

11/83

No. 28 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)  
CIVIL APPEAL NO. 23 OF 1979

(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)
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- and -

WING KWAI INVESTMENT CO. LTD.	First Respondent	(The Plaintiff in High Court Action No. 2927 of 1973)
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BALL LAND INVESTMENT CO. LTD.	Second Respondent	(The Defendant in High Court Action No. 2927 of 1973)
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CASE FOR THE SECOND RESPONDENT

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1. This is an Appeal from the Order of the Court of Appeal of Hong Kong exercising appellate jurisdiction (Cons, J.A., Yang and Bewley J. J.) dated 18th July 1980 dismissing the appellant's appeal from the judgment of McMullin J., exercising original jurisdiction, dated 10th March, 1979. McMullin J. had ordered specific performance of two sale and purchase agreements (called herein respectively "the First Agreement" and "the Second Agreement") in relation to 47 flats in Quarry Bay and granted other related or consequential relief against the Appellant. The Court of Appeal unanimously upheld the Order of McMullin J.

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2. The Appellant and a syndicate of individuals became in 1961 equal partners in a joint venture to develop a plot of land at Quarry Bay (the title to which had been vested on acquisition in the Appellant) by the erection thereon of numerous blocks of flats (with shops) divided into 3 estates; the 47 flats were but a small proportion (3 1/2%) of the total number of flats (and shops). The interest of the syndicate in the joint venture became in 1962 vested in the Second

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Respondent in which the members of the syndicate became shareholders. The Second Respondent was incorporated on 4th December 1962, and (as the Trial Judge found) amongst its assets were its rights in the joint venture of then substantial potential value; the Second Respondent entered into a joint venture agreement with the Appellant on 31st December 1962. The First Agreement was dated 17th January 1963 and was made between the Appellant (called "the Vendor") and the Second Respondent (called "the Purchaser"). By the First Agreement the Appellant "forward sold" the 47 flats (that is, the flats were still to be built) to the Second Respondent. The Second Agreement was dated 20th February 1963 and was made between the First and Second Respondents under which the Second Respondent on-sold the 47 flats to the First Respondent. These Agreements replaced earlier agreements in identical terms between the Appellant and the syndicate and between the syndicate and the First Respondent, respectively.

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3. The circumstances in which the two Agreements came into existence are clearly set out in

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the judgments of McMullin J. and of the Court of Appeal. They are not matters in dispute. Indeed the validity and enforceability at law of the two Agreements are now accepted by the Appellant. The only issue now raised is whether McMullin J. was right in exercising his jurisdiction in equity to grant specific performance of the Agreements (and whether the Court of Appeal was right in upholding him).

4. In addition to the facts set out in paragraph 2 hereof the essential facts as found or admitted are as follows:-
  - (1) Before the incorporation of the Second Respondent the partners in the joint venture were expecting, as the Trial Judge found "a large and certain eventual profit" from it and determined that each partner should have an immediate and equal benefit. This was achieved by the Appellant taking cash from the joint venture in the sum of \$1,135,560.60 and being debited therewith then or later as against the joint venture and by the syndicate and then in place of the syndicate the Second Respondent (a) contracting to purchase the 47 flats and being debited as

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against the joint venture then or later with the sum of \$1,135,560.60 also, by way of payment of 90% of the purchase price, and (b) immediately on-selling the flats for cash, (as was fully envisaged by the parties), so as to obtain the immediate benefit intended.

(2) The 47 flats were on-sold en bloc to the First Respondent for \$771,875.50, the best price which could be obtained. It was not disputed at the trial that the Appellant knew that it was the intention of the Second Respondent to buy in order to sell-on to sub-purchasers. The Appellant was also subsequently concerned as selling agent on commission in the sale of some of the 47 flats to the First Respondent's sub-purchasers.

(3) \$1,135,560.60 (90%) of the purchase price under the First Agreement was expressly acknowledged to have been paid in that Agreement as well as in the books and accounts of the joint venture. Moreover, at least from 1963 onwards the said two sums of \$1,135,560.60 appeared year after year as outstanding book debts due to the joint venture from the Appellant and the Second

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Respondent respectively, with their knowledge and consent.

