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In the Privy Council

No. 38 of 1978

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

ANSTALT NYBRO	**1st Defendant**
(formerly named ANSTALT SORO)	**(Appellant)**
— and —	
HONG KONG RESORT COMPANY LIMITED	**Plaintiff (Respondent)**

APPELLANT'S CASE

K. K. & Winston Chu,
Solicitors &c.,
1618 Prince's Building, Ice House Street,
Hong Kong.
Solicitors for the Appellant.

Woo, Kwan, Lee & Lo,
Solicitors &c.,
26th floor, Connaught Centre,
Hong Kong.
Solicitors for the Respondent

North & Co.,
Solicitors, &c.,
27 Ovington Square,
London, SW3 1LJ.
London Agent for the Appellant.

Stephenson, Harwood & Tatham,
Solicitors &c.,
Saddlers Hall, Gutter Lane,
London, EC2.
London Agent for the Respondent.

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ANSTALT NYBRO (formerly named ANSTALT SORO)	**1st Defendant (Appellant)**
— and —	
HONG KONG RESORT COMPANY LIMITED	**Plaintiff (Respondent)**

APPELLANT'S CASE

1. This is an appeal from a Judgment dated 16th August 1978 of the Court of Appeal of Hong Kong (Huggins, J.A., President, Pickering, J.A. and McMullin, A.J.A.) dismissing an appeal from a Judgment and Orders of Mr. Justice Li dated 12th May 1978 which ordered that upon the Respondent giving the Appellant an undertaking as to damages and fortifying it by the provision of a banker's guarantee in the amount of HK$100 million, that the registration as an estate contract under the provisions of the Land Registration Ordinance (Cap. 128) of Hong Kong of an Option Agreement dated 11th October 1976 and a letter dated 24th January 1977 exercising the option and also the registration as a lis pendens under the said Ordinance of the Writ of Summons in Action No. 1006/78 be vacated. Record p. 128-151 p. 61-73 p. 58-60

2. The issues raised in this appeal on the Appellant's behalf are:—

(1) Whether the provision in the Option Agreement to form 3 limited liability companies is void for uncertainty for want of specific provision as to the Articles of Association of the said 3 companies.

(2) Whether on an interlocutory application, the Court is entitled in law, or ought on conflicting and incomplete Affidavit evidence, to anticipate how after a full investigation of the facts at the trial, the trial Judge will exercise his discretion or conclude that the trial Judge's discretion "must necessarily be exercised in favour of damages" only. p. 149

(3) Whether the Option Agreement was an instrument affecting land within the meaning of the Land Registration Ordinance.

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(4) Whether the Court ought, at an interlocutory stage, to order vacation of the registration of the Option Agreement thus rendering it "null and void to all intents and purposes" under Section 4 of the Land Registration Ordinance (Cap. 128) before trial or any adjudication upon the merits.

(5) Whether similarly the Court ought, at an interlocutory stage, to order vacation of the lis pendens.

3. The Appellant is an "anstalt" registered under the laws of Liechtenstein and the Respondent is a company of limited liability incorporated under the Companies Ordinance of Hong Kong. The Respondent is in effect the lessee of a large area of land in Discovery Bay on Lantau Island (Ta Yue Shan) in the New Territories of Hong Kong granted to it in September 1976 by the Crown under Conditions of Exchange (hereinafter called "the Crown Agreement"). The
p. 164-166 Crown Agreement requires the Respondent to develop the land in accordance with a "Master Layout Plan" which was to be prepared by the Respondent and approved by the Secretary for the New Territories. Such plan was in fact prepared and approved prior to the grant and was called "Master Plan 3.5".

p. 159 4. On 11th October 1976 the Respondent entered into an agreement in writing with the Appellant (herein called "the Option Agreement"). The Option
p. 175-176 Agreement was concerned with certain specified sections of the Respondent's land and the consideration of $50,000 for the option was paid.

By Clause 1 of the Option Agreement the Appellant was given the option "to participate in the ownership, development and subsequent management operation and exploitation of the said twelve sections in the manner hereinafter
p. 194 & 196 set forth". The option was originally to be exercised on or before 31st January 1977 but was extended by mutual consent to 1st March 1977. The Appellant exercised the option by a letter dated 24th January 1977 but the Respondent
p. 198 & 212 denies the existence of the said letter.

