

6,1975

IN THE PRIVY COUNCIL

No. 14 of 1973

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG  
APPELLATE JURISDICTION

B E T W E E N :

YAT TUNG INVESTMENT COMPANY  
LIMITED

Appellants

- and -

10 DAO HENG BANK LIMITED and  
CHOI KEE LIMITED

Respondents

CASE FOR BOTH RESPONDENTS

RECORD

1. This is an Appeal against the Judgment of the Full Court of the Colony of Hong Kong given on the 21st day of March, 1973, dismissing the Appellant's appeal against the decision of a Judge in Chambers with costs to the Respondents.

20 2. The Appellant is a company incorporated with limited liability in accordance with the laws of the said Colony and was the owner of that piece or parcel of land registered in the Land Office of the said Colony as Section I of Inland Lot No.2802 together with the uncompleted building thereon. The 1st Respondent is a Bank which advanced monies under certain mortgages of the said property. The 2nd Respondent is also a company incorporated with limited liability in accordance with the said laws and is presently the registered owner of the said property.

CASE FOR BOTH RESPONDENTS

RECORD

3. The only question on this Appeal is whether the Appellant should be permitted to continue with an action against both Respondents, namely Original Jurisdiction Action No.534 of 1972.

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Facts of the Case

4. In the year 1964, one Lai Young Kwong carrying on Business under the style or firm name of Mee Ah Hong Construction Company entered into a contract with the then owners of the said piece of land to erect for them a building thereon. In the year 1966, Mee Ah Construction Co.Ltd., was incorporated in accordance with the said laws and took over the said contract from the said Mee Ah Hong Construction Company.

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5. The said owners executed a building mortgage over the said piece of land and the said building to be built thereon and, subsequently, a further charge over the same. Both the said mortgage and the said further charge were executed in favour of the 1st Respondent, and contained a power of sale in favour of the 1st Respondent in case of default.

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6. In the year 1968, the said owners disappeared. At such time the said building was yet uncompleted, the said Mee Ah Construction Co. Ltd., was owed certain construction costs by the said owners who were in default under the said mortgage and further charge. On 13th May, 1968, the 1st Respondent exercised its aforesaid power of sale and the said property was put up for auction. At such auction the said property was knocked down to the said Lai Young Kwong for \$880,000. The said Lai Yung Kwong took the assignment of the said property in the name of the Appellant.

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7. The said assignment was executed on 23rd May, 1968. On the 27th May 1968 the Appellant executed a building mortgage in favour of the 1st Respondent in the sum of \$1,000,000. Of this

sum the 1st Respondent retained an amount of \$880,000 being the aforesaid knock down price. From the said sum of \$1,000,000 there was also deducted certain costs and expenses. The Appellant was to be able to draw by stated instalments the last of which was to be in the sum of \$5,000. This building mortgage also contained a power of sale in favour of the 1st Respondent in case of default.

10 8. The Appellant drew each of the said instalments but for the last thereof and the said Mee Ah Construction Co.Ltd., proceeded to complete the said building. Before the former owners disappeared they had agreed to sell to certain purchasers 2 units in the said building. After the aforesaid purchase by the Appellant the Appellant executed assignments of such units to the said purchasers who paid the purchase price. Part of such purchase price namely the sum of \$111,795.74 was credited by the 1st Respondent as partial repayment  
20 of monies advanced under the said building mortgage.

pp.19-21

9. On 8th August, 1969, the Appellant and the said Mee Ah Construction Co.Ltd., issued a Writ of Summons against the 1st Respondent in Original Jurisdiction Action No.969 of 1969 and registered such writ against the said property as a lis pendens. By such Writ of Summons the Appellant claimed declarations that the said property was conveyed to the Appellant as nominee and/or trustee for the 1st Respondent and that the said building mortgage of \$1,000,000 was void. By such Writ of  
30 Summons the Appellant and the said Mee Ah Construction Co.Ltd., also claimed the sum of \$435,783.81 being construction costs allegedly expended at the request and on behalf of the 1st Respondent, alternatively the Appellant claimed to be indemnified against payment of the said construction costs.