- (4) Payments to members of the syndicate were made principally before but also after the incorporation of the Second Respondent in respect of their interests direct or indirect in the joint venture.
- (5) There was unrest in Hong Kong during the period 1965-67 (with riots and bank runs) and the property market slumped very severely. It has since both recovered and soared.
- (6) Forward selling of flats to be erected on the joint venture land generated a considerable cash flow during and after 1962 in the early years of the joint venture.
- (7) Apart from the initial contributions to the joint venture of \$563,737 by the Appellant and by the syndicate respectively the joint venture was envisaged to be self-financing and not to require further contributions from the partners.
- (8) The Occupation Permit in respect of the 47 flats was issued on 27th October 1967 and possession given by the Appellant shortly

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afterwards. The Appellant has failed to make and has resisted the transfer of the legal title to the 47 flats and still does so.

5. The Appellant's case on the pleadings was that there was a scheme or conspiracy to strip the Second Respondent of its assets and that the two Agreements were tainted with illegality. This was rejected by the Trial Judge. The Appellant further pleaded that if the First Agreement was enforceable it would execute a formal assignment of the 47 flats upon payment of the full price of \$1,126,734.00. The Appellant also pleaded that the \$1,135,560.60 immediately payable under and stated to have been paid in the First Agreement had not been paid and that there existed an unpaid vendor's lien; the Trial Judge rejected both allegations. The Appellant did not plead or particularize a case of unclean hands to preclude specific performance.
6. The Second Respondent submits on the following grounds that the appeal is misconceived.

7. First:

The two Agreements have already been substantially executed. As conceded by the Appellant, the First Respondent has paid the whole of the purchase price payable by it to the Second Respondent under the Second Agreement, and of the purchase price provided for by the First Agreement only 10% (by agreement abated from \$126,173.40 to \$96,000.00) remains payable by the Second Respondent to the Appellant on completion. The Appellant has refused tender of the balance which was lodged in court by the First Respondent until the present Appeal was instituted and which remains available for completion, which the Respondents are ready willing and able together to effect. As found by the Trial Judge "actual possession of 47 units was given to the First Respondent and its sub-purchasers shortly after the occupation permit was issued in October 1967". For over 12 years such possession has been retained. In such circumstances, where in equity laches is a material consideration then either time would not run or would be looked at by the court

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less narrowly - Fry on Specific Performance 6th Ed (1921) p.517. It is submitted that in the present case like considerations justify the like approach to objections to clothing the equitable interests in the flats under or deriving from the Agreements with the legal estate. It is submitted that the Trial Judge adopted the correct approach when he said he must first deal "with the most fundamental consideration of all viz.: whether there was such a completed sale and purchase between the third party [the Appellant] and the Defendant [the Second Respondent] as entitles the latter to demand that the property be now assigned formally to it." The Trial Judge effectively answered his question in the affirmative, correctly it is submitted.

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8. Second:

The conduct now complained of by the Appellant does not "have an immediate and necessary relation to the equity sued for": Spry on Equitable Remedies 2nd Ed. 1980 at p. 381 citing Moody -v- Cox [1917] 2 Ch. 71 at pp. 87-88; Dering -v- Earl of Winchelsea (1787) 1 Cox 318; Argyll -v- Argyll [1967]

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Ch. 307 pp. 331-332 and Meyers -v- Casey (1913) 17 C.L.R. 90 at pp. 123-124. The conduct complained of has no such relation to the vendor - purchaser relationship deliberately created by the Appellant with the Second Respondent under the First Agreement. By the First Agreement the right to the 47 flats was effectively "hived off" as it were from the partnership assets so as to enable the Appellant's partner to dispose of or otherwise deal with them for its sole benefit independently of the partnership (as the First Agreement and specifically the proviso to clause 16 makes clear) and of its fortunes. The Trial Judge found as a fact that "the intention of the parties was that, upon the issue of the occupation permit and the payment of the balance, the assignment should follow promptly without further ado whatever the interim condition of the project then might be".

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This is not a case where there is any allegation that there was anything unconscionable in relation to the First Agreement itself. The objections of the Appellant to completing the assignment of the

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legal estate in the 47 flats do not go to "the very ground upon which this transaction took place": Attwood -v- Small (1836) Cl. and F. 232 at p. 447. It is submitted that whatever alleged subsequent breaches of partnership obligation by either party in relation to the joint venture may have occurred (in particular subsequent breaches) or whatever alleged breach of law in any transactions between the Second Respondent and its members may have taken place are immaterial in relation to the two Agreements.