5. The Respondent then ran into financial difficulties and a winding-up petition was presented against it on 31st March 1977. On the following day the Official Receiver was appointed provisional liquidator. In or about June 1977 the Official Receiver joined in a transaction whereby the shares in the Company were sold to a consortium which took over the Respondent Company and a new Board of Directors was appointed. In December 1977 the winding-up petition was dismissed.

p. 209 6. On 6th January 1978 the Appellant wrote to the Respondent informing the latter that the Appellant was anxious to proceed with the incorporation of the three development companies in accordance with Clause 2 of the Option Agreement. On or about 23rd January 1978, but unknown to the Appellant, the Respondent (so it is alleged) obtained the approval of a new "Master Plan 4.0"
p. 6-7, 30-34 & 207 which differs from Master Plan 3.5. In late January 1978 the Appellant applied to register the Option Agreement and the letter exercising the option in the District Land Office under the provisions of the Land Registration Ordinance. Such registration was effected on 2nd March 1978.

7. On 14th March 1978 the Respondent commenced Action No. 785/78 against the Appellant as the First Defendant, the former Chairman of the Respondent as the Second Defendant and the Chairman of the Appellant as the Third Defendant respectively seeking a declaration that the Option Agreement was unenforceable and had not been validly exercised and, inter alia, damages for conspiracy. On the same day the Respondent applied by Summons for an injunction to compel the Appellant to erase the registration effected on 2nd March 1978. On 8th April 1978 the Appellant commenced Action No. 1006/78 against the Respondent claiming, inter alia, specific performance of the Option Agreement. On the same day the Appellant also caused the Writ of Summons in Action 1006/78 to be registered in the District Land Office as a lis pendens. On 18th April 1978 the Respondent issued another Summons in Action 1006/78 for a further injunction to compel the Appellant to vacate the lis pendens. Between the commencement of proceedings and the hearing of the Summonses by the learned Judge on 27th April 1978 a total of eighteen Affidavits/Affirmations were filed by or on behalf of the parties.

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p. 1-2
p. 3-4
p. 17-18

8. On 27th April 1978 both Summonses of the Respondent were heard together by the learned Judge in Chambers (Li J.). At the outset, Counsel for the Respondent informed the Court that the Respondent and the Second Defendant had come to terms whereupon Counsel for the Second Defendant withdrew from the hearing. On the second day of the hearing, Counsel for the Respondent further informed the Court that the Respondent was not seeking any relief against the Third Defendant. Accordingly, the dispute then became one strictly between the Respondent and the Appellant. The allegation of conspiracy and all related claims by the Respondent were not proceeded with on the interlocutory hearings and all Affidavits/Affirmations or the part or parts thereof relating thereto were neither read nor referred to.

9. The issues were therefore confined to:—

(1) Whether the option had been validly exercised; and

(2) What was the construction of the Option Agreement; was it void for uncertainty; if not, what remedies might the Appellant be entitled to.

10. In the Affidavits/Affirmations, the Respondent by its new Board, amongst other things, challenged the validity of the Option Agreement, averred that the letter exercising the option was a sham and alleged that unless both registrations were erased the Respondent would suffer irreparable damage. The Appellant, on the other hand, affirmed the propriety of the Option Agreement and the letter exercising the Option. The Chairman of the Appellant in effect swore that in the circumstances and in so far as it was within his power, the Appellant had done all that was expected of it in relation to the exercise of the option.

p. 9 & 15
p. 20-21

11. After hearing argument the learned Judge gave judgment in respect of both Summonses on 12th May 1978 and ordered both registrations to be vacated. On the question of whether the letter exercising the option was a sham and

Record p. 70 whether it validly exercised the option, the learned Judge rightly ruled that it should be "resolved at trial". He found, however, that the Option Agreement was void for uncertainty for the reason that the terms "development and management" in the Option Agreement were left "in a vacuum". He further held that no Court was likely to decree specific performance of the Option Agreement on p. 71-72 the ground either that such an order would require continuous supervision of the Court or for lack of mutuality. The learned Judge made the order that the registrations be vacated against the Respondent's fortified undertaking as to damages but granted a 14 day stay to enable the Appellant to lodge an appeal.

