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In the Privy Council

No. 28 of 1982

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 23 OF 1979

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(On appeal from High Court Action No. 2927 of 1973)

BETWEEN

SANG LEE INVESTMENT CO. LTD. *Appellant*

(The Third Party in High Court Action
No. 2927 of 1973)

and

10 WING KWAI INVESTMENT CO. LTD. *1st Respondent*

(The Plaintiff in High Court Action
No. 2927 of 1973)

BALL LAND INVESTMENT CO. LTD. *2nd Respondent*
(In Liquidation)

(The Defendant in High Court Action
No. 2927 of 1973)

CASE OF THE APPELLANT

1. This is an appeal from a Judgment and Order of the *Court of Appeal of Hong Kong* dated the 18th July 1980 whereby the said Court of Appeal dismissed the Appellant's Appeal (with costs to be paid by the Appellant to the Respondents) from a Judgment and Order of the Supreme Court of Hong Kong (McMullin J) dated the 10th March 1979 whereby the Supreme Court ordered and declared (inter alia):—
- (1) That subject to the terms of the Order dated the 6th day of February 1979 the agreement dated the 17th day of January 1963 made between the Third Party as Vendor and the Defendant as Purchaser and referred to in Paragraph 12 of the Re-amended Statement of Claim of the Defendant against the Third
- RECORDS*
pp. 112-124
pp. 58-91
p. 57
p. 56
pp. 147-153
p. 30

Party herein ought to be specifically performed and carried into execution, and

p. 56
pp. 155-162

(2) that subject to the terms of the Order dated the 6th day of February 1979 aforesaid, the agreement dated the 20th day of February 1963 made between the Defendant as Vendor and the Plaintiff as Purchaser and referred to in Paragraph 7 of the Amended Statement of Claim of the Plaintiff herein ought to be specifically performed and carried into execution and that save as aforesaid the Defendant and/or its Liquidator and the Third Party do cause an assignment of the premises forming the subject matter of the 2 said agreements to the Plaintiff or its nominee or nominees to be executed by all necessary parties subject to the Plaintiff paying into Court the sum of \$96000 pursuant to the said Order dated the 6th day of February 1979.

p. 6

p. 56

(3) That the Counterclaim of the Third Party against the Defendant do stand dismissed out of this Court.
(4) That the Plaintiff's and the Defendant's costs of this action up to and including the date of the signing of this Order be paid by the Third Party.

2. The facts relevant to this Appeal are as follows:—

(1) In 1961 Mr. T.F. Mok (later to be the guiding spirit in the 2nd Respondent company) had formed a scheme to redevelop a plot of land in Quarry Bay by the erection thereon of a high rise complex of three estates, each consisting of blocks of flats with shops on the ground floor and comprising in all 1,335 units. They were later to become known as the Po Lee, Wai Lee and Tak Lee Estates. Mr. Mok's plan was to sell the intended units (before construction had been begun) to purchasers who would pay a deposit followed by instalments over five years together with interest, thus making (it was hoped) the whole scheme virtually self financing. The deposit to be paid to obtain the said Quarry Bay land was \$609,120.00.

p. 519

pp. 523-524

(2) Thereafter Mr. Mok orally agreed with Mr. F.F. Kwan (the guiding spirit of the Appellant) that the said scheme should be carried out by a joint venture consisting of the Appellant on the one part and a syndicate of 18 members composed of Mr. Mok, members of his family and certain wealthy businessmen on the other part, which said syndicate headed by Mr. Mok was eventually to be incorporated into a limited company. In fact the syndicate took the name of Ball Land, and, on its incorporation on the 4th December 1962 the members of the syndicate became the shareholders of the second Respondent. The Appellant was to act as Manager for the Joint Venture.

(3) Mr. Mok duly formed his syndicate. One of its members was Mr. Lai Kwai Tim, who later became a shareholder and director of the second Respondent and who was also effectively the owner of the First Respondent. Mr. Mok collected from the syndicate \$640,000 on the promise that they would obtain a speedy return of their initial investment.

p. 125

p. 131

(4) On the 25th October 1961 Mr. Mok entered into a sale and purchase agreement with Messrs. Davie Boag and on the same day executed a deed of

trust declaring that the land was to be held by him upon trust for the Appellant. The deposit of \$609,120.00 supplied by the Appellant was also paid over on this date. Out of the monies collected by Mr. Mok from the syndicate, \$563,737 was paid to the Appellant as the contribution of the syndicate to the joint venture capital. Of that sum \$304,560 was paid in respect of the syndicate's half share in the initial deposit made to Messrs. Davie Boag (the Appellant contributing the other \$304,560.00) and \$253,800.00 was paid in respect of the syndicate's half share in the commission (totalling \$507,600) paid by the joint venture to Mr. Mok.