40 10. The Appellant defaulted in payment of interest under the said building mortgage wherefore on 26th November, 1969, the 1st Respondent exercised its aforesaid power of sale and put up the said property at auction. At such auction the said property was knocked down to the 2nd Respondent at the price of \$1,040,000. At such time certain

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persons unknown to the 1st Respondent were upon the said property, wherefore the said sale was subject to existing tenancies, if any, and, by reason of the aforesaid, and the said registration of the Writ of Summons in Original Jurisdiction No. 969 of 1969 as a lis pendens against the said property, with an indemnity to be given by the 1st Respondent to the purchaser against all damages which might be suffered by the said purchaser.

11. At the time of the said sale to the 2nd Respondent, there was owing by the Appellant to the 1st Respondent under the said building mortgage principal in the sum of \$883,204.26 (being \$995,000 advanced less repayment of the aforesaid \$111,795.74) and interest in the sum of \$182,187.20, a total of \$1,065,391.47. By reason of the said sale to the 2nd Respondent the Appellant thus owed to the 1st Respondent the sum of \$25,391.47. Expenses of the said auction amounted to \$16,840.50 and legal costs amounted to \$3,000 wherefore the 1st Respondent had suffered a total loss of \$45,231.97. 10 20

pp.21-25

12. In December of 1969, the Statement of Claim in the said Original Jurisdiction Act No.969 of 1969 was served. In it, it was alleged that the sale to the Appellant was a sham. It was alleged that one Au Wai Choi of the 1st Respondent had agreed with the said Lai Young Kwong that the said Lai Young Kwong should attend at the said auction and purchase the said property at the predetermined price of \$880,000 on behalf of and as trustee for the 1st Respondent and that in return the 1st Respondent would pay all outstanding and future construction costs and other incidental charges to the said Mee Ah Construction Co.Ltd. Such costs and charges were alleged to amount to \$435,783.81. It was alleged that the said building mortgage of \$1,000,000 was a sham and was void. 30

The Appellant and the said Mee Ah Construction Co. Ltd. claimed as in the said Writ of Summons. 40

13. The 1st Respondent served a Defence and Counterclaim in the said Original Jurisdiction Action No.969 of 1969 in February, 1970, which was later amended and then further amended. In the Counterclaim the 1st Respondent asserted the said sale to the 2nd Respondent and claimed the aforesaid sum of \$45,231.97 from the Appellant. As against both the Appellant and the said Mee Ah Construction Co.Ltd., the 1st Respondent also claimed a declaration that the same should indemnify the 1st Respondent against all costs, other expenses and damages caused or occasioned by or which may be caused or occasioned by, inter alia, the presence upon and ejection from the said property of such persons then upon the same.

14. The Appellant and the said Mee Ah Construction Co.Ltd., served a Reply and Defence to the 1st Respondent's Counterclaim in Original Jurisdiction Action No.969 of 1969. This was subsequently amended. By the same, for the reasons given in the said Statement of Claim, it was denied that the Appellant was indebted to the 1st Respondent. The sale to the 2nd Respondent was admitted but it was denied that the 1st Respondent had suffered any loss thereby, it being alleged that the 1st and 2nd Respondents were related companies. It was denied that the 1st Respondent had given the said indemnity to the 2nd Respondent alternatively it was asserted that because the 1st and 2nd Respondents were related companies such indemnity was unnecessary.

15. The said Original Jurisdiction Action No.969 of 1969 came on for hearing before Mr. Justice Pickering without a jury. The Appellant called 2 witnesses of which the said Lai Young Kwong was the main one, the other being one Brasset who gave evidence on only one minor point. The said Lai Young Kwong was disbelieved by the trial judge and the 1st Respondent's witnesses were believed wherefore judgment on both claim and counterclaim was given in favour of the 1st Respondent. Such Judgment is to be found at pages 34 to 61 of the Record. Such judgment on

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the counterclaim included the said sum of \$45,231.97 and the said declarations.

pp.61-67

16. The Appellant and the said Mee Ah Construction Co.Ltd., appealed the said judgment to the Full Court of this Colony. On 4th February, 1972, such Full Court dismissed the said appeal and their judgments are to be found at pages 61 to 67 of the Record.