12. By 2 Notices of Appeal both dated 19th May 1978 being Civil Appeal p. 78-80 Nos. 45 and 46 of 1978, the Appellant appealed to the Court of Appeal of Hong Kong. The Appellant there and then set down the appeals to be heard on p. 82 3rd October 1978 and obtained, subject to the giving of an undertaking as to damages fortified to the extent of $1 million to the satisfaction of the Registrar, p. 85-86 an Order of the Court dated 24th May 1978 to stay execution and all further proceedings until the outcome of the appeals. On 29th May 1978 the Respondent applied for an Order to lift the stay but such application was dismissed by the p. 92-93 Court on 31st May 1978. On 2nd June 1978 the Respondent filed two identical p. 94-95 Respondent's Notice of Additional Grounds to the said appeals. On 17th June p. 96-99 1978 the Appellant filed two identical Supplemental Notices of Appeal. On 30th June 1978 the Respondent, taking the Appellant quite by surprise, applied for and was granted an Order to advance the hearing of the appeals to the 18th July 1978. Thereafter four further Affidavits/Affirmations were filed on behalf p. 100-118 of the Appellant and leave to read and refer to them was granted during the p. 223-224 hearing of the appeals. Those Affidavits/Affirmations dealt in substance with the following matters:—

(1) What little time the Appellant (a foreign party) had been given to p. 100-101 prepare its case;
p. 223-224

(2) Provided further evidence as to the circumstances in which the option p. 102-104 was exercised;

(3) Provided evidence from the former Chairman of the Respondent relating to the signing and exercise of the Option Agreement;

(4) Placed before the Court a summary of the background information and material that was available to the parties relating to the "development" p. 110-114 "management" and "finance" of the venture; and

(5) Provided evidence generally casting doubt on the evidence submitted on behalf of the Respondent.

13. The Appeals came on for hearing before the Court of Appeal on the p. 128-151 18th July 1978 and were heard together. Judgment was delivered on the 16th p. 128-129 August 1978. The Court in dismissing the Appeals HELD:—

(1) Unanimously that a clearly triable issue of fact arose as to whether or p. 129, 135 + 140 not the option had been validly exercised.

(2) Unanimously that in construing the Option Agreement the Court must place itself in the same factual matrix as that of the parties. Record p. 131, 135-136 + 141

(3) Unanimously that the Option Agreement was not void for uncertainty in any of the respects relied upon by the learned Judge in that it contains terms that are in themselves simple and unambiguous and are capable of implementation via the machinery of the corporate structure which the learned Judge had misunderstood. p. 131, 139 + 140

(4) By a majority (Pickering J.A. and McMullin A.J.A., the learned President disserting) that the Option Agreement was void for uncertainty in that it failed to provide for Articles of Association for the three companies to be formed and that unless and until a company is registered without Articles, Section 11 (2) of the Companies Ordinance would not apply. p. 130, 139 +140

(5) Unanimously that although the Option Agreement was inherently capable of creating an interest in the land it could not in the special circumstances of this case do so because the circumstances here were such that the discretion of the trial Judge must necessarily be exercised in favour of damages and that the only reasonable and adequate recourse open to the Appellant was in damages. p. 134, 140 + 151

(6) Unanimously that an agreement enforceable in damages only was not an instrument by which land "may be affected" within the meaning of the Land Registration Ordinance.

14. The Appellant respectfully submits that the Court of Appeal was wrong in holding as it did by a majority (Pickering J.A. and McMullin A.J.A.) that the Option Agreement was a void for uncertainty because it failed to make specific provision for the Articles of Association of the three companies to be formed. It is submitted that the learned President (as well as the Judge at first instance) was right in holding that there was that sufficient degree of certainty by virtue of the maxim *"id certum est quod certum reddi potest"* because section 11 (2) of the Companies Ordinance supplies the Articles by virtue of the regulations to be found in Table A. p. 139+140 p. 130 + 70

15. Clause 2 of the Option Agreement provides "in the event of (the Appellant) declaring its acceptance of the above Option (the Appellant) and (the Respondent) will form three limited liability companies under the Companies Ordinance of Hong Kong in which (the Appellant) will have 49 per cent of the capital and (the Respondent) will have 51 per cent of the capital as follows....." p. 175

Section 11 (2) of the Companies Ordinance of Hong Kong provides as follows:—

> "In the case of a company limited by shares and registered after the commencement of this Ordinance, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations contained in Table

Record

A, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles".

Thus the parties agreed expressly that the companies were to be formed "under the Companies Ordinance of Hong Kong". Section 11 (2) of the Ordinance makes it clear that Hong Kong law does not require that the Articles of Association be agreed before a company can be registered. Indeed the Ordinance specifically envisages situations where no Articles are drawn up for a company to be registered and the law itself supplies the omission.