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- 10 (5) In order to keep his promise that the syndicate would obtain a speedy return of their initial investment, Mr. Mok decided to borrow money from the joint venture, use that money to buy some of the flats that were to be built by the Joint Venture and sell the unbuilt flats immediately at a discount for cash. The cash would then be returned to members of the syndicate. Pursuant to his decision in or about March 1962 the joint venture notionally sold 47 units out of the 1,335 units to Far East Investment Ltd, a private company owned by Mr Mok's family which was acting on behalf of the syndicate until the Second Respondent was incorporated. It is a common ground that a written agreement for sale and purchase of the 47 units (referred to in the Judgment of Mr. Justice McMullin as Blocks 1 and 3) was drawn up by Mr. S.C. Mok, a solicitor and son of Mr. Mok sometime in March 1962. No copy of that agreement has survived. It is also common ground that that agreement was replaced by the agreement dated 17th January 1965 made between the Appellant and the second Respondent which was in identical terms. The price was \$1,261,734 (this being approximately 20% lower than the list price) which was to be paid as to 90% immediately and the balance on assignment. No actual cash was paid but the syndicate, through Far East Investment Ltd, notionally borrowed \$1,135,560.60 (being 90% of \$1,261,734) from the Joint venture which they then used to purchase the 47 units from the joint venture. The Appellant was credited in the accounts of the joint venture with a loan equal to the said 90%.
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- 35 (6) Far East Investment Ltd. acting on behalf of the syndicate then immediately sold the 47 units to the First Respondent for \$771,875.50, that company being the alter ego of Mr. Lai Kwai Tim. An unsigned and undated copy of the said Sale and Purchase Agreement between the 1st and the 2nd Respondents has survived. It is common case that some such agreement was entered into between the 1st and 2nd Respondent in or about March 1962. This was subsequently replaced by the agreement dated 20th February 1963 between the 1st and 2nd Respondents and which was signed by Mr. Lai Kwai Tim on behalf of both the 1st Respondent and the 2nd Respondent. The said \$771,875.50 was paid as to \$248,156.00 in cash and the balance by means of credits given by the First Respondant in respect of syndicate members who "purchased" certain of the units. Thus, by the end of June 1962 the members of the syndicate had been fully repaid their original investments totalling \$640,000 either by way of cash or by way of units.
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- (7) On the 4th Decmeber 1962 the Second Respondent was incorporated with a

