since a counterclaim is a wholly separate cause of action and may be litigated at any time at the option of a defendant, he could not be accused of not having brought forward all relevant causes of action at the same time. In other words he says this question of the invalidity of the sale to Choi Kee Ltd. could never have been pleaded by his client by way of defence to the counterclaim in 969. For my part I am wholly unable to agree. That counterclaim, as Mr. Ching rightly observes, squarely put before the court the correctness of the defendant bank's manner of accounting for the sum which it said was owed to it by the plaintiff. This involved by implication, though not directly, the allegation that the sum which it sought to credit to the plaintiff resulting from the sale to Choi Kee was correctly accounted. The validity of that sale was not put in issue either by the plaintiff or the defendant but the fact of it was clearly before the court. The plaintiff therefore had to confront a situation in which it might be (as indeed it turned out to be) that the court would not accept his story of a bogus mortgage. That being the case, then, if in addition, the plaintiff was well aware that the subsequent sale to Choi Kee Ltd. was affected with fraud or negligence and had been at an undervalue it must have been obvious that to secure his position against every possible contingency it was necessary to plead that the defendant's manner of accounting, which left the plaintiff owing a sum of $45,000, was, aside from all the other complaints concerning the bogus nature of the mortgage between the bank and the plaintiff, itself wholly erroneous. It should not have been difficult to plead that at current market prices, if the sale to Choi Kee Ltd. had been a valid sale, a sum would have been realised which would not only obliterate the debt owing to the defendant (even accepting the defendant's account of the facts) but which would, in addition, leave

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

the defendant in possession of a balance in favour of the plaintiff. No compelling reason has been advanced to show that this matter could not have been pleaded by way of defence to the counter-claim. It would not have been a question of the plaintiff company taking up contradictory postures in relation to its own cause of action but simply of meeting the defendant upon his own ground in the event that the court disbelieved the plaintiff on the substance of its claim. But whether pleaded by way of defence to counterclaim or by way of defence and counterclaim to counter-claim, (and no especial difficulty in the way of such a pleading has been shown) it was, to my mind, so clearly a matter necessary and proper to be litigated at the same time with all the other issues between the parties that it would have been wholly wrong for the judge in chambers to have permitted the amendment. Mr. Bernacchi sought to maintain that it would be illogical to ask a defendant to such a counterclaim to rely upon a ground of defence which would in effect mean that he was owing more than the amount actually claimed against him in that counterclaim. Mr. Ching's reply to that was sufficient to dispose of it. The substance of such defence would not have been simply that the sale to Choi Kee Ltd. was voidable but that the sum which the bank alleged that it had realised was, in the circumstances, wholly inadequate. Indeed there was a suggestion from the Bar in the course of the appeal was that the property could well reach something in the neighbourhood of $2,000,000. As Mr. Ching pointed out all it needed to fetch, more than the bank say it fetched, was another $50,000 to put the plaintiff in credit on the defendant bank's own case.

What has been said already applies with equal force to the appeal from the application to strike out the statement of claim in 534. In Poulett v. Hill (8) a case on which both parties have sought to rely Lopes, L.J., in the very brief judgment on page 281 says:

> "A fusion of law and equity has taken place, and, according to Farrer v. Lacy, Hartland & Co., it is clear that the Plaintiffs can obtain in the first

(8) 1893 1 Chancery 277

> action everything to which they are entitled, yet they bring a second action. This second action is unnecessary."

The point at issue in that case was whether a mortgagee who had brought a foreclosure action was entitled, before the first action had been concluded, to commence a second action for arrears of interest under the same mortgage. The court found that since the Judicature Acts such successive actions were no longer necessary and that such proceedings were oppressive. At page 282 Kay L.J. says:

> "When an action has been brought by which the plaintiff can recover everything to which he is entitled, he ought not to bring another."