pp.67-74

17. Despite the Appellant's repudiation of the said building mortgage, the institution of the said Original Jurisdiction Action No.969 of 1969 and the allegations therein made and despite the aforesaid sale to the 2nd Respondent, the Appellant, the said Mee Ah Construction Co.Ltd., and certain other parties continued to remain upon the said property. By a Writ of Summons issued in Original Jurisdiction Action No.909 of 1970 the 2nd Respondent sought relief against such parties so upon the said property as could be identified, namely the said Mee Ah Construction Co.Ltd., one Mee Ah Hong Co.Ltd., the Appellant and one Keung Wai Shum. The pleadings in this action are to be found at pages 67 to 74 of the Record.

pp.67-70

18. By its Statement of Claim in Original Jurisdiction Action No.908 of 1970, the 2nd Respondent asserted its ownership of the said property and claimed inter alia, possession of the 1st to 5th floors thereof and certain orders that the Defendants therein should remove from its property, that the Defendants should be restrained from entering, re-entering, remaining upon or otherwise howsoever trespassing upon its property, from erecting signboards in or upon, posting or painting signs notices or messages in or upon and interfering with the locks of and in its property and from interfering in any way with the 2nd Respondent's quiet enjoyment of the said property.

pp.70-72

19. By their Defence, the Defendants in Original Jurisdiction Action No.909 of 1970 admitted that the 2nd Respondent purported to buy the said property. Such purchase was attacked only upon

10 the ground that when the 1st Respondent sold to 2nd Respondent, the 1st Respondent purported to act as mortgagee whereas, for the reasons set out in the Statement of Claim in Original Jurisdiction Action No. 969 of 1969, the 1st Respondent was in fact the owner of the said property. Such Defendants further asserted that the 2nd Respondent, being a related company of the 1st Respondent, knew that the said building mortgage of \$1,000,000 was void.

20. Original Jurisdiction Action No.908 of 1970 was set down for hearing before a different Judge but upon the same dates as those fixed for the hearing of Original Jurisdiction Action No.969 of 1969. On the morning of the day of commencement of such hearings, Original Jurisdiction Action No.908 of 1970 was adjourned sine die.

20 21. On 3rd March, 1972, the Appellant instituted Original Jurisdiction Action No.534 of 1972. The Writ of Summons is to be found at pages 1 to 3 of the Record. The pleadings are to be found at pages 4 to 13 of the Record. This action was instituted against both Respondents herein and is the action the striking out of which is presently under appeal.

pp.1-13

30 22. In its Statement of Claim in Original Jurisdiction Action No.534 of 1972, the Appellant refers to Original Jurisdiction Action No.969 of 1969 and the decision therein as affirmed on appeal and states that it accepts that decision and bases this action thereon. The Statement of Claim then seeks to attack the sale by the 1st Respondent to the 2nd Respondent upon the grounds that the same was fraudulent and/or in breach of the 1st Respondent's duty as mortgagee and/or was otherwise improper upon the grounds set out in paragraph 14 thereof (Record pg.7-8). Those grounds were that the 1st and 2nd Respondents were in fact one interest and/or acted in concert to secure the said property at a low price and to extinguish the Appellant's interest therein, 40 that insufficient notice was given of the auction,

pp.4-9

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that reference was made in the advertisements for the auction to Original Jurisdiction Action No.969 of 1969 without explaining that the same would not affect the buyer's ultimate title thereto and insufficient time was left for buyers to make appropriate enquiries and/or to obtain legal advice, that the advertisements were calculated to frighten off buyers, that the auction at which the 2nd Respondent purported to buy was a mock auction staged by the Respondents, that the said sale was at a gross undervalue and that the 1st Respondent was itself in breach of the terms of the said building mortgage in that it had refused to advance the said last instalment thereunder of \$5,000. In the alternative it was alleged that the said auction sale was a sham and was therefore void or voidable. 10