pp. 61-62

p. 136

p. 161

pp. 547-574

- notional share capital of \$640,000 divided into 64,000 shares of \$10 each, the shares being allocated to the members of the syndicate substantially in accordance with the amount each member had originally contributed. The Second Respondent took over (inter alia) the liabilities that had been incurred by Far East Investment Ltd, namely the \$1,135,560.60 loan made by the joint venture for the purchase of the said 47 units. On its incorporation the Second Respondent did not have a capital of \$640,000 and was in fact insolvent in that it had already returned the \$640,000 to the members of the syndicate, had taken over a liability of \$1,135,560.00 and had agreed to transfer the 47 units either to the First Respondent or to various members of the syndicate.
- p. 302*
- p. 411*
- pp. 578-594*
- pp. 411, 415, 417, 419, 421, 423, 425, 427, 429, 431, 435, 437, 439, 441, 443, 445*
p. 140
- (8) On the 5th December 1962 the Second Respondent paid out a further \$128,000.00 to those shareholders who had been members of the syndicate. On the 29th October 1963 the Second Respondent paid out a further \$51,260 to its shareholders. In March 1966 the Second Respondent paid out a final \$64,000 to its shareholders.
- (9) On the 31st December 1962 a final partnership agreement was entered into between the Second Respondent and the Appellant under which the Second Respondent agreed to pay the Appellant \$3,048,300.00 (being one moiety of the price of the Quarry Bay land). The receipt of the \$609,120.00 deposit was acknowledged and the Second Respondent was bound therefore, to pay (inter alia) the Appellant:
- (1) The sum of \$387,854.19 on or before the 15th January 1963.
 - (2) The sum of \$526,535.81 on or before the 30th June 1963.
 - (3) The balance of the price \$1,523,610 on or before the 30th December 1964.
- (10) The agreements for the sale of the 47 units from the Appellant to Far East Investment Ltd. and then their resale to the First Respondent were replaced by identical agreements (with the Second Respondent replacing Far East Investment Ltd) dated respectively the 17th January 1963 and the 20th February 1963.
- (11) Davie Boag conveyed the Quarry Bay land to the Appellant by two assignments dated the 22nd July 1964 and the 7th January 1965 respectively. On the 22nd July 1965 the Appellant mortgaged part of the land to the Bank of East Asia for \$3,000,000 by way of an immediate advance of \$1,500,000.00 an increase of overdraft facilities by \$750,000 and a further advance of \$750,000 to be paid in stages tied to the progress of construction of the Po Lee and Wai Lee Estates. Interest was payable at 1% monthly, compound with monthly rests. On the 1st August 1964 some of the directors of the Appellant, namely, Mr. Kwan, Mr. Ma and Mr. Hudson Chen Wood personally guaranteed the sums due under the mortgage. On the 8th January 1965 the Appellant mortgaged the remaining part of the land to the Bank of East Asia for a further \$3,000,000 on the same terms as the previous loan and the said directors again furnished similar guarantees. On 14th January 1965 the Appellant entered into a Building Contract with the Nan Sang Building Construction Ltd to construct the said Estates. By the end of 1965 the joint

5 venture was running into financial difficulties. In January 1966 the
 Appellant managed to borrow a further \$700,000 from the Bank of East Asia
 but by March 1966 it was forced to mortgage some of its own properties (as
 opposed to the joint venture properties) to secure banking facilities to the
 extent of \$4,450,000. On the 17th February 1967 the said three directors of
 the Appellant agreed with the Bank of East Asia to guarantee all sums due
 under the said mortgages up to a total of \$4,250,000 and it was further
 agreed that instalments paid by the purchasers of the units would be paid
 directly to the Bank of East Asia and that as and when each unit was released
 to the purchaser the joint venture would reduce the outstanding loans by
 \$10,000. By the end of March 1967 the total bank advances to the joint
 venture had reached the high point of \$7,200,000.

p. 188

p. 341

p. 195

p. 344

15 (12) The Po Lee and Wai Lee Estates were due to be finished by October 1967
 (the occupation permit was issued on 27 October 1967) and the joint venture
 was desperate to find the cash to repay the \$10,000 in respect of each unit
 released to the purchaser. In September 1967 the joint venture offered (as
 recorded in the minutes of the 54th Joint meeting of the Directors of the
 Appellant and the 2nd Respondent, hereinafter referred to as "Joint
 Meetings") inter alia to the individual shareholders of the Appellant and the
 Second Respondent to pay interest at the rate of 2% per month to any
 shareholder willing to lend money to the joint venture on a bare promissary
 note. At first, no shareholder was prepared so to do but eventually in
 November 1967 (as recorded in the minutes of the 56th Joint Meeting) the
 said 3 directors of the Appellant agreed to lend the joint venture a total of
 \$900,000 which was provided to the joint venture on the 19th July 1968.

p. 285

p. 288

25 (13) By March 1969 the joint venture was still in serious financial difficulties and
 the mortgage debt had only been reduced to \$6,916,000. On the 28th March
 1969 the said 3 directors of the Appellant lent the joint venture a total of
 a further \$329,600. In 1969 the unfinished Tak Lee Estate was sold for
 \$3,560,000. On the 30th May 1970 the said 3 directors of the Appellant lent
 the joint venture a total of a further \$329,600 and thereafter lent further
 totals of \$1,000,000.00 and \$329,600 on the 25th March 1971 and 21st
 August 1971 respectively. Thus, in all the said 3 directors of the Appellant
 lent the joint venture a total of \$2,888,800 and by the 31st March 1973 by
 reason of the interest due and payable on the loans they were owned by the
 joint venture the sum of \$4,269,429.79. So far as the Bank of East Asia was
 concerned they were paid off in full by the joint venture by the end of March
 1972. By that date the balance sheet of the joint venture showed a deficit of
 \$5,713,234.04 the bulk of which was constituted by the said \$4,269,429.79
 due and owing to the said three directors.