In my view these words may form a suitable epigraph to the attempt by Yat Tung Ltd. to assert, in an action brought over two years later, a claim which ought to have been brought before the court at least as early as the point of time at which it faced the counterclaim of its opponent. It is indeed as Mr. Bernacchi says a different claim and a separate issue from the issue primarily raised by the plaintiff in 969 but it was throughout, a clear and substantial issue and such as could readily have been raised either by way of defence or counter-claim. Of course it is true to say that a counter-claim is a separate cause of action but that is so in so narrow and technical a sense in the present circumstances that I do not think that any such rule should be held to support the plaintiff in refusing to ventilate at one of the same time with his other claims an issue so intimately connected with and so importantly opposed to the claims of his opponent.

To the application of the doctrines of election and res judicata in the extended or diluted sense in which Mr. Ching, rightly as I think, sought to apply them, the whole question of the bona fides of Mr. Lai and his companies is very relevant. In relation to that aspect of the matter the following may serve as a commentary as well as a summary of the argument and its conclusions: In 969 the cause of action was breach of a contract to pay construction costs (or possibly for work done and materials supplied) and incidental to that there was in issue the question whether there was such trust agreement as Yat Tung Ltd. alleged or whether, as the bank alleged, Yat Tung Ltd. was truly purchaser and

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

mortgagor of the premises. The sale to Choi Kee Ltd. came into the picture as a part only, albeit an important part, of the accounts between the bank and the plaintiff in 969. In that action Yat Tung Ltd. admits the sale to Choi Kee Ltd. and makes no question of the validity of that sale, not even such question as might have been raised as a consequence of Yat Tung's allegation that the mortgage was a sham. That might have been a way of establishing that the sale to Choi Kee Ltd., on its own, and apart from the later allegations made against it, was voidable but, the validity of Choi Kee's title was never debated at the trial.

In 909 the issue is possession and the cause of action trespass by Yat Tung Ltd. and the other defendants. Yat Tung Ltd. now says, for the first time, that the Choi Kee Ltd. has no title to evict him and at first puts this contention (never argued in 969) squarely on the footing that, since the assignment was on trust, and since the mortgage was a sham, the sale to Choi Kee Ltd. must have been vitiated so that no good title passed. Presumably what this means is that the bank, as legal owner of the property under the original mortgage, purported to pass that legal interest to Yat Tung Ltd. and then to receive it back from Yat Tung Ltd. as mortgagee, subject only to the equity of redemption whereas, in truth, they passed the legal estate to Yat Tung Ltd. to be held in trust for them. They thus retained an equitable interest only which, nevertheless, they purported to pass to Choi Kee Ltd. as the full estate both legal and equitable. Yat Tung Ltd. says of course that the bank would have got full legal interest in the property had it performed its promises under the alleged trust agreement i.e. if it had paid the construction costs and if it had done everything else in strict accordance with what it says was the agreement between them resulting in the state of indebtedness by the bank which is alleged by the plaintiff in 969.

Whether this is a good defence to Choi Kee's claim is questionable. It could be argued that this device was in effect a sale by the bank to itself and therefore that it was in no better state than an outright and blatant purchase by the bank of the property as mortgagee from the original owners so that it was altogether null and of no

effect in like manner as would be a purchase by a mortgagee of the mortgaged property, since: "a sale to oneself is no sale". On that view, nothing would have happened to deprive the bank of its right to sell the legal estate to Choi Kee, Ltd. so that, despite the interposition of a curious, suspicious and ineffectual charade, the bank was left in as good a position to transmit title to Choi Kee, Ltd. as it had been immediately upon the default of the original owners under the original mortgage. Whatever may be the proper resolution of that question, when one turns to consider 909 one wonders why any defendant possessed of so simple an answer to Choi Kee's title as Yat Tung Ltd. now claims to possess, would nevertheless choose to prop his defence, not partly, not even primarily, but wholly upon a balance of legal and equitable niceties the very substance of which was, moreover, a pretence in which he himself had willingly participated. A litigant is always at risk in "keeping the good wine until last" for he can seldom claim the benefit of miraculous intervention to explain his delay. But, where, as here, he makes no secret of having wilfully held it back almost to the close of day he must expect to have his claims for it most narrowly examined. Mr. Ching has described the new matter now pleaded as a myth not merely because of the lateness and novelty of the rather dramatic accusations which are now brought forward, but because of what he regards as the contradiction at the root of the whole situation brought about by these latest manoeuvres. There is no doubt something parodoxical or even bizarre in the present position of the Yat Tung Company and its associates for if a court were to avoid the sale to Choi Kee Ltd. thus securing to Yat Tung Ltd. the immediate benefit it sought to obtain i.e. continued possession of the premises, its respite might be very temporary and its victory hollow. The bank could then claim a return of the full sum advanced under the mortgage which was affirmed by the court in 969 i.e. $1,000,000, under the covenant to repay, less all deductions originally allowed save, of course, the purchase price paid by Choi Kee, Ltd. which would presumably have to be refunded to that company. If Yat Tung Ltd. was unable to pay the bank could foreclose or sell or sue on the covenant to repay and Yat Tung Ltd. would be powerless to resist any such action. In addition the bank as legal mortgagee would in any event, be entitled to take proceedings by way of ejectment as soon as the