16. It is submitted that upon the true construction of the Option Agreement it has the same effect as if it had expressly provided that "the Articles of Association of the said companies shall be such as may be agreed or in default of agreement those set out in Table A."

Thus in the event of the parties being unable to agree upon the wording of the Articles of Association of the three limited companies to be formed then the law would supply the omission. If the parties were agreed as to some of the Articles but not all then the law would supply the remainder. Thus if parties agree jointly to form a company and the law allows that company to be formed without further agreement as to the Articles then the agreement cannot be void for uncertainty in the absence of agreement over the Articles. The companies could be registered under the Ordinance without any Articles having been agreed at all. Thus it is submitted that Pickering J.A. was wrong in assuming that there could be no registration unless there had been agreement over the Articles.

p. 139 When Pickering J.A. says at page 139 that the Articles were "neither provided, provided for, nor encompassed by a reference to Table A" he did not advert to the fact that the Agreement specifically provided for companies to
p. 175 be formed "under the Companies Ordinance of Hong Kong" and that the parties must be deemed to have contracted in the light of the machinery provided by the law, namely, the Companies Ordinance and Table A, for situations where companies are registered without Articles. The fact that a contract contemplates further agreement upon certain points does not make the contract itself void if the contract itself provides the machinery for resolving any further outstanding matters or alternatively if the law provides the answer in the event of disagreement. It will be noted that no-where does the Option Agreement provide that Table A shall not apply.

17. The Appellant submits that the speculation of Pickering J.A. that if the
p. 139-140 parties were at loggerheads as to the Articles neither would be likely to apply for registration nor indeed was either entitled so to apply unilaterally is irrelevant to the question of whether the agreement was void for uncertainty because it did not make specific provision for the Articles and is untenable.

The obligation to register is clear and can be performed without agreement as to the Articles. To speculate as to the likelihood of disagreement is an irrelevant consideration to matters of construction of the Agreement and of the statutory background envisaged by the parties.

The Appellant further submits that it cannot be right that any joint venture agreement which involves the setting up of a corporate vehicle must be void for uncertainty if it fails to spell out in detail the Articles of Association of the new company, even though such agreement was at the time clearly intended to be binding and to be acted upon and was indeed subsequently acted upon by the parties thereto. Record

18. The principal ground upon which the Court of Appeal held unanimously that the registrations must be vacated was that "in the special circumstances of the case the only reasonable and adequate recourse open to the Appellant is in damages; the reason why the entries in the register should be vacated is that, although the Agreement was inherently capable of creating an interest in land it cannot do so in this case because the circumstances here are such that only damages and not any form of equitable relief will be available to enforce it"; and that accordingly the Agreement could not create any interest in land. The principal judgment of the Court on the point was that of McMullin A.J.A. with which Huggins and Pickering J.J.A. agreed. It is however submitted first that the Court here failed to distinguish between (1) the circumstances in which a Court of equity will refuse equitable relief upon the grounds that damages are an adequate remedy and (2) the circumstance in which a trial Judge with full knowledge of the facts and in the exercise of his discretion may decline to grant equitable relief. p. 151 Lines 4-9

19. The circumstances referred to in (1) above are comparatively narrow in scope. The principles within which equity has declined to intervene on the basis that the remedy in damages is adequate are well defined and include for example contracts for the sale of a commodity readily available in the market. In such cases although the precise accuracy of the expression is doubtful it may be convenient to say that the court has no "jurisdiction" to award specific relief.

But conversely equity has never regarded damages as adequate for breach of an obligation concerned with the sale or transfer of land, with the sale of shares in an unquoted or private company or where there would be great difficulty in the assessment or proof of damage.

By contrast a trial judge is entitled to take into account all the circumstances of the case and the whole conduct of the parties in deciding how to exercise his discretion, but this he can only do in the light of all the facts as found by him after discovery and examination and cross-examination of all the witnesses.

20. The Respondent's contention in the Courts below was that the contract was "enforceable only in damages". All its arguments were directed to "jurisdiction" in the above sense; to the "unsuitability" of relief other than damages and not to the matter of the trial Judge's discretion. The Appellant never understood the Respondent to be inviting the Court to anticipate how the trial Judge might ultimately find the facts or how he might ultimately exercise the discretion vested in him. p. 119 p. 146 Line 29

It is respectfully submitted that McMullin A.J.A. correctly directed himself

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p. 146 Line 29 / p. 149 Line 28

that to succeed the Respondent's objections had to "go to jurisdiction and not discretion" and further correctly directed himself as to the onus on the Respondent when he said the Appellant "rightly put this issue in this strong form: 'is it clear beyond argument that this is an agreement that in no circumstances the Court will enforce by a decree for specific performance?' His opponent frankly conceded that it was at that level that he must meet the challenge."