p. 503

p. 623

p. 623

p. 623

p. 364

40 (14) In 1971 the said 3 directors sued the Joint Venture for the sum of \$1,559,200
 (being the original loan of \$900,000 together with interest). The Appellant
 consented to judgment. The 2nd Respondent was given conditional leave to
 defend on payment of \$400,000 into Court, they were however unable
 and/or were not willing to comply with the said condition and judgment was
 entered against them on the 3rd September 1971. A Petition to wind up the

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p. 529

second Respondent was made on the 5th November 1971 and a Winding-up Order was made against them on the 26th November 1971. Prior to the 8th January 1979 (and probably prior to the proceedings in this case) the First Respondent filed a proof of debt with the official receiver of the Second Respondent for \$771,875.00. 5

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(15) On the 3rd October 1973 the First Respondent issued a Writ against the Second Respondent claiming, inter alia, specific performance of the agreement dated the 20th February 1963 and for damages. The Second Respondent bought in the Appellant as Third Party. In addition to the claim for specific performance of the agreement dated the 17th January 1963 made 10 between itself and the Appellant, the Second Respondent also claimed for breach of the partnership agreement, fraud and other breaches of fiduciary duties and prayed an account of the joint venture on the footing of wilful default.

p. 155

p. 147

(16) The action came on for trial on the 8th January 1979, and during the course of the trial the parties agreed that the specific performance question was to 15 be dealt with immediately and the partnership issues adjourned to a future date. The first trial was concluded on the 15th February 1979 and judgment was given on the 10th March 1979 when Mr. Justice McMullin ordered (inter alia) that specific performance should be given in respect of both the 20 agreements of the 17th January 1963 and the 20th February 1963 respectively but there should be no order as to damages.

pp. 58-91

pp. 100-110

(17) On the 3rd January 1980 Mr. Justice McMullin gave judgment in the partnership action and found that the Appellants had been guilty of 4 major items of wilful default namely, 25
 (a) No separate bank account was maintained by the Appellant for the custody of joint venture funds, as a result of which, between June 1962 and May 1965 while income from the joint venture (namely purchaser's deposits) showed credit balances over expenditure, no bank interest was credited to the joint venture.
 (b) The joint venture was never credited with the sum of \$135,000 which 30 had been paid to the Appellant by Nam Sang Construction Co.
 (c) That a profit of \$182,719.34 that had been made by the sale of certain steel bars, had been kept by the Appellant and not credited to the joint venture.
 (d) That the Appellant was in breach of fiduciary duty in failing to consult 35 with the Second Respondent over certain 'confirmor' sales.

p. 92

Thereupon Mr. Justice McMullin ordered an account on the basis of wilful default together with costs.

On the 30th March 1979 the Appellant gave Notice of Appeal against both parts of Mr. Justice McMullin Order, but, prior to the hearing of the appeal, 40 abandoned the appeal so far as it related to the findings of wilful default.

3. *Financial Facts*

(1) *The First Respondent.* Though the syndicate, through Far East Investment Ltd, sold the 47 units to the First Respondent for \$771,875; in fact Far East

Investment Ltd. only received \$248,156 in cash, which said sum it received from the 1st Respondent as the alter ego of Mr. Lai Kwai Tim, who was at the same time a member or the syndicate. The balance of the \$771,875 was distributed to various members of the syndicate in specie or in cash.

p. 117

5 (2) *The Second Respondents.* Between the date of its incorporation and the 4th December 1962 and the date it was wound up on the 26th November 1971, the Second Respondent contributed nothing towards the cost of the joint venture and neither did any of its directors or shareholders. The members of the syndicate (who after the 4th March 1962 became

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shareholders in the Second Respondent) received a total of \$883,200 in cash or units in lieu thereof. (The Appellant refers to para. 2.(8) above).