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

sale had been set aside. But strange though the result might be if 534 were to succeed I do not think it can be said that 534 is at this stage barred by outright contradiction between what is now pleaded and the pleadings or the result in 969. The setting aside of the sale to Choi Kee, Ltd. in any such subsequent action would not in any way overturn the judgment of Pickering J. That judgment assumed the right to sell but did not purport to validate the sale itself. The effect of the sale on the accounts of the parties was accepted only because the court disbelieved the trustee allegation; the fact of the sale was never disputed nor was its validity disputed before that court on the grounds now advanced. The real defect in the position of the Lai companies is to be found rather in the general impropriety of the present manner of attempting to shore up a defeated claim by late discovery of suspicious novelties. The anomalies referred to above merely serve to fortify the total impression of a last ditch stand disingenuously contrived.

It should be remembered that it was not merely that the Yat Tung Company as plaintiff in 969 failed to bring forward its present contention concerning the sale to Choi Kee, Ltd. As to that it may seize upon the excuse, however tenuous and technical, afforded by the fact that the writ preceded the sale. Although for my own part I do not regard that as a very cogent answer, it was at least an available answer. The same cannot be said for the Yat Tung Company's reticence in pleading to Choi Kee's claim in 909. Of two possible answers to the claim for possession it chose to put forward only the more doubtful and oblique, seeking to introduce the other some considerable time later and only after the first had failed. Moreover it has never sought to counterclaim in 909 for the balance of the alleged true value of the property. All this is surely substantial reason for suspicion.

The judge in chambers could not and did not remain unmindful of the trial judge's estimate of Mr. Lai as a litigant. It is not necessary to go into that again but the judge in chambers had no reason (nor has this court) to doubt the justice of his observation when, in summarising the evidence the trial judge referred to Mr. Lai's preoccupation with this litigation (and

his suspicions concerning his opponents, their legal advisors and indeed his own) as obsessive. While I have hesitated to agree that the matter now brought forward was res judicata in quite as direct and simple a way as appears to be indicated in some of the expressions used in the judgment of the judge in chambers I do not believe that the substance of the judgment is other than I have endeavoured to convey. The claim it is now sought to put forward was indeed a thing adjudicated, not in the direct sense that the claim of fraud in the subsequent sale was ever considered and decided, but in the wider sense that the invalidity of that sale was hinted or implied in 969 and, though never actually argued, was a possible corollary of the argument. It was openly pleaded in 909 and it is now sought to be sustained in that action upon a wholly different ground and one which ought to have been disclosed at the earliest opportunity. If that ground was in truth available before the trial of 969 and the plaintiff then hung back in deference to the proprieties of pleading it ought to have discovered the full reach of its defence at least in 909. As Mr. Ching said, Yat Tung Ltd., although professing, in 534 and 909 to accept the finding of the court in 969 was doing so only in part and was covertly seeking to upset the pecuniary award on the counterclaim on grounds which, if they had been adduced and if they had been successful in the first instance would have prevented such an award ever being made.

