Privy Council Appeal No. 9 of 1979

Wong Lai Ying and Others – – – – – – *Appellants*

v.

Chinachem Investment Co. Ltd. – – – – – *Respondents*

from

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER 1979

Present at the Hearing:

LORD DIPLOCK
VISCOUNT DILHORNE
LORD EDMUND-DAVIES
LORD SCARMAN
LORD LANE

[*Delivered by* LORD SCARMAN]

In this appeal from the Court of Appeal of Hong Kong, the question is whether 24 contracts for the sale of flats by the respondents as vendors to the appellants as purchasers in two tower blocks to be built by the respondents were brought to an end by frustration arising from a landslip which, unforeseen, unforeseeable, and caused by circumstances beyond the control of the respondents, seriously interrupted the building of the two blocks. The answer to the question depends upon the view to be taken of two closely related matters: the true meaning of the contracts (all of them, so far as material, in the same terms), and the correct assessment of the impact of the landslip upon the performance of the contracts. The interpretation of the contract (the singular may henceforth cover the plural) is a question of law. The assessment of the effect of the landslip is a mixed question of fact and law.

The appellants were plaintiffs in an action in which they claimed a declaration that their contracts of purchase were not frustrated and an order directing specific performance. The respondents relied on the defence of frustration. The trial judge held that the landslip was "a frustrating event" but that upon a true construction of the contract "the unforeseen and the impossibility have been provided for". He would have held the landslip to be an event frustrating the contract, had it not been that in his view it was covered by the terms of Clause 22 of the contract. He gave judgment for the appellants.

The respondents appealed. The Court of Appeal agreed with the trial judge that the landslip was a frustrating event but differed from him in their construction of Clause 22. They held that the clause did not make provision for what had occurred. They, therefore, allowed the respondents' appeal. The appellants now seek to persuade their Lordship's Board that upon the true construction of the contract the trial judge was right to hold that there

was no frustration, and they ask for specific performance of their contracts. It is conceded that, if there was no frustration, they are entitled to specific performance.

The respondents are "the owners" (their interest is leasehold—a term of 75 years with a right of renewal) and developers of a building site upon which they planned to erect two blocks of flats to be known as "University Heights". It is situate in the mid-levels of Hong Kong Island. On the 18th June 1972 part of the hillside near the Po Shan Road above the site of "University Heights" slipped down the hill, taking with it a block of flats of thirteen storeys called "Kotewall Court". There is no dispute as to the physical consequences of the disaster, which the Chief Justice summarised as follows:—

> "The debris from this building together with many hundreds of tons of earth landed on the [respondents'] site obliterating the building works already completed. The landslide was of major proportions and 67 persons were killed. The authorities realised that the whole area was unsafe and the [respondents] were barred from the site while urgent rescue work was undertaken. At this stage, the [respondents] did not know if they would ever be allowed to return to the site".

When the landslip stopped work on the "University Heights" site, the respondents were developing the site with two tower blocks containing 144 flats. Between the 14th March 1971 and the 5th November 1971 they had entered into the 24 contracts which are the subject of this litigation. Wong Lai Ying, who was the first-named plaintiff in the action and is the first-named appellant before the Board, entered into her contract, which may be taken as typical of the others, on the 20th March 1971. By Clause 1, she agreed to buy from the respondents 11 equal undivided 1,613th shares in the site (registered in the Land Office as Inland Lot No. 8171) "and in the . . . buildings now in the course of being erected thereon and to be known as University Heights . . . in accordance with the plans and specifications approved by the Building Authority" together with the sole and exclusive right to hold use occupy and enjoy the flat and car parking space specified in the contract. The respondents agreed to complete the building in the manner set forth in the contract. The total price was $112,875, which Wong Lai Ying paid upon signing the agreement "as deposit and in full payment of the purchase price".

The respondents' building plans were originally approved in September 1970. After amendment, they were finally approved by the Building Authority on the 8th October 1971, notification of approval being given on the following day. Permission to commence the work was required from the Building Authority under the Buildings Ordinance: and it was granted on the 17th November 1971, upon the footing that the work must be done in accordance with the plans already submitted and approved. On the 3rd December 1971 the respondents, as required by the Buildings Ordinance, gave notice of the appointment of their authorised architect. Work began on the 11th December 1971. It continued until the landslip on the 18th June 1972. The work then ceased: and, since it was not, indeed could not be, resumed within 3 months, the Buildings Ordinance permit lapsed (Buildings Ordinance, s.20).

It is now necessary to set out in full the clauses of the contract which fall to be considered in order to determine whether the landslip frustrated the contract. They are as follows:—

"3 (1) The Vendor shall comply with the requirement of the Building Authority and of the director of Public Works relating to the said building and shall complete the building within the period of eighteen months from the date of the issue by the Building Authority of a permit of commencement of building works.