21. But it is submitted that McMullin A.J.A. erred in principle:—

p. 149 Line 8

(1) In posing the question as being "whether this Court would be justified in concluding that the discretion of the trial Judge must necessarily be exercised in favour of damages."

(2) In misunderstanding or misapplying the passage cited from the judgment of Buckley L.J. in *Price v. Strange* (now reported 1978 Ch. 337). Lord Justice Buckley was there dealing with the position at trial and not before trial and used the phrase "adequate remedy" in the accepted sense defined above.

p. 148 Line 35

p. 149-50

(3) In holding in effect, in reliance upon *Wilson v. Northampton and Banbury Junction Railway Company* (1874 9 Ch. App. 279) that unless it could be established that the new Board of the Respondent had acted with "unblushing dishonesty", there was no basis for an award of specific performance, and that because the new Board of the Respondent can be assumed to have acted in good faith (an assumption that the Appellant does not accept) that therefore there can be no decree of specific performance.

(4) In concluding that "in the special circumstances of the case the only reasonable and adequate recourse open to the Appellant is in damages."

p. 151 Line 5

22. It is respectfully submitted that the true principles are:—

(1) that the "special circumstances of the case" can only be determined at the trial by the trial Judge after seeing and hearing the witnesses;

(2) that in interlocutory proceedings the Court should not attempt to anticipate how the trial Judge might exercise his discretion and cannot properly do so at a stage when the full facts are not known and when there has been no discovery and everything is not yet before the Court;

(3) that having regard to the nature of the Option Agreement as being an agreement to take shares in unquoted companies and to transfer interests in land the breach of which would give rise to grave problems in the assessment of damages the Court should have found that it did not fall within that category of cases where damages are clearly an adequate remedy; and

(4) that the grant or refusal of specific performance does not turn upon its effect upon the party in breach or upon the bona fides of the party in breach and the fact that the new Board of the Respondent acted

bona fide (if this should hereafter be established) would not of itself preclude the grant of any form of specific relief.

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23. Further it is submitted that the correctness of the principle that the Court's ultimate discretion should be exercised only by the trial Judge and the danger inherent in attempting to anticipate this are illustrated by the factual analysis contained in the Judgment of McMullin A.J.A.

At the outset the learned Judge reviewed certain features which he described as the "practical realities" and which founded his ultimate conclusion that the "special circumstances" of the case could lead only to an award of damages and he acted largely upon this background in so doing.

p. 143 Line 39
p. 147 Line 35 and p. 149 Line 42

In reaching his findings upon the facts it is submitted that the learned Judge fell into error in the following respects:

(1) he comments in reference to the new Master Plan 4.0 that whereas the opinions of both O'Neill and Reynolds refer to the advantage of the new plan over the old, that the Appellant had adduced no countervailing evidence even in the new Affidavits introduced during the course of the Appeal. However the Affidavits of Reynolds and O'Neill were served on the day of the hearing before Li J. but neither they nor the Appellant's evidence to which they were directed, namely, the Affirmation of D. Fleming of 22nd April 1978 and the Affidavit of J. North of 22nd April 1978 paragraphs 5-12 and Exhibit JN-5, were read to the learned Judge, since such evidence was accepted by all parties as being irrelevant to the issues then before the Court. Similarly the same evidence was not read to the Court of Appeal because of its irrelevance to the issues before that Court. It is submitted therefore that McMullin A.J.A. was not entitled to draw any conclusions from evidence treated by the parties as irrelevant and still less was he entitled to draw any conclusion from the Appellant's failure to seek in the Court of Appeal to adduce new "countervailing evidence" directed to the irrelevant evidence;

p. 143 Line 28
p. 30, 35
p. 231

(2) He predicates his argument upon the finding that the grant of specific relief would cause a "disastrous disadvantage to the Respondent" because it had abandoned the original Master Plan 3.5 "for want of confidence in its commercial viability". These findings were not justified on the evidence and were not part of the Respondent's case. The evidence did not establish any disastrous disadvantage to the Respondent if it was obliged to perform its contract with the Appellant nor did it establish any want of commercial viability in Master Plan 3.5. Still less was it demonstrated that a trial judge would necessarily conclude that the original plan was not commercially viable. Further by the terms of the Crown Agreement the ultimate decision on layout lay with the Crown and in fact at no time was any new approved Master Plan duly signed by the Secretary for the New Territories Administration on behalf of the Government ever produced to the Court. The Appellant does not accept that any new Master Plan has in fact been

p. 143 Line 45
p. 144 Line 2
p. 164-165

Record

approved.