Again it should be noted that there is a close similarity between the kind of double-dealing now ascribed to the bank and that originally attributed to it. In 969 the bank is alleged to have sold to itself with a trustee interposed to give a colour of propriety to the deal. In 534 it is said to have sold to a company which Mr. Lai obviously regards as a mere nominee of the bank; a company which, by virtue of common directors and shareholders is, on his contention, to be regarded as the bank's alter ego. Clearly two such serious allegations so closely similar in purport and so wholly distinct on the facts said to support them could have been and should have been disclosed in the first action, or at latest in 909. This piecemeal approach is eloquent of a desire to establish duplicity and fraud in the bank on some ground, come what may : a bona fide claim of this kind is ill served by "esprit de l'escalier". These

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 10

Judgment of the Hon. Mr. Justice McMullin

21st March 1973

(cont.)

observations tell equally in favour of the view that principles of election and res judicata stand against the plaintiff in 534 and the defendants in 909, and more might be added to highlight the want of merit in this situation generally. Enough however has been said to show that Mr. Lai had put himself and his companies in an untenable position by failing to bring forward all his available defences and claims in the original action. That failure embraces a period of two years and there has been no explanation for it. The delay in advancing these claims, and the anomalies involved in them were they now be forwarded, with all the detriment in expense delay and continued trouble to Choi Kee Ltd. and the bank which would thereby be entailed amply support the Judge's finding that they were frivolous, vexatious and an abuse of the process of the Court.

For these reasons I would dismiss these appeals.

21st March 1973

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 11

Notice of Motion

31st March 1973

No. 11

NOTICE OF MOTION

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 51 of 1972

(on Appeal from O.J. Action No. 534 of 1972)

BETWEEN

YAT TUNG INVESTMENT COMPANY LIMITED — Plaintiff

and

DAO HENG BANK LIMITED — 1st Defendant (1st Respondent)

CHOI KEE, LIMITED — 2nd Defendant (2nd Respondent)

TAKE NOTICE that the Full Court will be moved on Thursday the 12th day of April, 1973 at 9.30 o'clock or so soon thereafter as Counsel on behalf of the abovenamed Plaintiff (Appellant) can be heard for an Order giving leave to appeal the decision of the Full Court herein to the Judicial Committee on the Privy Council pursuant to the Order in Council regulating appeals from the Court of Appeal for Hong Kong to Her Majesty in Council.

Dated the 31st day of March, 1973.

(sd.) D'Almada Remedios & Co.
Solicitors for the Plaintiff
(Appellant)

TO: Messrs. Patrick Poon & Co.,
Solicitors for the 1st and 2nd Respondents.
Hong Kong.

In the Supreme Court of Hong Kong

Appellatee Jurisdiction

No. 12

Affirmation of Lai Young Kwong

6th April 1973

No. 12

AFFIRMATION OF LAI YOUNG KWONG

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 51 OF 1972

(On appeal from O.J. Action No. 534/72)

BETWEEN

YAT TUNG INVESTMENT COMPANY LIMITED	Plaintiff (Appellant)
and	
DAO HENG BANK LIMITED	1st Defendant (1st Respondent)
CHOI KEE, LIMITED	2nd Defendant (2nd Respondent)

I, LAI YOUNG KWONG (Signature in Chinese) of Flat B, 11th floor of Miami Mansion, Nos.13-15 Cleveland Street, Causeway Bay in the Colony of Hong Kong, do solemnly sincerely and truly affirm and say as follows:

1. I am a director of the Yat Tung Investment Company Limited, the Plaintiff (Appellant) herein and I am duly authorized to make this affirmation. I have been in the construction trade and land investment business for a number of years and have good personal experience in estimating land values from prior to 1969 up to the present time.

2. The property which is the subject matter of the Plaintiff's claim (hereinafter referred to as "the Plaintiff's Property") (or damages for fraud or negligence and breach of duty as was indicated in argument by the Plaintiff's Counsel both before this Honourable Court and in the court below) is the Land and newly constructed building thereon known as Nos. 195-197 Johnston Road and No. 114 Thomson Road. The building is a 14-storyed cement concrete structure comprising of 2 ground floor units; 3 units

of each of the floors from 1st to the 5th floors; 2 units on each of the floors from the 6th to 9th floors; and 1 unit on each of the floors from the 10th to the 13th floors including the roof.