(2) If the Vendor shall fail to complete the said building within the period as aforesaid or such further period as may be allowed under

sub-paragraph (4) hereof, the Purchaser shall be entitled on giving to the Vendor not less than 14 days notice in writing in that behalf to rescind this Agreement and on the expiry of such notice this Agreement shall be rescinded and the Vendor shall repay to the Purchaser all amounts paid by the Purchaser hereunder together with interest thereon at the rate of one per cent per calendar month from the date or dates on which such amounts were paid to the date of repayment the payment of such amount and interest to be in full and final settlement of all claims by the Purchaser against the Vendor hereunder.

(3) If the Vendor shall fail to complete the said building within the said period of eighteen months as aforesaid (subject to such extension as may be granted by the Architect under sub-paragraph (4) hereof) the Purchaser shall have the option notwithstanding any extension of time or further period granted as aforesaid either to rescind this Agreement in which event the above-mentioned provisions for rescission shall apply or to wait for the completion of the building in which event the Vendor shall pay to the Purchaser interest at the rate of one per cent per calendar month on all amounts paid hereunder from the expiry date of completion of the building (subject to such extension as aforesaid) until the date of the completion of the said building.

(4) The Architect shall grant such extension of time for the completion of the said building beyond the said eighteen months as aforesaid (not exceeding in any event 365 days in the aggregate) as shall appear to the Architect to be reasonable having regard to delay caused by any of the following, that is to say:—

(*a*) Strike or lockout of workmen,

(*b*) Bad weather,

(*c*) Riots or civil commotion,

(*d*) Force Majeure or Act of God,

(*e*) Delay in completing the foundations due to water rock or similar obstruction or difficulty,

(*f*) Delay in connecting drainage or water pipes in dealing with the application for permit of commencement of building works or occupation permit or attributable to the Public Works Department or any other Department or Authority concerned,

(*g*) Default of contractors or subcontractors,

(*h*) Act of the Queen's enemies and

(*i*) Any other cause beyond the control of the Vendor.

4. So soon as the said buildings shall be completed the Vendor shall forthwith instruct the Architect to apply for an occupation permit in respect thereof. Upon the issue of the occupation permit the Vendor shall forthwith give notice in writing to the Purchaser and, provided no instalment of purchase money is then in arrear, the Purchaser shall then be entitled to enter into occupation of the said Apartment and to the receipt of the rent and profits thereof.

.....

9.A. The said undivided shares of and in the said land and buildings and the exclusive right to hold use occupy and enjoy the said Apartment are sold:—

(1) For all the residue of the term of 75 years with a right of renewal for a further term of 75 years created by the said Conditions of Exchange No. 9303 as modified or varied by a Letter of Modi-

fication dated the 20th day of February 1971 (hereinafter collectively called 'the said Conditions') and subject to the payment of a due proportion of the rent and to the observance and performance of the lessee's covenants and conditions therein reserved and contained.

. . . . . .

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

. . . . . .

20. It is hereby further agreed that in the event of the Apartment or any part thereof being requisitioned by the Government of Hong Kong or other competent Authority, the Purchaser shall, notwithstanding such requisition, comply with all the terms and conditions herein contained and shall not be entitled to rescind this Agreement by virtue thereof Provided however that, subject to payment by the Purchaser of all moneys payable in accordance herewith, the Purchaser shall be entitled to any compensation payable by the requisitioning Authority in respect of the said Apartment.

. . . . . .

22. It is further agreed that notwithstanding anything herein contained should any dispute arise between the parties touching or concerning this Agreement or should any unforeseen circumstances beyond the Vendor's control arise whereby the Vendor becomes unable to sell the said undivided shares and Apartment to the Purchaser as hereinbefore provided, the Vendor shall at be liberty to rescind this Agreement forthwith and to refund to the Purchaser all instalments of purchase price paid by the Purchaser hereunder without interest or compensation and upon such rescission and upon repayment of the instalments of purchase price this Agreement shall become null and void as if the same had not been entered into and neither party hereto shall have any claim against the other in respect thereof."

For the purpose of the proceedings, the parties made the following admissions:—

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

2. The Po Shan Road landslip of 18th June 1972 was an unforeseeable natural disaster.

3. As a result of the landslip, it was not possible for the Defendant to have completed the said building before 1/10/76 or reasonably practicable for the Defendant to do so before 31/12/76. The Defendant does not contend that such impossibility existed beyond the said 1/10/76.