9. Third:

As the Court of Appeal correctly found: "Yet Sang Lee knew full well what Ball Land was doing and gave its blessing. It knew that the 47 flats would be sold out immediately at a heavy discount. That was the only way for Ball Land to raise the immediate cash, which was what both Ball Land and Sang Lee wanted at the time. Sang Lee took cash directly".

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The Appellant has long ago with full knowledge affirmed the transactions effected by the Agreements. It did so:-

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- (a) By delivering possession of the 47 flats once built after the certificate of occupation was given in October 1967.
- (b) By acting as selling agents accounting to the First Respondent in sales-off of the flats and taking commission for so acting.
- (c) By acquiescing in the creation and maintenance for years in the joint venture account of express equal liabilities of itself and of the Second Respondent in the said respective sums of \$1,135,560.60, repayment of which sums was in November 1970 demanded by the joint venture.

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10. Fourth:

Third party rights of sub-purchasers have come into existence with the knowledge and acquiescence of the Appellant. It would be unjust to sub-purchasers for the Court now to refuse specific performance at the suit of this Appellant.

11. Fifth:

It would be inequitable for the Appellant to benefit in relation to the 47 flats from the change in local property market conditions

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between those of slump when the Appellant gave possession in 1967 and those of the subsequent property market recovery and buoyance.

12. Sixth:

It is submitted that (apart from the immateriality of partnership or other conduct as above submitted) the Appellant having been found to have itself committed most serious breaches of fiduciary duty as partner in relation to the joint venture it would be wrong on its petition to embark on a weighing of alleged breaches of fiduciary duty or of law, alternatively wrong to disregard such breaches of fiduciary duty by the Appellant against the Second Respondent (from the findings as to which the appeal from the Trial Judge was abandoned). The Court of Appeal found that it was the Appellant's abuse of its position as keeper of the purse strings that was "the root of many of the later financial problems or seeming problems". Alternatively, if it be material to weigh the respective conduct of the parties to the First Agreement, then the finding of the Court of Appeal that the Appellant was the worst offender ought not to be disturbed.

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13. Seventh:

There was, as the Trial Judge found, nothing which would justify refusal of specific performance, "nothing in the nature of an inequitable or unconscionable conduct which affected the agreements to any degree which would permit the Court in its discretion to refuse such an Order". Having exercised its discretion in favour of specific performance the Court's decision ought not it is submitted to be reversed unless it was plainly wrong. The decision of the Trial Judge was a careful and considered exercise of discretion by a Judge with knowledge of local circumstances after a prolonged examination of facts spanning more than a decade of local Hong Kong history. It is submitted that the decision was plainly right. That decision was moreover endorsed in its material aspects by the Court of Appeal.

14. If it be material, which it is submitted it is not, on the questions of whether there was any unlawful declaration of dividend or return of capital by the Second Respondent or as to whether there was conduct by or in

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relation to the Second Defendant of which equity would not approve it is submitted that the conclusions of the Trial Judge that the payments in question were or should be treated as loans and that there was no such conduct are to be preferred to the view on the points of the Court of Appeal.

15. The Second Respondent accordingly contends that the appeal should be dismissed and that the order for specific performance should be upheld for the following among other:-

REASONS

BECAUSE it has not been shown and was not the case that the Trial Judge was wrong in the exercise of his discretion or that the Court of Appeal was wrong in upholding him.

BECAUSE it is just and convenient to enable the equitable interests as sub-purchasers of the holders in possession of the flats to be clothed with the legal estate.

BECAUSE there was no unconscionable conduct of the Second Respondent in relation to the First Agreement.

BECAUSE the conduct complained of by the Appellant has no or no material relation to the transaction sought to be impugned by it or the relief sought.

BECAUSE the Appellant with knowledge adopted and affirmed the transaction the ultimate completion of which it resists.

BECAUSE third parties' rights have intervened.

BECAUSE it would be inequitable for the Appellant to benefit in relation to the 47 flats.

BECAUSE the weighing of alleged improper conduct ought not to be embarked upon in the light of the findings as to the serious misconduct of the Appellant.

BECAUSE the Trial Judge's findings of fact relevant to the exercise of his discretion and the grant of specific performance were correct.

LEONARD BROMLEY Q.C.

DENIS CHANG Q.C.