23. The claim in Original Jurisdiction Action No.534 of 1972 is then for a declaration that the said purported sale to the 2nd Respondent should be set aside as fraudulent and/or in breach of the 1st Respondent's duty as mortgagee or as otherwise having been improper. There is a claim for a declaration that the said sale was void alternatively for an Order setting aside such sale. This is followed by claim for consequential orders and for a declaration that the Appellant is yet the mortgagor of the said property and for an injunction restraining the Respondents from entering onto the said property and/or from doing or causing to be done any thing inconsistent with the Appellant's rights to the said property. 30

pp.13-14

24. By summonses dated 13th June, 1972, the Respondents made application in both Original Jurisdiction Action No. 909 of 1970 and in Original Jurisdiction Action No.534 of 1972. By its summons in Original Jurisdiction Action No.909 of 1970 the 2nd Respondent sought to strike out the Defence and to enter judgment. By the summons in Original Jurisdiction Action No.534 of 1972, to be found at pages 13 and 14 of the Record, both Respondents sought to strike out the Statement of Claim, alternatively for all proceedings to be stayed. By a summons in Original Jurisdiction 40



Action No.909 of 1970, the Defendants including the Appellant sought to amend their Defence to the extent that the same would make the same allegations as contained in the Statement of Claim in Original Jurisdiction Action No.534 of 1972. This last mentioned summons was not supported by affidavit.

10 25. All three summonses referred to in paragraph 24 hereof were heard together by a Judge in Chambers on 5th and 6th October, 1972. On 23rd October, 1972, the Judge in Chambers refused the Appellant leave to amend its Defence in Original Jurisdiction Action No.909 of 1970, Struck out the same and gave judgment for the 2nd Respondent upon its claim. In Original Jurisdiction Action No.534 of 1972 the Judge in Chambers struck out the Statement of Claim. The formal Order so striking out the said Statement of Claim is at page 85 of the Record. The Judgment of the Judge in Chambers is at pages 74 to 84 of the Record.

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26. In the said judgment of the Judge in Chambers, leave to amend the Defence in Original Jurisdiction Action No.908 of 1970 was refused, the Defence was struck out and judgment entered for the 2nd Respondent for the following reasons :-

- 30 (a) The validity of the sale to the 2nd Respondent had been litigated in Original Jurisdiction Action No.969 of 1969. It would be unjust to allow the Appellant to litigate the same a second time even though the 2nd Respondent was not a party to that action.
- (b) The court should not entertain a claim by a litigant who changes the whole tenor of the facts upon which he wishes to rely, especially when the new version alleges fraud which is not particularised.
- 40 (c) The summons to amend and to allege fraud was issued very late and was not supported by affidavit.

RECORD

27. In the said Judgment of the Judge in Chambers, the Statement of Claim in Original Jurisdiction Action No. 534 of 1972 was struck out for the following reasons :-

- (a) By its award in the counterclaim in Original Jurisdiction Action No.969 of 1969, the Court had upheld the validity of the sale to the 2nd Respondent.
- (b) The Appellant had elected to put his case one way in Original Jurisdiction Action No. 969 of 1969 and cannot thereafter bring the same transaction before the Court in another way saying that he is relying on a new cause of action. 10

28. Generally, in his judgment in each of the said actions, the Judge in Chambers held :-

- (a) That if the Appellant were to be allowed to amend its Defence in Original Jurisdiction Action No.909 of 1970, the Appellant would not be able to get its case off the ground without the said Lai Young Kwong giving evidence. If such evidence were the same as given by him in Original Jurisdiction Action No.969 of 1969 the amended Defence would fail. Yet he would be unable to give evidence contradictory to it. 20
- (b) For the first time, fraud was being alleged. 30
- (c) An attack on the sale to the 2nd Respondent could have been made in Defence to Counterclaim or by a Counterclaim to the Counterclaim in Original Jurisdiction Action No.969 of 1969. Alternatively, that action could have been withdrawn and a new action instituted against both Respondents.

29. From the aforesaid decision of the Judge in Chambers the Appellant appealed to the Full Court. From the decision in Original Jurisdiction Action No.909 of 1970 the appeal was Civil Appeal No.50 of 1972. From the decision in Original Jurisdiction Action No.534 of 1972 the appeal was Civil Appeal No.51 of 1972. The Notice of Motion in Civil Appeal No.51 of 1972 is to be found at pages 86 to 88 of the Record. Both appeals came on for hearing together before the Full Court and both were dismissed with costs. The judgments of the Full Court are to be found at pages 89 to 120 of the Record.