4. The Defendant did not exercise the right to rescind, if any, under Clause 22 of the sale and purchase agreements within the required time if the Court should hold that there was an obligation on the part of the Defendant, should it wish to exercise the right, to do so forthwith.

5. The building is expected to be completed by Janaury 1978. The superstructure has already been completed and finishing works are in progress. There were no amendments to the general plans and the various apartments in the building are identical with those shown on the original approved plans in terms of area, configuration, number of undivided shares allocated and the other material respects".

It was not in dispute that the impact of the disaster upon the building work was very great. It was described by the trial judge in a few sentences:—

> "I find as a fact . . . . that as a result of the landslip the Building Authority was in no position to approve whatever plan which might render the site safe to build on until mid 1975. So much depended on the soil test and the observation of the ground water levels. With ideas of rendering the site safe for building purposes the defendant [i.e. the respondents] had to undertake a great deal more of work than what was originally required such as underpinning the foundation of the lower block and sinking caisson columns to secure the retaining wall and the access road."

In the Court of Appeal the Chief Justice, when summarising the case for the respondents, set out its factual basis, which upon the evidence could not be disputed and which the court accepted, in the following terms:—

> "They say that as a result of that disaster they were first excluded from the site totally for five months. Secondly, the building permit lapsed making it illegal for them to continue with the work. They had to stop. Thirdly, they say that there was a long and uncertain period of delay. This was due to investigatory work necessitated by the new requirements of Government and it cannot be considered to be a limited period of delay. It was a period which at the time was incalculable. And, in fact, it lasted for 3½ years. Part of this period was due to the fact that certain remedial works on the site had to be done, a lengthy investigation as to the feasibility to build had to be undertaken and the design of the building had to be refashioned—none of this was envisaged by the original contract. Fourthly, they had already spent some two million dollars on the foundation of the building. Almost all, if not all of this was lost as different foundations were required to be constructed. It appears that though the superstructure of the building is much the same as the original design this is not true of the foundations, which were wholly different from what was considered appropriate before the landslide occurred and at the time of the signing of the contract."

His conclusion of fact, from which none of the four judges concerned with the case below differed, was that:

> "at the time of the landslide the parties could not know how soon [the respondents] would be allowed to re-enter the site, how long the delay would be and whether they would be granted a new building permit, nor, if one was granted, when it would be approved. The position of the parties was clouded in uncertainty."

From this outline of the facts two series of critical dates emerge:

(1)	8th, 9th October 1971:	plans finally approved,
	17th November 1971:	permit to commence works,
	17th May 1973:	contract date for completion of the building,
	17th May 1974:	maximum permissible extension for completion:
(2)	18th June 1972:	landslip, an unforeseeable natural disaster putting a stop to building work,
	18th September 1972:	permission to build expired after lapse of 3 months in which no work had been done,
	24th November 1975:	permit to resume work to the original design on basis of new foundation plans,
	1st October, 1976:	earliest date upon which it was possible, as a result of the landslip, to complete the works.

The latest contract date for completion was, therefore, the 17th May 1974: the earliest possible date for completion after the landslip was the 1st October 1976, 2 years 4½ months later. And time was of the essence of the contract.

The law is now well settled. A frustrating event is an interruption of the performance of a contract, which is an event of such a character and duration as to make the contract when resumed a different contract from the contract when broken off: *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*, [1918] A.C. 119. Or, as Lord Radcliffe put it in what has become the "*locus classicus*" for the description of the doctrine,

> "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract"; *Davis Contractors* v. *Fareham U.D.C.* [1956] A.C. 696 at pp. 728–9".

As Lord Denning M.R. put it in "*The Eugenia*" [1964] 2 Q.B. 226 at p.239,

> "It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound."

The court has to decide as a question of law whether the contract has been frustrated; and

> "the question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do": Lord Sumner, *Bank Line Ltd.* v. *Arthur Capel & Co.* [1919] A.C. 435 at p.454.

In the later case of *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497 Lord Sumner commented at p.509 that

> "what the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds."

Lord Wright summed up the law in a well-known passage in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265 at p.276:—

> ". . . . when frustration occurs, it is automatic, and . . . . its legal effect depends not on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. I mentioned these two aspects of the principle here because they are important for the decision of the present case. The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds.' "

Their Lordships would at this stage make two comments. First, if there was a frustrating event, it was the landslip. All four judges below were agreed on this point: and their Lordships would not disturb their finding, which accords with the parties' admission that the landslip was an unforeseeable natural disaster and that, as a result of the landslip, it was not possible for the defendant to have completed the said building before the 1st October 1976. Secondly, all four judges below formed the view that, Clause 22 apart, the landslip was "a frustrating event": in other words that, unless Clause 22 covered it, the contract made no provision for it. Thus the difference of opinion between the trial judge and the Court of Appeal is solely as to the proper construction of Clause 22.