p. 148 Line 10

(3) Equally there was no basis in evidence for the finding that the only scheme that the Appellant was prepared to promote as manager was the original Master Plan 3.5. The fact that the Appellant asserts a contractual right to participate in a development in accordance with the presently approved Master Plan 3.5, does not support the inference that it will refuse to consider any alteration thereto, especially an alteration required or approved by the Crown.

p. 144 Line 14

p. 144 Line 24

(4) He finds that "we are entitled — indeed obliged to take the evidence as we find it", and again in reference to the evidence of Mr. Duckworth he finds "these we must assume in the absence of evidence to the contrary, were the only records to come into the hands of the new Directors". It was wrong to assume that all parties had put forward at this early interlocutory stage all the evidence that would be available and might be led at the trial. Equally it was wrong to assume that discovery and cross examination would in no way alter the position. Indeed the unread evidence filed in relation to the respective merits of the two schemes showed that the Appellant had been able to make only the most preliminary appraisal of the Respondent's scheme and did not justify the deadlock position which the learned Judge assumed and which was crucial to his conclusion, but which also ignored the decisive role of the Crown.

24. The relief granted by the Court to the Respondent was draconian. Once the Register was vacated a party dealing with the Respondent bona fide and for value, even with express notice, would be unaffected by any interest of the Appellant in the land. It was equivalent to striking out all the specific substantive claims in the Writ in Action 1006/78 with the exception of Paragraph 6 (damages) and the grant of summary judgment to the Respondent upon Paragraphs 6 and 7 of the Writ in Action 785/78. Relief of this nature upon an interlocutory application should, it is submitted, only be granted in a plain and clear case, e.g. one giving rise to a question of construction of agreed documents where all the material facts are before the Court so that "the Court can decide the matter then and there without sending it for trial" per Lord Denning M.R. in *Tiverton v. Wearwell* (1975 Ch. 146 at p. 156E). These were not such cases and in any event a trial was necessary. Upon no issue were the full facts before the Court including those relevant to the factual matrix against which the Option Agreement falls to be construed. While it was clear that the Option Agreement prima facie affected land so that registration was both permissable and necessary, it was neither plain nor clear that the Appellant was not entitled to any specific relief.

p. 12

p. 1-2

25. On 29th August 1978 the Court of Appeal of Hong Kong made an Order granting the Appellant leave as of right to appeal to Her Majesty in Council. On the same day the Court, erroneously it is submitted, refused to grant the Appellant's application for a stay of execution even for a period sufficient to enable the Appellant to apply therefor to Her Majesty in Council.

p. 157, 178

26. The Appellant respectfully submits that the Judgment of the Court of Appeal dismissing the Appellant's appeals from the Judgment of Li J. was wrong and ought to be reversed, and this appeal ought to be allowed with costs, for the following amongst other

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REASONS

1. Because the Option Agreement is not void for uncertainty.

2. Because the Option Agreement affects land and was properly registered under the Land Registration Ordinance as an estate contract, and Action 1006/78 was properly registered as a lis pendens under the said Ordinance.

3. Because damages for breach of the Option Agreement would not be an adequate remedy to the Appellant.

4. Because the remedies to which the Appellant may prove to be entitled in both actions can only be determined by the trial Judge after all the material facts have been found by him and the Court of Appeal ought not upon interlocutory applications to have attempted to anticipate the trial Judge's findings.

5. Because the Court of Appeal's conclusion as to the way in which the trial Judge must necessarily exercise his discretion was based upon a series of findings and assumptions which were not justified upon the incomplete and contradictory evidence before the Court and ignored the decisive power of the Crown under the Crown Agreement.

6. Because the Court of Appeal ought not to have granted the draconian relief sought by the Respondent in a case which was not clear or plain and in which a trial was in any event necessary.

DAVID HUNTER
RICHARD MILLS-OWENS
Counsel for the Appellant

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