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30. In the Judgment of Mr. Justice Huggins in the Full Court, the validity of the sale to the 2nd Respondent was not decided in Original Jurisdiction Action No.969 of 1969, but by accepting the credit of the benefit received by the 1st Respondent on such sale the Appellant had conceded the validity of such sale. He also held that the Appellant could have adduced evidence of the true market value of the property but by tacitly accepting the correctness of the purchase price the Appellant admitted that a higher price could not have been obtained and cannot now be heard to say that it could.

pp.89-91

31. In the Judgment of Mr. Justice McMullin in the Full Court, he held :-

pp.92-120

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(a) The validity of the sale to the 2nd Respondent was not directly litigated in Original Jurisdiction Action No.969 of 1969. He held, however, that the question was so clearly one that should have been litigated at the same time that it would be wholly wrong to permit the amendment to the Defence in Original Jurisdiction Action No.909 of 1970.

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(b) In the sense of (a) hereof the question of the validity of the sale to the 2nd Respondent was res judicata.

RECORD

- (c) The claim in Original Jurisdiction Action No.969 of 1969 on the one hand and the proposed Defence in Original Jurisdiction Action No.909 of 1970 on the other hand were not mutually exclusive, the Appellant had deliberately chosen not to raise the question of the validity of the sale to the 2nd Respondent and cannot now do so.
- (d) The delay in making the allegations sought to be inserted into the Defence in Original Jurisdiction Action No.909 of 1970 and all of the circumstances made such allegations vexatious, frivolous and an abuse of the process of the Court. 10
- (e) The name reasoning applied to the Statement of Claim in Original Jurisdiction Action No. 534 of 1972.
32. The Respondents and each of them submit that it was right to strike out the Statement of Claim in Original Jurisdiction Action No.534 of 1972 and that the Judgment of the Full Court should be affirmed with costs for the following (amongst other) 20

R E A S O N S

- (1) There is no appeal from the decision of the Full Court affirming the judgment in favour of the 2nd Respondent in Original Jurisdiction Action No.909 of 1970 and the Appellant continues to be bound thereby. There is thus a finding that the 2nd Respondent is entitled to the said property and that the sale of the said property to it was valid. 30
- (2) The validity of the sale to the 2nd Respondent was adjudicated upon directly or by necessary implication, in such circumstances as to amount to res judicata in Original Jurisdiction Action No. 969 of 1969. Alternatively the validity of such sale was a matter so clearly part of the subject matter of that 40

litigation and so clearly could have been raised in that litigation that it would be an abuse of the process of the Court to allow a new proceeding to be carried on in respect of it.

- 10 (3) The judgment on the Counterclaim in Original Jurisdiction Action No.969 of 1969 in favour of the 1st Respondent in the sum of \$45,231.97 is an absolute bar to the action disclosed in the Statement of Claim in Original Jurisdiction Action No.534 of 1972.
- 20 (4) In Original Jurisdiction Actions No.969 of 1969 and No.909 of 1970 the Appellant elected to pursue its claim or defence upon the ground that the sale to it was a sham and elected not to attack the validity of the sale to the 2nd Respondent on the grounds now proposed in the Statement of Claim in Original Jurisdiction Action No.534 of 1972, alternatively has chosen to split its claim.
- (5) The allegations contained in the Statement of Claim in Original Jurisdiction Action No. 534 of 1972 would not have been allowed as an amendment to the Defence to Counterclaim in Original Jurisdiction Action No.969 of 1969 unless made at a very early stage supported by affidavit and should not now be allowed as a fresh action.
- 30 (6) The Action disclosed in the Statement of Claim in Original Jurisdiction Action No. 534 of 1972 is in all of the circumstances vexatious, frivolous and an abuse of the process of the Court.
- (7) For the reasons otherwise appearing in the judgments of Mr. Justice Huggins and Mr. Justice McMullin.

G.B.H. DILLON

CHARLES CHING

No. 14 of 1973

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF HONG  
KONG APPELLATE JURISDICTION

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B E T W E E N :

YAT TUNG INVESTMENT  
COMPANY LIMITED Appellant

- and -

DAO HENG BANK  
LIMITED First  
Respondent

- and -

CHOI KEE LIMITED Second  
Respondent

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CASE FOR BOTH RESPONDENTS

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

Respondents' Solicitors