3. Prior to the date of the auction sale which is the issue between the parties herein, one unit on the ground floor was sold for HK$187,000.00 on the 18th of April 1969 and the roof for HK$44,500.00 on the 12th of July 1969. The other units were undisposed of.

4. At the date of the auction sale on the 26th of November 1969 the property was purportedly sold to the Second Defendant (the 2nd Respondent) for HK$1,040,000.00.

5. Land values had been steadily increasing during 1969 and at the date of the sale a conservative estimate of the value of the Plaintiff's property (excluding the 2 units sold) would be $1,950,000.00. This value can also be arrived at by taking comparable figures of land sales in the vicinity at that time. For instance, recorded sales show that one unit on the ground floor of the adjoining building Nos. 191-193 Johnston Road and No. 112 Thomson Road constructed simultaneously with the Plaintiff's property) was sold on the 30th October 1969 for $360,000.00. In that building there are 29 units in respect whereof, 22 units were disposed of between July to December 1969 and the remaining 7 units between January to July 1970. The total floor area of that building (less the area is for common use) is 17,218 sq. ft. The total price realised on sale of all the units that building amounted to $2,141,100.00. The total area of the Plaintiff's property is 17,767 sq. ft. which is greater than that of the adjoining building referred to.

6. Such has been the rise in property values that at the present time the Plaintiff's property is now worth at least 8 millions in value.

7. For all these reasons I can say that the value of the issues in this action are more than

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 12

Affirmation of Lai Young Kwong

6th April 1973

(cont.)

$50,000.00.

AFFIRMED at the Courts of Justice, Victoria, Hong Kong, this 6th day of April 1973, the same duly interpreted to the Affirmant in the Cantonese dialect of the Chinese language by:-

(sd) LAI YOUNG KWONG

(sd) Yin E. Leung

Sworn Interpreter,

Before me,

(sd) K.C. Chang

A Commissioner, etc.

This affirmation is filed on behalf of the Plaintiff (Appellant)

In the Supreme Court of Hong Kong

Appellate Jurisdiction

No. 13

Order granting Final Leave to Appeal to Her Majesty in Council

21st May 1973

No. 13

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 51 OF 1972

(On Appeal from O.J. Action No. 534/1972)

BETWEEN

YAT TUNG INVESTMENT COMPANY LIMITED	Plaintiff (Appellant)
and	
DAO HENG BANK LIMITED	1st Defendant (1st Respondent)
CHOI KEE, LIMITED	2nd Defendant (2nd Respondent)

BEFORE THE HONOURABLE MR. JUSTICE BLAIR-KERR AND THE HONOURABLE MR. JUSTICE MCMULLIN IN FULL COURT

O R D E R

Dated the 21st day of May, 1973.

UPON reading the Notice of Motion herein dated the 19th day of May 1973 on behalf of the Plaintiff (Appellant) for final leave to appeal from the decision of the Full Court to the Judicial Committee of the Privy Council pursuant to the Order in Council regulating appeals from the Court of Appeal for Hong Kong to Her Majesty in Council.

AND UPON hearing the Counsel for the Plaintiff (Appellant) and the Counsel for the 1st and 2nd Defendants (1st and 2nd Respondents) IT IS ORDERED that the Plaintiff (Appellant) be granted final leave to appeal from the said decision of the Full Court to Her Majesty the Queen in Her Privy Council.

In the Supreme Court of Hong Kong

Appellate Jurisdiction

AND IT IS FURTHER ORDERED that the costs be costs in the cause of the appeal to Her Majesty in Council.

Assistant Registrar

No. 13

Order granting Final Leave to Appeal to Her Majesty in Council

21st May 1973

(cont.)

IN THE PRIVY COUNCIL No. 14 of 1973

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

BETWEEN :

YAT TUNG INVESTMENT COMPANY LIMITED — Appellants

- and -

DAO HENG BANK LIMITED

- and -

CHOI KEE LIMITED — Respondents

RECORD OF PROCEEDINGS

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Appellants' Solicitors

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Respondents' Solicitors