Clause 22 apart, there is nothing in the contract to suggest that the parties were making provision for an unforeseen natural disaster which would make uncertain not only when, but whether, it would be possible to resume the contract work. On the contrary, there is much to suggest that no provision was made or intended for such an event. The landslip was a major interruption fundamentally changing the character and the duration of the contract performance. The contract, which was one for the sale of an undivided share in land upon the express condition that the vendor would erect and within a stipulated period complete a building on the land to include a flat for the purchaser, was entered into when plans had been approved by the Building Authority but no work begun. The purchaser was required to pay a substantial deposit at once (in Wong Lai Ying's case, the whole purchase price). Not surprisingly, time was made the essence of the contract. Clause 3, which imposed the time limit upon the vendor and spelt out the purchaser's rights in the event of delay, made express provision only for a limited period of delay, and no provision at all for an event arising which made further performance uncertain and the character and duration of any further performance (should any prove possible) radically different from that which the original contract contemplated.

It was, however, urged that the language of Clause 22 is wide enough to cover the event which happened. So it is. But the question is whether the general words of the clause are sufficient to support the inference that the parties must be presumed to have made provision for the event. In answering the question, the concurrent findings of fact by four judges, all of whom would be well aware of conditions in Hong Kong, must be respected by the Board. The event was, admittedly, an "unforeseen natural disaster", and Mr. Justice Li at trial and the Chief Justice in the Court of Appeal spelt out its consequences for the contract in the passages already quoted from their judgments. All of them were prepared to characterise it as a "frustrating event": they differed only in their construction of Clause 22.

In *Metropolitan Water Board* v. *Dick, Kerr and Co. Ltd., supra.*, Lord Parmoor (at p. 140) repeated with approval a warning given by Hannen J. in an earlier case of the danger of placing too much weight upon general words unsupported by specific contractual provision. In *Baily* v. *De Crespigny* [1868–9] L.R.4 Q.B.180 Hannen J. had said, at p. 185:—

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

The unforeseen character of the event is not in dispute. Clause 22 cannot, in their Lordships' opinion, be construed as making provision for the possibility of this particular unforeseen contingency. The clause, coming at the end of a contract, replete with specific provisions and time limits, was plainly intended to confer upon the vendor a remedy of rescission if a dispute arose or it became clear he could not complete in accordance with the contract, provided he acted "forthwith" to terminate the contract. It does not follow from the provision of a summary remedy avoiding litigation in such circumstances that the parties must have agreed that their contract would continue after an unforeseen natural disaster having the consequences

analysed and assessed by the judges below. The Board agrees with the view expressed by Mr. Justice Huggins in the Court of Appeal that

> "the inclusion of a clause such as Clause 31 in the Bank Line charterparty [*Bank Line* v. *Capel, supra,*] or Clause 22 of the Agreement in this case is .... not inconsistent with the operation of the doctrine of frustration and does not show an intention that that doctrine shall not apply".

Strictly, of course, the issue is not whether the doctrine of frustration is excluded but whether provision was made for an event causing the circumstances of performance to be radically different from that undertaken by the contract. The word "forthwith" is an indication, if any other than the context and circumstances of the contract is needed, that this "frustrating event" was not contemplated: for a most significant feature of this event was that as a result of it "the position of the parties was clouded in uncertainty" (Briggs C.J., *supra*). Another indication is the bizarre consequences of holding the event covered by the clause. If the vendor should fail to act "forthwith", and completion should become indefinitely delayed, the purchaser, exercising his right under Clause 3(3), could wait as long as he pleased, collecting all the time his interest at the rate of 1 per cent per month. A further indication is the presence in the contract of Clause 20. Requisition, if not provided for, could well be a frustrating event: indeed it is a classic instance in some circumstances of frustration. The parties by Clause 20 made specific provision for it.

As Lord Denning M.R. remarked in "*The Eugenia*" *supra* (p.239), frustration is a common law doctrine designed to achieve justice where it would be "positively unjust to hold the parties bound". On the facts as found concurrently by the trial judge and Court of Appeal it would be unjust to hold the parties bound. It would be requiring the contractor "to submit to an aleatory bargain to which he had not agreed", as Lord Dunedin put it in the *Metropolitan Water Board* case at p.128. The common law, supplemented by legislation, enables the vendor in this case to be relieved of a performance radically different from that which he originally undertook and the purchaser to be repaid his money with interest from the date of payment.

Their Lordships will humbly advise Her Majesty that these appeals be dismissed with costs.

(641509, 70)

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Delivered by
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