15 (3) *The Appellants.* By March 1967 the Appellant had borrowed \$7,200,000 from the Bank of East Asia. All of this sum was expended on the joint venture. The said bank was fully paid back by the end of March 1972. By March 1966 the Appellant had mortgaged some of their own properties as part security for banking facilities to the extent of \$4,450,000. From August 1964 the 3 directors of the Appellants gave personal guarantees in respect of the Appellant's borrowings from the Bank, and advanced to the Joint Venture a total of \$2,888,800 none of which has been repaid.

p. 344

p. 364

20 The Court of Appeal made (inter alia) the following findings:

(1) That they were not persuaded that the transactions spoke so strongly for themselves that they ought to revise the Trial Judge's finding that the Respondent was not guilty of fraud.

p. 123

25 (2) That the monies returned to the syndicate (and later to the shareholders of the Second Respondent) namely the sums of \$640,000, \$128,000, \$51,200 and \$64,000 were not genuine loans made by the Second Respondent to its shareholders.

pp. 122, 123

(3) That the payments made by the Second Respondent to its shareholders after incorporation were unlawful.

p. 122

30 (4) That though the payment of \$640,000 made before the Second Respondent was incorporated was 'within the law', Equity could not regard with approval what followed almost immediately, namely the incorporation of the syndicate into a limited company with that money registered as fully paid up capital.

p. 123

35 (5) That the Second Respondent did not honour their commitments under the partnership agreement or respond to the calls made from 1965 onwards.

p. 120

(6) That equity would not approve of the greater part of the Second Respondent's conduct and the remainder was unlawful.

p. 123

40 (7) That the Appellant was far worse offender than the Second Respondent in that it had used joint venture's monies for its own private ends and had been guilty of the 4 breaches of confidence amounting to equitable fraud as found by Mr. Justice McMullin.

p. 123

- (8) That the arguments, namely that the Court should concern itself only with the conduct of the Second Respondent and not the Appellant in that it was the former who must show its conduct had been up to the standards demanded by equity and that in this case Equity should stand aloof and leave the parties to their legal remedies, would be correct if there was little to choose between the competing parties. 5
- (9) In view of the Appellant's grave misconduct that it would not be just and fair to refuse specific performance.

5. The question to be decided in this Appeal is whether:

- (1) The Court of Appeal should have assessed and compared the respective degrees of unconscionable or inequitable conduct of the respective parties. 10
- (2) The Court of Appeal having found that Equity would not have approved of the greater part of the Second Respondent's conduct and that the remainder was unlawful, were nevertheless, right to find that specific performance should be granted in view of the Appellant's 'grave misconduct'. 15

6. The Appellants submit that as specific performance is an equitable remedy, a party who calls for the aid of a Court of Equity must come with clean hands. This has for centuries formed part of the Law of England (and subsequently the Law of Hong Kong). 'He who has committed iniquity... shall not have Equity'.

v. Jones v. Lenthal (1669) 1 Cha Ca 154 20

'He must come as it is said with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction'.

v. Cadman v. Horner (1810) 18 Ves 10

It is conceded that the absence of clean hands does not mean a general depravity; it must have an immediate and necessary relation to the equity sued; it must be a depravity in a legal as well as in a moral sense'. 25

v. Dering v. Barl of Winchelsea (1787) 1 Cox CC 318, 319-320

However, the Hong Kong Court of Appeal clearly (and we would submit rightly) considered that the conduct of the Respondent did have 'an immediate and necessary relation' to the grant or otherwise of specific performance of the agreement of the 17th January 1963 and the 20th February 1963 respectively. 30

The Appellant further submits that it can find no reported decisions in Hong Kong, the United Kingdom, in the Commonwealth or the United States of America, where a Court of Equity has contrasted the conduct of one party with the other and granted to one party specific performance notwithstanding his own lack of clean hands, because the hands of the other party were still less clean. In all the reported cases where the maxim of 'clean hands' has been raised the Court has solely taken into account the conduct of the party praying for equitable relief. 35

In *Mcklestone v. Brown (1801) 6 Ves S 2* the Court was dealing with property transferred to the Defendant on trust. At page 69 Lord Eldon said that if the facts were that the Plaintiff, stating he had been guilty of a fraud upon the law, to evade, to disappoint, the provisions of the Legislature to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, 40

between the two species of dishonesty the Court would not act but would say 'Let the Estate lie where it falls'.

v. also *Cottington v. Fletcher (1740) 2 A and K 156*

5 In *Newman v. Pinto (1887) 57 LT 31* the Court of Appeal were considering an action for infringement of trade mark where both the Plaintiffs and the Defendants had used a false trade mark. The Plaintiffs were asking for an injunction to restrain the Defendants from using the trade mark. The defence was (inter alia) that the Plaintiff did not come to the Court with clean hands (v. p.37 Mr. Justice Bowen). The Court unanimously held that the Plaintiffs were not entitled to the equitable relief sought, 10 though it refused to give the Defendants their costs. Again there was no suggestion by the Court of Appeal that the Defendants' 'dirty hands' might enable the Plaintiffs to obtain equitable relief even though their hands were not clean.

In *Litvinoff v. Kent (1918) 34 TLR 298* the Defendant landlord had unlawfully re-entered the premises because he objected to the Plaintiff's unlawful political conduct. 15 In disposing of the Plaintiff's claim for an injunction Mr. Justice Neville made no attempt to weigh or contrast the Plaintiff's unlawful conduct against the Defendant but decided the case solely on the Plaintiff's lack of clean hands.

In *Gascoigne v. Gascoigne 1918 1 KB 223* a husband took a lease of land in his wife's name with her knowledge and connivance because he was in debt and was anxious to 20 protect his property from his creditors. He brought an action against his wife claiming a declaration that she held the property as a trustee for him. Lush J. in overruling the County Court Judge said at page 226:

25 'he has permitted the Plaintiff to rebut the presumption which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it'.

In *Hamilton v. Ball 1839/1840 Irish Equity Reports 191*

the Plaintiff sought an injunction against the Defendant to stop him bringing certain proceedings, the parties having previously carried out a collusive sale of land. During the argument the Lord Chancellor said to the Plaintiff at page 193.

30 'You state yourself out of Court. If the Defendant were coming here to have the benefit of this bond, I would not assist him, but you come here as a Plaintiff to get rid of a bond entered into for a very dishonest purpose'.

At page 195 he held,

35 'I am bound to make the defence in answer to such a suit, not for the sake of the Defendant who was a party to the transaction, but for the sake of the public.'

In *Darling v. Carcard (1901) 3 WAA R 90* the Supreme Court of Western Australia held that a Court of Equity would not assist either party out of a difficulty which had arisen by reason of a fraud perpetrated by both of them as a sham to deceive a third 40 party. Again there was no suggestion that the Court thought that the relative inequities of each party are relevant to the exercise of its equitable jurisdiction.

In *Weegham v Killifer (1914) 215 F 168* the Plaintiff, representing a baseball team

entered into a contract with the Defendant (who was a very skilled and well known baseball player) to play for the Plaintiff even though the Plaintiff knew the Defendant was under contract to a Third Party team. The Defendant (in breach of contract) then entered into a new contract with that team. The Plaintiff claimed an injunction to restrain the Defendant from playing for any team other than his own. The District Court Judge was critical of the Defendant's wrongful behaviour (v page 169). However, he described the maxim 'He who comes into equity must come with clean hands' as a cardinal one lying at the foundation of equity jurisprudence. At page 173 he said:

'The motion for an injunction must be denied . . . not because there are only equities in (the Defendant's) favour which excuse or exempt him from the performance of his engagements, and not because the merits of the controversy are with (the Third Party) but solely because the actions and conduct of the Plaintiffs in procuring the contract upon which their right to relief is and must be founded do not square with one of the vital and fundamental principles of equity which touches to the quick the dignity of a court of conscience and controls its decision regardless of other considerations'.

Also at page 173 he said:

"While it is true that the Plaintiffs and Mr. Killifer have entered into a legal and binding contract for the breach of which the one may be compelled to respond in damages to the other, it is also true that because both have acted wrongfully and in bad faith, a Court of Equity will neither adjust their differences *nor balance their equities*'. (our emphasis)

The District Court's decision was subsequently affirmed by the Circuit Court of Appeal v. (1914) 215 F 289

This decision makes it clear that a Court of Equity will not 'balance' the respective wrongful conduct of the Defendant against that of the Plaintiff, and, if the latter does not come with clean hands a Court of Equity will not grant him equitable relief. It is submitted that the case was rightly decided and that the Circuit Court of Appeal were right to so hold.

It is further submitted that the purpose of the 'clean hands' maxim is not to determine which of the parties is more deserving of the assistance of the Court, but rather to assess whether the party who seeks the assistance of the Court is deserving of that assistance. It is his conduct, and his conduct alone, that is determinative of whether he will be granted equitable relief. No doubt, on the findings of the Hong Kong Court of Appeal, if the Appellant had sought equitable relief they would have been refused the same. In *Holman v. Johnson* 98 English Reports 1121, Lord Mansfield said:

"The objection, that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles or policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who bounds his cause of action

upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, then the Court says he has no right to be assisted. It is upon this ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both party are equally in fault, potior est conditio defendantis."

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10 The Appellant concedes that they did not have clean hands but will contend that the Court of Appeal's findings that they were far worse offenders than the Second Respondent was against the weight of evidence.

The Hong Kong Court of Appeal having rightly found that the Respondent hands were 'dirty' went on to compare the respective 'dirtiness' of the parties hands and granted

15 the Respondents the equitable relief of specific performance, solely because they thought the Appellant's hands were considerably dirtier than those of the Respondents. This, it is submitted, was a fundamental error that vitiates the exercise of their discretion. It reduces the issue to a private dispute rather than, as is the case, a public issue of whether the party applying for relief should, by reason of his previous relevant

20 conduct, be denied the assistance particularly undesirable for two reasons:—

a) It necessitates a weighing of iniquity. In every case the Court would have to decide was the Defendant's conduct more or less reprehensible than that of the Plaintiff's? On what criteria is a Court expected to perform this task? As long ago as 1679 an English Court refused to be involved in comparisons of iniquity.

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v. Bodley's case (1679) 22 ER 824

b) It means that Plaintiffs who do not have clean hands can still claim and obtain equitable relief so long as they could show that the Defendants hands were dirtier than theirs. This would make great inroads into a maxim which has worked well throughout several centuries.

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It is further submitted that the matters raised by the Hong Kong Court of Appeal in the last paragraph of their Judgment does not justify their approval of the grant of Specific Performance to the Respondents. If the Respondents were refused specific performance they would still normally have their remedies in law. The fact that the Respondents waited just under 6 years before bringing proceedings and did not obtain damages in this action and would be statute barred if they now brought a fresh action, is not something that should assist them in obtaining equitable relief. It is true that a refusal of specific performance might profit the Appellants in respect of flats not owned by Mr. Mok, his family or by members of the syndicate, but the same result is obtained in cases where the Courts refuse assistance to persons whose claims necessarily reveal an illegal or immoral contract, in such cases the Court lets the losses and gains lie where they may fall, even though this may be unfair to one party.

v. Taylor v Chester (1869) ER 4 QB 309

Parkinson v College of Ambulance Ltd (1925) 2 KB 1

The Appellant humbly submits that the Appeal should be allowed for the following among others:

Reasons

- I. Because Equity would not approve of the greater part of the Respondents' conduct and the remainder (so far as the Second Respondent's were concerned) was unlawful, and, consequently the Respondents did not have clean hands. 5
- II. Because the Respondents were not entitled to equitable relief by reason of the fact that they did not come to a Court of Equity with clean hands.
- III. Because the Hong Kong Court of Appeal was wrong in law in weigh up and contrast the respective 'iniquities' of the Respondents and the Appellant. 10
- IV. Because the Hong Kong Court of Appeal was wrong in law in taking into account the Appellant's conduct when deciding whether or not to grant the Respondents the equitable relief of Specific Performance.

COLIN ROSS-MUNRO QC 15

ROBERT TANG

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

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No. 2927 of 1973)

and

10 WING KWAI INVESTMENT CO. LTD. *1st Respondent*

(The Plaintiff in High Court Action
No. 2927 of 1973)

BALL LAND INVESTMENT CO. LTD. *2nd Respondent*
(In Liquidation)

(The Defendant in High Court Action
No. 2927 of 1973)

CASE OF THE APPELLANT

LOVELL, WHITE & KING
21 Holborn Viaduct,
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London Agents for
H.H. Lau & COMPANY
Solicitors for the
Appellant